

REPUBLIC OF KENYA

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT MOMBASA**

JUDICIAL REVIEW APPLICATION NO. E010 OF 2025

REPUBLIC
APPLICANT

VERSUS

**THE DIRECTOR OF OCCUPATIONAL SAFETY AND
HEALTH SERVICES**
RESPONDENT

AND

DERRICK ERICK OMONDI **INTERESTED
PARTY**

AND

GRAND SUBTERRA LIMITED **EX PARTE
APPLICANT**

RULING

The ex parte applicant filed the motion herein dated 7 August 2025 under the provisions of Article 47, 50(1) and 159(2) (d) of the constitution, Order 53 rule 3 of the Civil Procedure Rules, section 3A of the Civil Procedure Act, Sections 7, 8, and 9 of the Fair Administrative Actions Act and sections 8 and 9 of the Law Reform Act and seeking Orders:

1. An order of mandamus do issue compelling the respondent to issue a written determination on the ex parte applicant's objection dated 21 January 2025 pursuant to section 52 of the Work Injury Benefits Act, which in 14 days.
2. The court be pleased to issue such further relief as it may deem just and expedient in the circumstances.
3. Costs of the application be provided for.

The Affidavit of David Nandi supports the application on the grounds that he is the Assistant Claims Manager at Geminia Insurance Company Limited, the insurer of the ex parte applicant, Grand Subterra Limited. It authorises this application seeking judicial review orders. He avers that the ex parte applicant lodged a formal objection with the respondent on

21 January 2025 pursuant to section 51 of the Work Injury Benefits Act (WIBA), challenging the validity of the award issued on 14 January 2025.

Under section 52 of the WIBA, the respondent is under a statutory duty to issue a written determination within 14 days, which it failed to do. During the pendency of the objection, enforcement proceedings have been commenced against the ex parte applicant in Mombasa CLRC Misc. Application No. E046 of 2025.

On 24 July 2025, the court granted leave to file this application and ordered that such leave operate as a stay of execution and enforcement award, including the enforcement proceedings. The failure by the respondent to discharge its mandatory obligation violates the ex parte applicant's rights under Article 47 on fair administrative action and the right to a fair hearing under Article 50(1) of the Constitution.

The statutory objection mechanism under WBA has been rendered nugatory by the respondent's inaction, and the enforcement of the impugned award is both premature and unlawful. Unless the order of mandamus is issued, the ex parte applicant shall suffer injustice and prejudice by being subjected to a premature and illegal enforcement process. The ex parte applicant has no effective or alternative remedy and is compelled to invoke the court's supervisory jurisdiction under article 165(6) and (7) of the Constitution and the Law Reform Act.

In reply, the respondent filed the Replying Affidavit of Japhet Mupeh, head of the Occupational Safety and Health Office, Kilifi County. He avers that he received a notification dated 20 December 2025 from the ex parte applicant regarding an accident involving the interested party, Derrick Erick Omondi. This was under the prescribed DOSH/FORM 1, which he acknowledged and noted that it was filed out of time.

Mupeh avers that Part II of DOSH/FORM 1, comprising the medical report, was completed by Dr Darius Wambua Kiema, who indicated 25% permanent incapacity due to injuries sustained by the interested party. He proceeded to compute and assess compensation dated 14 January 2025 and made a demand against the ex parte applicant to settle the same within 90 days for a sum of Ksh. 5,286,918. The assessment and compensation were conducted in accordance with Section 30 of WIBA.

Mupeh avers that the ex parte applicant did not raise any objections to the claim or demand within the 60 days required under section 51 of WIBA. An objection was raised through the

Nairobi office of DOHS through a letter dated 29 January 2025, and there was a response that;

- a) The relief sought is granted unconditionally by invoking sections 25, 30 and 53 of WIBA.
- b) The interested party be facilitated by the ex parte applicant/objector to appear before the Work Injury Evaluation Clinic (WIEC) panel at the DOHS heard office by 20 February 2025 with prior booking and referral by COSHO, Malindi County.
- c) Upon receipt of the WIEC medical report, an informed determination shall be communicated to the affected parties.

Muveh avers that despite the directions from the DOSH Nairobi office, the ex parte application was not addressed by 20 February 2025. The ex parte applicant did not present themselves for booking at the Malindi COSHO as required. By failing to comply with the directions issued, the objections were addressed.

The timelines indicated in the reply to the objection for re-examination of the interested party were necessary. The ex parte applicant has not explained their failure to comply. The instant application is without merit and should be dismissed.

In response, the ex parte applicant filed a Supplementary Affidavit of David Nandi, who avers that the reply by the respondent through the Affidavit of Japhet Muveh is commissioned by an advocate who is inactive and has not taken a Practising Certificate for the year and at the time of commissioning the affidavit hence not qualified to act as a Commissioner for Oaths under section 4(1) of the Oaths and Statutory Declarations Act and Section 9 of the Advocates Act. The affidavit in reply is a nullity.

Nyanundi avers that the respondent's allegations regarding a response to the objection requiring attendance at WIEC were unfounded, as the letter was not received or served. The objection was issued electronically, but there is no response. The attached physical communication was not received.

The respondent has not addressed its mandatory legal obligation under section 52 of WIBA. The requirement to attend WIEC is unlawful. The medical examination should be conducted for the employee, not the employer; hence, the decision taken is devoid of due process and made contrary to fair administrative action.

The ex parte applicant submitted that section 52(2) of WIBA requires the Director to, within 14 days, reply to any objection raised against his decision by giving a written answer with reasons for varying or upholding the decision taken. In **Peter Wekesa Khaemba v Walker Industries Limited [2022] eKLR**, the court held that upon any objections to the Director's award, section 51(1) of WIBA gives 14 days for a written ruling to issue, giving reasons thereof. The THz written response should be sent to the objector and to the person affected by the decision.

In **Charles Mwangi Muraya v Republic [2001] eKLR**, the court held that the work *shall* place a mandatory obligation on the court to carry out an enquiry. Therefore, the mandatory nature of Section 51(1) of WIBA requires the Director to respond to any objection within 14 days and provide reasons. In this case, the unilateral directions given in the noted reply are not in compliance with the law. There is no WIEC function under the WIBA.

The Replying Affidavit of Japhet Mupeh is not commissioned correctly, rendering it invalid and unlawful. The contents thereof disregarded, there is no reply to the application.

The respondent submitted that upon the ex parte applicant submitting DOSH/FORM 1, it was assessed, and an award was made on 7 January 2025. A notice was issued to the ex parte applicant, and no payment has been made. Upon the objections raised on 21 January 2025, a reply was issued on 29 January 2025. The ex parte applicant has not settled the award of Ksh.5, 286,918.

The applicant herein is without merit. In *Law Society of Kenya v the Attorney General & Another*, Petition No. 4 of 2019, the court held that the Director is the primary officer responsible for addressing work injury claims. Any objections must be under section 52 of WIBA.

The work injury arose in Kilifi County, but objections were sent to Nairobi County. Section 15 of the Civil Procedure Act requires that a suit be filed where the cause of action arose; hence, the court has no jurisdiction.

The interested party submitted that the principal order sought by the ex parte application is that the respondent be compelled to render a determination on its objections of 21 January 2025. The respondent has since issued a written response dated 29 January 2025. The ex parte application failed to address the respondent's direction to facilitate the interested party's

attendance at COSHO, Malindi, and to book the interested party for a WIEC re-examination. There was no compliance; hence, the Director's award is valid and subject to enforcement.

Determination

The ex parte applicant is primarily seeking an order compelling the respondent to issue a written response to its objections of 21 January 2025 to the DOSH award dated 7 January 2025.

The Supreme Court in [John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others \[2021\] KESC 39 \(KLR\)](#) has held that despite the shift from common law to codification in the Constitution and the Fair Administrative Action Act, the purpose of the remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself.

However, when determining a judicial review application, the court may examine specific aspects of merit and even set aside a decision; but it may not substitute its own decision on merit, instead it must remit the matter to the body or office with the power to make that decision. See [Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others \[2016\] KECA 729 \(KLR\)](#)

Replying Affidavit of Japhet Mupeh is not dated in August 2025. The evidence that the same is commissioned by an advocate who had no Practising Certificate is not challenged.

This affidavit is of no probative value pursuant to section 4(1) of the Statutory Declarations Act and Section 9 of the Advocates Act. The records attached to this affidavit are equally of no value.

On the substantive issue of the objection raised by the ex parte applicant on 21 January 2025 regarding the work injury assessment and award, the respondent asserts that a written response was sent to the ex parte applicant through a letter dated 29 January 2025.

The objection by the ex parte applicant, dated 21 January 2025, is made through the insurer, Geminia Insurance Co. Ltd, at P.O. Box 61316 – 00200 Nairobi. The response by the respondent is through DOSH, Nairobi office, with copies to the ex parte applicant, the interested party and COSHO, Malindi.

What then is the purpose of an objection?

Section 51(1) of WIBA requires that any person/party who is aggrieved by a decision of the Director, within 60 days, file objections:

(1) Any person aggrieved by a decision of the Director on any matter under this Act, may within sixty days of such decision, lodge an objection with the Director against such decision.

(2) The objection shall be in writing in the prescribed form accompanied by particulars containing a concise statement of the circumstances in which the objection is made and the relief or order which the objector claims, or the question which he desires to have determined.

There is no contestation that the ex parte applicant filed its objections with the respondent. The burden of giving a written response thereto vested on the respondent.

In this regard, the Supreme Court, in *Law Society of Kenya v Attorney General & another* (Petition No. 4 of 2019), when addressing Section 52 of the WIBA, emphasised that there is a right of appeal or objection. The Director must therefore provide a written decision varying or upholding the original decision.

Upon the objections, the issue of the ex parte application being directed to attend before WIEC arose.

An employer may seek that the employee undergo a fresh medical examination under section 25 of WIBA.

25. Employee to submit to medical examination

(1) An employee who claims compensation or to whom compensation has been paid or is payable, shall when required by the Director or the employer as the case may be, after reasonable notice, submit himself at the time and place mentioned in the notice to an examination by the medical practitioner designated by the Director or the employer with the approval of the Director.

The Director or the employer has the right to require the employee who seeks compensation to submit himself for an examination by a medical practitioner ***designated by the Director or the employer with the approval of the Director.***

The Director has the primary duty to designate the medical practitioner to examine the injured employee. Where the employer seeks the right of choice, the Director must approve the appointed medical practitioner. This then balances each party's right of choice. The director, being the primary officer responsible for assessing work injury claims and, as such, the repository of such expertise, must approve the medical practitioners assisting in this duty. An approval is not akin to impending on the right of choice but a quality check to ensure the examination meets the threshold under WIBA.

Equally, the directions of the Director upon objections must be taken within the principles of Article 47 of the Constitution, now well-defined under the Fair Administrative Actions Act as held in [Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others \[2016\] KECA 729 \(KLR\)](#), cited above.

Inherently, the decision-maker, with the right to render a decision, is of necessity required to invite and hear the parties before making the decision.

In this case, the ex parte applicant initiated the DOSH/FORM 1. Of necessity, the Director, upon receipt of such notification, in undertaking its duty under section 16 of WIBA, and before taking a decision, positive or negative, the ex parte applicant, as the initiator of the notice, is entitled under Article 47 of the Constitution to the right to fair administrative action. This right is imperative to any public officer, such as the Director, to apply, despite the WIBA not specifically addressing it.

This is aptly captured by the Supreme Court in **Law Society of Kenya v Attorney General & another**,

The above proposition [section 52 WIBA] would be the most prudent way for a judicial system to operate. Lord Atkin in R v Electricity Commissioners 119241 1 KB 171, 204-205, declared that prerogative writs would issue to "anybody of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially". Indeed procedural fairness, a common law duty, implies that one would act fairly in decision making by the exercise of statutory and judicial powers which may affect an individual's rights, interest and legitimate expectations.

The Replying Affidavit by the respondent being invalid, the contents thereof cannot be applied. There is no response to the objections.

The orders sought by the ex parte applicant are justified.

On costs, the ex parte applicant has raised fundamental legal questions. This enhances the court's objectives and addresses issues of justice. For posterity, each party to bear its costs.

Accordingly, the following orders are hereby issued;

- a) An Order of mandamus is issued compelling the respondent to within 14 days from the date hereof to issue a written response to the ex parte applicant's objections dated 21 January 2025 pursuant to section 52 of the Work Injury Benefits Act.**
- b) Proceedings in Mombasa ELRC Misc. Application No. E046 of 2025, seeking to enforce the DOSH award of 7 January 2025, is hereby stayed.**
- c) Each party to bear its costs.**

Delivered in open court at Nairobi, this 18th day of December 2025.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Marion

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