

**REPUBLIC OF KENYA**

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

**MISC. APPLICATION NO. E080 OF 2025**

**KHADIJA ABBAS ABDALLA ..... APPLICANT**

**VERSUS**

**DREAMLINE EXPRESS LIMITED ..... RESPONDENT**

**RULING**

The ruling relates to two applications dated 8 and 27 October 2025 filed by the 2<sup>nd</sup> and 1<sup>st</sup> respondents, respectively.

The application dated 8 October 2025 is seeking orders:

- 1) *Spent.*
- 2) *Spent.*
- 3) *The court be pleased to set aside its orders delivered on 1 October 2025 in relation to the application dated 21 August 2025 in relation to the 2nd respondent, Occidental Insurance Company Limited.*
- 4) *The 2<sup>nd</sup> respondent is to be struck off from the current proceedings.*
- 5) *The court be pleased to vary the adoption Order issued on 1 October 2025 to exclude the claimant for reasonable burial expenses pleaded at Ksh. 712,400 as the claimant does not form part of the DOSH award.*
- 6) *The court be pleased to vary the Adoption Order issued on 1 October 2025, awarding interest on the claim for reasonable burial expenses as the same does not form part of the DOSH Award.*
- 7) *Upon granting prayers 2, 3, 4, 5 and 6, the court be pleased to re-open the proceedings to enable the respondent to participate fully in the matter and be accorded the right to be heard on merit by filing the draft preliminary objection in opposition to the application.*
- 8) *The draft preliminary objection so filed be deemed as duly on record.*

9) *The firm of J. N. Muema & Company Advocates be deemed properly on record as the advocates for the respondent.*

10) *Costs of the application be provided for.*

The Affidavit of Michael Shisia supports the application, and the legal officer of the 2nd respondent avers that on 26 September 2025, the applicant served the 2nd respondent with the application dated 21 August 2025. The matter was coming up for hearing on 1 October 2025, and the hearing notice was not served.

The 2<sup>nd</sup> respondent instructed its advocates to enter an appearance and defend the application. However, the matter proceeded to a hearing on 1 October 2025, and the court allowed the application as prayed. No hearing notice was served, leading to the hearing and adoption of the DOHS award.

Shisia avers that the 2<sup>nd</sup> respondent filed an application dated 29 September 2025, but the court proceeded to award the DOSH award. The court failed to consider the 2nd respondent's Notice of Appointment of Advocate on record and arbitrarily allowed the application despite a lack of service.

Unless the court sets aside the ruling delivered on 1 October 2025, the 2nd respondent stands to suffer irreparable loss and prejudice as a result of being condemned unheard and the substantial loss of Ksh. 2,889,000.

There is a clear case of misjoinder of parties, as the 2nd respondent was improperly joined in this suit. The 2d respondent has never been the employer of the applicant, and there exists no employer-employee relationship between the parties. Section 2 of the WIBA relates to work injury between the employer and employee, which is not the case between the applicant and the 2<sup>nd</sup> respondent. The court's role is strictly limited to the adoption of DOSH awards and should not entertain factual or merit-based claims that DOSH did not award under the WIBA.

Shisia avers that the inclusion of reasonable burial costs together with the DOSH award is bad law and ought to be set aside. The application by the 2<sup>nd</sup> respondent is with merit and should be allowed with costs.

The applicant replied to the application by the 2<sup>nd</sup> respondent through her Replying Affidavit. She avers that the respondents were served with the application dated 21 August 2025, coming up for hearing on 1 October 2025. The respondents were represented by one Mr.

Kasula, who held brief for Mr. Muema. No response was filed, and the court adopted the DOSH award, together with burial expenses.

There is no misjoinder of parties as alleged. At the time the deceased sustained work injuries, the 1st respondent filed DOSH Form 1 based on the facts that it had an insurance cover with the 2nd respondent. DOSH assessed the claim and awarded the applicant Ksh. 2,280,000. There is no objection or appeal. Under the WIBA, the employer who is insured for work-related injuries of employees is required to make payment through the insurance directly. In this case, the 1<sup>st</sup> respondent had a valid insurance cover with the 2<sup>nd</sup> respondent.

The 2<sup>nd</sup> respondent was well aware of the hearing date and attended through its advocates. It cannot claim that the right to be heard was violated. The burial expenses awarded are part of the benefits accruing under the WIBA, and where justified, these were properly assessed and awarded, including the DOSH award.

The application by the 2nd respondent is an abuse of the court process and should be dismissed with costs.

The 1<sup>st</sup> respondent filed an application dated 27 October 2025 and is seeking orders:

1. *Spent.*
2. *Spent.*
3. *That a declaration is hereby issued that the 2nd respondent is bound to indemnify the 1st respondent by settling the applicant's DOSH award sum of Ksh. 2,889,000 plus the taxed cost and auctioneer's fee, if any, failure to which the judgment shall be entered for the sum of Ksh. 2,889,000 as against the 2nd respondent herein and in favour of the 1<sup>st</sup> respondent.*
4. *That and or in the alternative, a declaration hereby do issue directing the 2nd respondent to indemnify the 1st respondent. Failure to which the 2nd respondent be ordered and or directed to enforce the said DOSH award of Ksh. 2,889,000 against the 2nd respondent herein, plus costs and interests.*
5. *The 2nd respondent meets the costs of this application.*

The 1<sup>st</sup> respondent filed the Supporting Affidavit of Issah Awadh, the operations manager, who avers that the 1st respondent is a public transport business and is on the verge of collapse from settling claims against resulting work injuries, instead of the 2nd respondent settling the claims since the 1st respondent holds a valid insurance cover with them. The 1<sup>st</sup> respondent

was not served with the application for adoption of the DOSH award dated 21 August 2025; the adoption of the ward by the court was made without the 1st respondent's response, thereby denying the 1st respondent justice. Given the chance to file a response, the 1<sup>st</sup> respondent will have the opportunity to state its case and have the 2<sup>nd</sup> respondent pay under the insurance cover.

The parties attended and made the submissions.

These are analysed together with the issues for determination being;

Whether there was proper service of the application dated 21 August 2025 upon the respondents;

Whether there is proper joinder of the 2<sup>nd</sup> respondent insurance company in these proceedings;

Whether the respondent's right to a hearing has been denied;

Whether the award of DOSH should be set as well, including burial costs.

Who should pay the costs herein?

To begin with, every work injury claim commences with the employer's issuance of DOSH Form 1, such as the 1st respondent. On the form, the employer provides the particulars of the work injury and the insurance coverage relating to the matter. In this regard, the DOSH form 1 issued to the DOSH office was by the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent is noted as the insurer.

As the initiator of the DOSH assessment and ward process, the 1<sup>st</sup> respondent cannot justify its claim that it was denied the right to a hearing; on the contrary. It initiated the process and ought to have followed its outcome with objections, an appeal, or payment of the award.

Inherently, under section 7 of the WIBA, every employer is required to report work-related injuries to its employees:

***(1) Every employer shall obtain and maintain an insurance policy, with an insurer approved by the Minister, in respect of any liability that the employer may incur under this Act to any of his employees.***

***(2) ...***

Thus, the role and position of the 2nd respondent are based on a statutory requirement. The 2<sup>nd</sup> respondent does not challenge the detailed insurance cover under DOSH from 1. These are the details necessary under section 7 of the WIBA.

Based on the valid insurance cover, upon the DOSH assessment and award for work injury, under section 17(1) (b), the employer or the insurer are requirement to make the payment of compensation:

***(b) The employer or insurer by whom compensation in respect of that accident or disease is payable may institute action in a court against the third party for the recovery of compensation that the employer or insurer, as the case may be, is obliged to pay under this Act.***

The compensation should be paid within 90 days from the notice of DOSH under section 26(4) of the WIBA:

***(4) An employer or insurer against whom a claim for compensation is lodged by the Director under this section shall settle the claim within ninety days of the lodging of the claim.***

Any aggrieved party about the DOSH award has the right to file objections or an appeal. Refusal to pay, or assertion of misjoinder or that the right to be heard has been violated, does not remove liability.

In this case, the matter came up in court on 1 October 2025, and the 2nd respondent was in attendance through its advocate of choice. The attendance was in acknowledgement of knowledge of the matter pending in court. The 2nd respondent cannot turn back on this attendance and assert that its right to a hearing was denied.

Shisia avers in his Supporting Affidavit dated 8 October 2025 that:

*On 26 September 2025, the applicant/respondent served the 2nd respondent/applicant with notice of motion and annexures about the same dated 21 August 2025.*

There was service. The court relied on the records and such attendance.

As outlined above, the 1<sup>st</sup> respondent, as the initiator of the DOHS assessment process, was also aware of the proceedings and opted not to attend the hearing on 1 October 2025. There is an Affidavit of Service to confirm service.

The respondents have admitted to being conversant with the CTS returns. Indeed, the 2<sup>nd</sup> respondent accessed the same on 26 September 2025 but failed to file a Replying Affidavit thereof and instead waited until 8 October 2025 to file its application.

The good practice addressed in *Kennedy Wangunyu v Martha Wangari Kamau* [2020] KEHC 8463 (KLR), where the court held that respondents are required to address pending applications before filing a counter-application. This is a procedural requirement to ensure that all relevant matters are considered before moving with counter-applications to maintain fairness and justice in the legal process. Otherwise, the court proceedings will be marred by counterapplication and fail to address the core issue at hand. In this case, the applicant moved the court to adopt the DOSH award. Still, the counter-application has now been withdrawn, and the parties have moved to unrelated matters, without challenging the DOSH award itself, filing objections, or pursuing any appeal therefrom.

In ***Samuel Mwinami v Social Service League & another* [2016] KEELRC 16 (KLR)** and ***Kenya Plantation & Agricultural Workers Union versus P. J. Dave Flowers Ltd, Cause No.101 of 2015(Nakuru)***, the Court held that before filing counter-applications, a Respondent should address the pending application and that;

*The natural and legal consequence of an inter parties hearing at an interlocutory stage will seek the orders granted ex parte either confirmed or vacated after hearing both sides. It serves no useful legal purpose to file a counter application(s).*

These principles have served the justice process well over time. They should not be discarded for expedience or to stall justice. To allow such to take root would impede access to justice.

Under the provisions of sections 7, 17, and 26 of the WIBA, the 2<sup>nd</sup> respondent is a proper party in these proceedings. Knowledge of these proceedings was well in advance, and no response was filed to the application dated 21 August 2025 seeking to enforce the DOSH award.

The proceedings of 1 October 2025 stand.

As to the inclusion of burial costs, this is a legal imperative under section 34 of the WIBA. The 2<sup>nd</sup> respondent acknowledges this fact under the Supporting Affidavit of Shishia at paragraph 13.

Reasonable burial costs are payable in addition to the compensation payable as assessed by DOSH. Section 34(4) of the WIBA addresses such as follows:

***(4) In addition to the compensation payable under this section, the employer is liable to pay reasonable expenses for the funeral of the deceased employee subject to the maximum amount determined by the Minister, after consultation with the Council.***

As outlined above, without the respondents making any objections, appeal or reply to the application by the applicant, the award was properly confirmed as the judgment of the court. The order for payment stands.

The 1<sup>st</sup> respondent holds valid insurance coverage with the 2<sup>nd</sup> respondent. Such insurance cover is intended to indemnify the 1<sup>st</sup> respondent in an instance such as herein. The insurance cover/policy held by the 1<sup>st</sup> respondent with the 2<sup>nd</sup> respondent is not challenged.

Accordingly, the 2<sup>nd</sup> respondent is liable to settle the DOSH award, together with the burial costs, all assessed at Ksh. 2,889,000. The 2<sup>nd</sup> respondent should meet the costs attendant herein to the applicant and the 1<sup>st</sup> respondent. Had the same been paid within the WIBA timelines, these proceedings would not have been necessary.

**Accordingly, the application by the 2<sup>nd</sup> respondent dated 8 October 2025 is dismissed with costs to the applicant. The application by the 1<sup>st</sup> respondent dated 27 October 2025 is allowed to the extent that the 2<sup>nd</sup> respondent shall pay the DOSH award plus burial costs at Ksh. 2,889,000 plus costs and interests due to the applicant and the 1<sup>st</sup> respondent.**

Delivered in open court at Mombasa, this 19th day of February 2026.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Omar

..... and .....

