



REPUBLIC OF KENYA



KENYA LAW

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**Khisa v Kenya Builders & Concrete Co. Ltd & another (Miscellaneous Application
E023 of 2025) [2026] KEELRC 319 (KLR) (4 February 2026) (Ruling)**

Neutral citation: [2026] KEELRC 319 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
MISCELLANEOUS APPLICATION E023 OF 2025**

SC RUTTO, J

FEBRUARY 4, 2026

BETWEEN

SAMUEL K. KHATENGE KHISA APPLICANT

AND

KENYA BUILDERS & CONCRETE CO. LTD 1ST RESPONDENT

DIRECTORATE OF OCCUPATIONAL SAFETY AND HEALTH

SERVICES 2ND RESPONDENT

RULING

1. By way of a Notice of Motion dated 11th July 2025, the 1st Respondent/Applicant moved the Court seeking the following orders:
 1. Spent.
 2. Spent.
 3. That this Honourable Court do set aside the Ex Parte Judgment entered herein against the Respondent /Applicant and all consequential orders be set aside.
 4. That the Respondent /Applicant be granted unconditional leave to defend this suit and the attached Draft Response to Claim be admitted out of time.
 5. That the costs of this application be in the cause.
2. The Application is premised on the grounds set out on its face and is supported by an Affidavit sworn on 11th July 2025 by Jeremiah Nzioka, the 1st Respondent's Human Resources and Administration Manager.
3. The 1st Respondent avers that it was unable to attend Court due to inadvertent delays in obtaining critical documents, including a certificate dated 21st February 2024 confirming full settlement of the



- Applicant's claim, as well as clarification from the 2nd Respondent regarding a second certificate dated 9th July 2024.
4. It is contended by the 1st Respondent that the second certificate dated 9th July 2024, relied upon by the Applicant, is erroneous and of unknown origin.
 5. The 1st Respondent further avers that it fully settled the Applicant's claim in February 2024 on the basis of a 2% permanent total disability assessment, and that a certificate of payment was issued by the 2nd Respondent in compliance with the provisions of the *Work Injury Benefits Act* (WIBA).
 6. The 1st Respondent contends that the second certificate dated 9th July 2024, which assesses permanent total disability at 20% and awards Kshs. 405,849, is invalid, as no appeal was lodged by the Applicant within sixty (60) days of the certificate issued on 21st February 2024.
 7. That further, the 2nd Respondent failed to give reasons for varying the disability assessment from 2% to 20%, contrary to Sections 51 and 52 of the WIBA and that no evidence to justify such variation has been adduced by the Applicant.
 8. Upon being served with the instant Notice of Motion, Samuel Khatenge Khisa, the Applicant herein, filed a Replying Affidavit sworn on 23rd July 2025, in which he deposes that his employment with the 1st Respondent was terminated on 31st July 2023.
 9. He further states that in December 2023, he was called by the 1st Respondent to accept payment of Kshs. 43,836.95 as service pay, on the basis that he was the only former employee who had not accepted payment while his fellow former employees had done so. To this end, he confirms that he only received the sum of Kshs. 43,836.95 from the 1st Respondent.
 10. Mr. Khisa further avers that he sustained injuries while working at a quarry in Mlolongo, Athi River, and that he initially sought medical treatment at a hospital in Athi River. He thereafter visited the offices of the 2nd Respondent in Athi River. He thus contends that the cause of action arose in Mlolongo, Athi River.
 11. He further states that the DOSH Form 1 upon which he relies originated from the 2nd Respondent's offices in Athi River.
 12. Mr. Khisa further avers that the certificate of payment for the sum of Kshs. 57,657.96 annexed to the 1st Respondent's Motion confirms that he was paid only Kshs. 43,836.95, which, in his view, supports his averments.
 13. He further contends that there is no legal requirement that DOSH Form 1 be completed by the primary treating doctor, and that any qualified medical practitioner may assess the degree of disability.
 14. In light of the divergent positions taken by the Applicant and the 1st Respondent concerning the assessment undertaken by the 2nd Respondent's Athi River and Nairobi offices, the Court, on 28th July 2025, directed the 2nd Respondent to file a report in respect of the claim.
 15. Subsequently, the 2nd Respondent filed a report dated 25th September 2025, signed by Eugene Oduori Anyimi, who identifies himself as the Assistant Deputy Director of Occupational Safety and Health in charge of the Directorate of Occupational Safety and Health Services (DOSHS), Athi River office.
 16. Mr. Anyimi states that the DOSHS Athi River office forms part of the larger DOSHS department within the Ministry of Labour and Social Protection, which is mandated to process compensation for work-related injuries under the *Work Injury Benefits Act*, 2007.



17. He avers that the investigation into the Applicant's claim was assigned to him in his capacity as the officer in charge of DOSHS Athi River.
18. Mr. Anyimi further states that the 1st Respondent has a branch in Mlolongo, with its main office located in Embakasi, Nairobi County.
19. He avers that following the accident involving the Applicant on 17th November 2020, the employer (the 1st Respondent) duly notified the 2nd Respondent's Nairobi office on 26th November 2020, in compliance with Section 21 of the *Work Injury Benefits Act*.
20. Mr. Anyimi further states that the Applicant was treated at Athi River Shalom Community Hospital, and that Dr. Hellen Onyango, the primary treating doctor, assessed the Applicant on 23rd June 2021 and awarded a 2% permanent incapacity.
21. He further avers that, on the basis of the same assessment, the 2nd Respondent's Nairobi office awarded the Applicant Kshs. 40,585.00 for permanent incapacity and Kshs. 17,073.00 for temporary incapacity.
22. Mr. Anyimi avers that the Applicant did not lodge any appeal against the 2nd Respondent's decision dated 14th July 2021, as provided for under Section 51 of the *Work Injury Benefits Act*.
23. He adds that during the period of temporary incapacity, the Applicant was paid full salary by the employer and was therefore not entitled to compensation for temporary incapacity.
24. Mr. Anyimi further avers that on 21st February 2024, the Applicant and the 1st Respondent executed an agreement (DOSH/WIBA/5) in which the Applicant confirmed full agreement with the award issued by the 2nd Respondent.
25. He states that on the same date, following execution of the agreement, the 1st Respondent issued a banker's cheque number 037957 in favour of the Applicant in the sum of Kshs. 43,837.00, which amount was paid to him, who acknowledged receipt by both signature and right thumbprint.
26. Mr. Anyimi further states that upon payment of the compensable amount, the 2nd Respondent issued a Certificate of Payment (DOSH/WIBA/7), thereby marking the conclusion of the compensation process.
27. In conclusion, Mr. Anyimi opines that any claim lodged after closure of the compensation process is illegal and fraudulent, as it falls outside the scope of Section 51 of the *Work Injury Benefits Act*. He further contends that lodging the same claim before a different office, namely the DOSHS Athi River office, without disclosure that a similar claim had previously been processed by the Nairobi office, amounts to fraud.
28. It is worth pointing out that the Applicant did not file any response to the 2nd Respondent's report.

Submissions

29. The Application was canvassed through written submissions. Only the 1st Respondent filed written submissions, which the Court has duly considered.

Analysis and Determination

30. Having considered the Motion, the Applicant's Replying Affidavit, and the 2nd Respondent's report, the central issue for determination is whether the Court should set aside the ex parte orders issued on 30th May 2025 against the 1st Respondent, together with all consequential orders.



31. The record shows that on 30th May 2025, the Court allowed the Applicant's Notice of Motion dated 21st May 2025 as against the 1st Respondent and, in doing so, adopted the award made by the 2nd Respondent in the sum of Kshs. 405,849.00 as a judgment of the Court. The Applicant thereafter commenced execution proceedings against the 1st Respondent.
32. Following the commencement of execution, the 1st Respondent moved the Court by way of the instant Motion seeking to set aside the orders issued on 30th May 2025 together with all consequential orders.
33. The gravamen of the 1st Respondent's Motion is that it had fully settled the Applicant's claim in February 2024 pursuant to a certificate dated 21st February 2024, and that it therefore considered the matter closed. The 1st Respondent further contends that the Applicant did not appeal the decision of the 2nd Respondent within sixty (60) days from 21st February 2024 as required by law.
34. In his Replying Affidavit, the Applicant confirms that he received the sum of Kshs. 43,836.95 from the 1st Respondent but contends that the payment related to service pay following the termination of his employment on 31st July 2023.
35. Owing to the conflicting positions taken by the Applicant and the 1st Respondent, the Court directed the 2nd Respondent to file a report in respect of the Applicant's claim.
36. The Court has considered the report filed by the 2nd Respondent, which states that the Applicant was initially treated at Athi River Shalom Community Hospital, following which the attending doctor assessed his injuries and awarded a 2% permanent incapacity. Thereafter, the 2nd Respondent's Nairobi office awarded the Applicant Kshs. 40,585.00 for permanent incapacity and Kshs. 17,073.00 for temporary incapacity.
37. In support of these assertions, the 2nd Respondent annexed ML/DOSH/WIBA/Form 4, which indicates that the total award made in favour of the Applicant was Kshs. 57,657.96.
38. The 2nd Respondent further annexed a copy of the agreement executed between the Applicant and the 1st Respondent, indicating that the said sum of Kshs. 57,657.96 was in discharge of the 1st Respondent's liability in respect of the injuries sustained on 17th November 2020.
39. Also annexed was ML/DOSH/WIBA/7, being the Certificate of Payment, which confirms that the Applicant received the sum of Kshs. 43,836.95 through banker's cheque number 037957.
40. According to the 2nd Respondent, the subsequent claim lodged by the Applicant and the resultant award dated 9th July 2024 were illegal and fraudulent.
41. As noted earlier, the Applicant did not file any response challenging the assertions made by the 2nd Respondent, particularly with regard to the assessment and award made by the Nairobi office and the subsequent settlement by the 1st Respondent in the sum of Kshs. 43,836.95. In the absence of any rebuttal, the Court has no reason to doubt the accuracy of the averments contained in the 2nd Respondent's report.
42. Notably, there is no evidence on record that the Applicant lodged an objection with the 2nd Respondent regarding the award made on 14th July 2021, as provided under Section 51 of the [Work Injury Benefits Act](#). Similarly, there is no evidence that the Applicant appealed the said award under Section 52 of [Work Injury Benefits Act](#). Accordingly, the award dated 14th July 2021 remains in force.
43. What's more, the Applicant's assertion that the sum of Kshs. 43,836.95 was paid as service pay following termination of his employment was unsupported by any evidence.



44. What emerges from the foregoing is that the award issued on 9th July 2024, pursuant to which the Applicant's Motion dated 21st May 2025 was allowed, arose from a second claim concerning the same injuries sustained on 17th November 2020, which had already been assessed and compensated on 21st February 2024.
45. Having received compensation under the Work Injury Benefits Act in respect of the injuries sustained on 17th November 2020, the Applicant was precluded from lodging a further claim in respect of the same injuries. To do so amounted to double compensation.
46. It therefore follows that the orders issued by the Court on 30th May 2025, pursuant to the award made on 9th July 2024 by the 2nd Respondent's Athi River office, were obtained without full disclosure of material facts.
47. In the circumstances, the Court's ex parte orders of 30th May 2025, which adopted the 2nd Respondent's award of Kshs. 405,849.00, are hereby set aside.
48. The resultant decree and orders are also set aside.
49. Since the ex parte orders were prompted by the 1st Respondent's non-appearance at the hearing of the Motion of 21st May 2025, no order as to costs shall be made.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY 2026.

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STELLA RUTTO

JUDGE

In the presence of:

Mr. Mwendwa for the Applicant/Respondent

Ms. Simani instructed by Mr. Kiwinda for the 1st Respondent/Applicant

No appearance for the 2nd Respondent

Catherine Court Assistant

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

