



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT KISUMU

MISC. APPLICATION NO. E053 OF 2025

BECKY NYANCHAMA ONYANCHA (suing as a
dependant and legal representative of
FREDRICK OTIENO
(Deceased).....**APPLICANT**

ADUMBO

VERSUS

GOGNI RAJOPE CONSTRUCTION LTD.....**1ST**

RESPONDENT

CEABUD ENGINEERING SERVICES LTD.....**2ND**

RESPONDENT

JUDGMENT

1. The Applicant instituted this suit via a Notice of Motion dated 28th July 2025 seeking to have the Court adopt the Director of Occupational Safety and Health (hereinafter DOSH) award of Kshs. 32,880,000/- issued on 12th October 2023 with

interest till payment in full. They also seek for costs of the application.

2. The application is supported by the grounds set out on its face and the applicant's supporting affidavit. She deposes that she is a joint administratrix to the estate of Mr. Fredrick Otieno Adumbo who died as a result of a work injury while in the Respondents' employment. It is her contention that the award was reached in line with the requirements of the Work Injuries Benefits Act (hereinafter WIBA), including filling and submission of DOSH form 1 to Director of Occupational Safety and Health for processing and computing dues payable to dependants, followed by issuance of a Certificate of Dependency, and issuance of notice of assessment to the Respondents as well as reminders. She avers that despite a resolution at a meeting of the 28th September 2023 attended by DOSH, the Respondents' directors, the Respondents' Advocates and the Applicant that payment would be processed, no objection has been made and no payment has been made so far. She further asserts that the Respondents' contention that the deceased did not die in the course of employment was found untenable by the DOSH in his letter

dated 12th October 2023. In view of the foregoing the Applicant urges the court to allow the application.

3. In opposition, the Respondents filed a replying affidavit sworn by Mr. Hannington Raburu Juma their director on 22nd September 2025. He deposed from the outset that the deceased was employed by the 1st Respondent. He maintained that the work he carried out for the 2nd Respondent did not make him its employee hence the 2nd Respondent had been improperly joined to these proceedings. He further deposed that the deceased did not die in the course of his employment as contemplated by section 2 of the Work Injury Benefits Act, asserting that notification of death is a statutory requirement under section 22(2) of WIBA, not an admission of culpability.

4. As regards the award, the Respondents refuted that it was made on 12th October 2023 as alleged by the Applicant. They maintained that the letter dated 12th October 2023 by DOSH was a response to the 1st Respondent's enquiry on the award and was not capable of enforcement. They maintained that

the award was actually made on 21st August 2017, drawing attention to annexure HRJ 1 attached to its replying affidavit. The Respondents asserted that the deceased having died on 7th March 2017, from an alleged employment related cause, brought this action within the ambit of section 90 of the Employment Act. It was their contention that having been filed 7 years later this suit was time barred. The application was canvassed by way of written submissions.

Applicant's Submissions

5. From the outset the Applicant maintains that the claim arises under the Work Injury Benefits Act and not the Employment Act. They submit that the suit is not time barred pointing to the Respondents' acknowledgement of liability via the letter dated 28th September 2023 in which they only questioned the quantum. She asserts that it is only after the Respondent's refusal to pay following the demand by DOSH on 25th July 2024 that the DOSH decided to have the matter referred to this court. In respect of the court's jurisdiction the Applicant submits that this court possesses inherent jurisdiction to adopt the Director's award as a judgment for purposes of execution, distinct from its appellate jurisdiction

under section 52(2) of the WIBA. In support of her position, she cites **Charles v Cheto (Civil Appeal E046 of 2022) [2025] KECA 784 (KLR)**, which in quoting **Samson Chweya Mwendabole v Protective Custody Limited [2021] KEELRC1809 (KLR)**, held that, even though there is a lacuna on the procedure for enforcement of awards, the Employment and Labour Relations Court has unlimited jurisdiction in employment matters under Article 162(2)(a) of the Constitution and section 12 of the Employment and Labour Relations Court Act, thus it can adopt the DOSH award for execution purposes.

6. The Applicant further contends that the DOSH having determined the beneficiaries and their respective entitlements each dependant is entitled to their share, citing the case of **Hellen Waruguru Waweru (suing as the Legal representative of Peter Waweru Mwenja (deceased) v Kairie Shoe Stores Limited [2015] eKLR**, which held:

"Finally on the third issue, counsel for the defendant was of the view that Hellen could not claim damages under both the Law Reform Act and Fatal Accidents Act because

there would be double compensation since the dependents were the same, and therefore supported the two courts below which deducted the entire sum awarded under the LRA from the amount awarded under the FAA. With respect, that approach was erroneous in law. This Court has explained the concept of double compensation in several decisions. The principle is logic enough; duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and dependents under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under FAA should be denied damages for pain and suffering and loss of expectation of life as those are only awarded under the LRA hence the issue of duplication does not arise."

7. The Applicant also cites the Oregon Supreme Court in **White v Jubitz Corp., 219 Or App 62, 182 P3d 215 [2008]**, which stated:

"Damages cannot be reduced by an amount which the Plaintiff may have received from third parties, acting

independently of the defendant, though it is given to the plaintiff on account of the injury. For it is given not intended by the giver to be in lieu of damages, or else it is given in performance of a contract. In neither case the defendant any equitable or legal claim to share the benefit."

8. The Applicant submits that the DOSH award remains binding given the Respondents' failure to explore the mechanisms for challenge of the award provided in section 51 of the WIBA. In support of the doctrine that statutory dispute-resolution procedures must be followed, the Applicant relies on, **The Speaker of the National Assembly v Karume [2008] 1 KLR 426 (EP)** and **Kimani Wanyoike v Electoral Commission Civil Appeal No. 213 of 1995 (UR)**, in which it was underscored that where there is a Constitutional or statutory redress mechanisms they must be strictly followed. She also references **Diana Kethi Kilonzo v IEBC & 2 others [2013] eKLR**, for the proposition that bodies empowered by the Constitution to carry out duties must be allowed to carry out those duties freely without

interference by court. In view of the foregoing the Applicant asserts that the Respondents are estopped from raising objections or appealing at this stage citing **Stallion Insurance Company Limited v Ignazio Messina & C S.p.A. [2007] KECA 305 (KLR)**, which frowned upon the alteration of the case at the appellate stage, terming it prejudicial. The Applicant therefore urges the Court to adopt the Director's determination, enter judgment in the assessed sum, and award costs.

Respondents Submissions

9. In opposition to the suit the Respondents' invite the court to determine whether the Deceased was employed by the 2nd Respondent, whether a valid award was issued by the Director of Occupational Safety and Health Services on 12th October 2023, whether the assessment made on 21st August 2017 is enforceable, whether the claim is statute-barred under the Employment Act, and whether the doctrine of laches applies. On employment status, the Respondents submit that the Deceased was at all material times employed solely by the 1st Respondent and had no contractual relationship with the 2nd Respondent within the meaning of

the Employment Act or sections 4 and 5 of the Work Injury Benefits Act (WIBA). They assert that the award by the DOSH as well as the accompanying notice were both directed at the 1st Respondent and it was the 1st Respondent who notified DOSH of the death under section 22 of the WIBA. They therefore maintain that the 2nd Respondent was improperly joined and that no cause of action lies against it.

10. On whether a valid award was issued on 12th October 2023, the Respondents submit that the letter of that date did not constitute an award. They aver that it was correspondence in response to their advocate's letter dated 28th September 2023. They maintain that the actual award was made on 21st August 2017 asserting that the various correspondences of 1st July 2025, 10th December 2024, 25th July 2024, 17th November 2023 and 12th October 2023 could not form the basis for computation and extension of time.

11. In respect of whether the award of the 21st August 2017 is enforceable, the Respondents submit that it is unenforceable as; the death resulted from a suspected criminal act (Asphyxia due to strangulation) outside the course of

employment, no claim was lodged within the statutory 12-month period after death under section 26 of the WIBA, and the Director allegedly failed to comply with section 52 of WIBA by responding to the employer's objection within 14 days. On limitation, the Respondents submit that the claim arises from an employment relationship and is therefore subject to the three-year limitation period under section 89 (formerly section 90) of the Employment Act. They rely on **Richard Akama Nyambane v ICG Maltauro SPA Cause No. 4 of 2020 KEELRC 847 (KLR)** where the Court held that enforcement of a DOSH award must comply with the three-year limitation period in the Employment Act. They further cite **Charles v Cheto (Civil Appeal E046 of 2022) [2025] KECA 784 (KLR)**, which approved the same reasoning and affirmed that the limitation provisions of the Employment Act apply to enforcement of an award by DOSH. The Respondents also rely on **Beatrice Kahai Adagala v Postal Corporation of Kenya [2015] KECA 257 (KLR)**, in which the Court of Appeal emphasized that limitation periods in employment disputes are mandatory and cannot be extended. They submit that this Court has similarly

recognised, in **Peter v Gitau [2025] KEELRC 55 (KLR)**, that a WIBA claim is anchored in the employment contract and that the cause of action arises when the Director communicates the assessment.

12. Finally, on the doctrine of laches, the Respondents assert that the Applicant delayed for more than eight years before bringing the present claim. They submit that equity aids the vigilant, not the indolent, and that allowing the claim would prejudice the Respondents and undermine statutory limitation principles. They therefore urge the Court to find that the application lacks merit, that the award issued on 21st August 2017 is time-barred, and that the suit should be struck out or dismissed with costs.

Disposition

13. The enforcement of the award of the Director of Occupational Safety and Health is what is at the core of this suit. From the onset, the Court is minded that the dispute revolves around a workplace accident. The Applicant herein is the widow of the deceased workman, an engineer by profession. According to the Work Injury Benefits Act, a work

injury is a personal injury to an employee arising out of and in the course of employment. The deceased was injured away from his workplace and died as a result of an incident that was not related to his employ as he suffered murder which was not tied to his employment.

14. An assessment was made on 21st August 2017. The suit herein was presented in 2025 with an indication there was an assessment made on 12th October 2023. From the material before the Court, there is no assessment made on 12th October 2023. In terms of the Work Injury Benefits Act, the only jurisdiction a Director under DOSH has is in relation to the injury that is work related. The death of the Applicant's kin resulted from a suspected criminal act. The death certificate indicates Asphyxia. This was due to strangulation and this occurred outside the course of employment. Of note is that no claim was lodged within the statutory 12-month period after death under section 26 of the WIBA. The Work Injury Benefits Act is *sui generis* and one that is applicable in a very limited scope.

15. By attempting to assess a non-work related injury or death, the Director did not follow the law. The law does not contemplate the Director as being capable of determining compensation under the Fatal Accidents Act. Under the law, the jurisdiction to make awards under the Fatal Accidents Act is reposed in courts of law. An award by the Director of Occupational Safety and Health would run afoul the finding in the case of **Hellen Waruguru Waweru (suing as the Legal representative of Peter Waweru Mwenja (deceased) v Kairie Shoe Stores Limited** (*supra*). The Applicant has a grouse no doubt, but the forum would have been a civil suit if she felt the amount given in compensation was not enough. The Director granted an award he was not capable of grant in the law.

16. The Court notes the suit was presented 8 years after the assessment which is beyond the statutory limitation under section 89 (formerly section 90) of the Employment Act. If there was any claim for this Court to determine, the same is bound by section 89 and therefore presenting the claim on the basis that there was a query on the matter in 2023 does not continue or revive the otherwise stale claim. The

foregoing is ample proof that the suit before the Court is devoid of merit and is dismissed albeit with no order as to costs.

It is so ordered.

Dated and delivered at Kisii this 25th day of February

2026

**Nzioki wa Makau, MCI Arb.
JUDGE**

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