

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

ELRC MISC E114 OF 2024

DOUGLAS MAILUAPPLICANT

VS

REGINE BUTT.....RESPONDENT

RULING

Background

1. Douglas Mailu [the Applicant] approached this Court through her Notice of Motion Application dated 8th November 2024, and sought that the Court adopt as its Judgment the award of the Director of Occupational Safety and Health Services made on 19th April 2022, and that therefore, Judgment be entered in his favour against Regine Butt [the Respondent] for KShs. 1, 152,000.
2. On 17th February 2025, the Court granted the application, thereby adopting the Director’s award as the Judgment of the Court. The order of this day is the subject of the instant application dated 23rd May 2025, by the Respondent.

The Respondent’s Application

3. By a Notice of Motion application dated 23rd May 2025, the Applicant seeks the following orders;
 - a) THAT pending the inter partes hearing of this Application, this Honourable Court be pleased to order a stay of execution of the directions issued by this Honourable Court on the 17th February 2025.

- b) THAT this Honourable Court be pleased to review, vary and/or set aside the orders made on 17th February 2025, adopting the sum of KShs. 1,152,000 in its place, substitute the revised and fully settled amount of KShs. 131,939.63.
 - c) THAT this Honourable Court be pleased to grant the Respondent leave to file her response to the Application dated 8th November 2024 and be heard on merit.
 - d) THAT the Honourable Court be pleased to issue any other or further orders it may deem just in the circumstances
 - e) The costs of this Application should be provided for.
4. The application is based on the principal grounds set out on the face of the Application and those on the affidavit of REGINE BUTT, annexed to it.
 5. The Respondent/Applicant states that on or about the 17th of February 2025, the Court issued directions wherein the Applicant/Respondent's Application dated 8th November 2024 was allowed, thereby adopting an award allegedly issued by the Directorate of Occupational Safety and Health service on the 1 th of April 2022 in the sum of Kshs. 1,152,000.00.
 6. It is further stated that, prior to the filing of the said Application, she had objected to the abovementioned award by letter dated 16th January 2024, the receipt of which was acknowledged by the Directorate of Occupational Safety and Health Services.
 7. The Directorate of Occupational Safety and Health Services revised the Award of Kshs.1,152,000.00 to Kshs. 131,939.63.
 8. . It is further stated that, upon review of the award by the Directorate of Occupational Safety and Health Services, she proceeded to pay the sum of Kshs. 131,939.63. The amount was duly paid in full by cheque number 061175, dated 19th November 2024, amounting to Kshs. 104,885.75, and through three M-Pesa transactions totalling Kshs. 30,000.00, made directly to the Claimant's M-Pesa account associated with the phone number 0727670181.

9. The payment was duly acknowledged by the Directorate as constituting a full and final settlement of the Claimant's claim under the Work Injury Benefits Act (WIBA). The Directorate expressly stated that it would contact the Claimant; therefore, this burden did not lie with her.
10. The Applicant further states that, prior to filing this matter in Court, the Claimant's Advocate had repeatedly and unjustifiably demanded payment from her, including legal fees. In response, the Applicant informed them of the aforesaid settlement.
11. Equally, the Claimant's Advocates were contacted by DOSH officials and informed of the settlement, as set out in DOSH's Letter dated 19th November, 2024.
12. Despite the foregoing, on 17th February 2025, the Claimant proceeded to apply for and obtain orders from this Honourable Court adopting the original unrevised WIBA award of Kshs. 1,152,000. without disclosing the review and the full payment made.
13. The Application was made ex parte and on the basis of material non-disclosure, which misled the Court and resulted in orders that were unjust, erroneous, and prejudicial to the Applicant.
14. It is further stated that, in circumstances that are unjustifiable, the Claimant's Advocate, vide the letter dated 5th May 2025, has requested a decree from this Honourable Court with the intention of commencing execution proceedings.
15. In a draft Decree served on the Applicant, the Respondent is demanding Kshs. 1,186,666.67 plus accrued interest, a sum that is not only grossly inflated and erroneous but also unjustified in light of the reviewed and fully settled claim.

16. The conduct of the Claimant and his Advocate in this regard is vexatious, misleading, and amounts to an abuse of the Court process, warranting the immediate intervention of this Honourable Court.
17. The Applicant asserts that this Application has been filed promptly and in good faith, and that granting the sought orders will not cause any prejudice to the Claimant.

The Response's Opposition

18. By a replying affidavit sworn on 4th July 2025, the Respondent opposes the Applicant's instant application. He states that the Applicant was aware throughout of his application herein, which culminated in the proceedings and the order of 17th February 2025.
19. He further asserts that the Applicant has not provided any reasons that would justify her failure to respond to the Application, despite being fully aware of the litigation initiated against her.
20. The Applicant had the opportunity to respond to the Claim but chose to ignore it and has only woken up at the stage of execution. The Applicant's action is intended to impede him from realising the fruits of my judgment.
21. The cheque issued by the Applicant was so issued on 19th November 2024, after the Respondent had already filed his dated 8th November 2024.
22. The Respondent further argues that, although he was not privy to the proceedings that resulted in the revised compensation sum, it is Kshs. 131,939.63. He notes that the sum was awarded on 19th December 2023. The Applicant has failed to explain why she took so long to effect the payment awarded from 19th December 2023, only to purport to draw a cheque on 19th November 2024, after she had been served with court process.
23. The award of Kshs. 1,186,666.67 was made on 19th April, 2022, while the alleged review was made on 12th December, 2023, about one year and eight

months later, outside the statutory timelines for lodging objections. Therefore, the award of Kshs. 131.939.63 was made contrary to law, and as such, this Court should disregard it.

24. The Respondent further asserts that, as far as he is concerned, he has never been compensated. The Applicant has not demonstrated that the cheque was paid to.
25. The Applicant's application constitutes a review application. The application does not meet the legal threshold for a grant. Analysis and Determination
26. I have carefully considered the Applicant's instant application, the ground upon which it is premised and the affidavit in support thereof, the Respondent's replying affidavit, and the respective submissions by their Counsel, and a sole principal issue emerges for determination: Is the application merited?
27. It is undisputed that, following the Director's assessment and award dated 19th April 2020, the Director assessed and awarded the Respondent a sum of 1,152,000 for injuries he sustained at the Applicant's workplace. The Applicant contends that, upon realising the existence of the award, she filed an objection under the provisions of section 51 of the Work Injury Benefits Act, and, upon reviewing the initial award, the Director reduced it to KShs. 131, 939.63.
28. There is no dispute that following the award, and in compliance with the stipulations of the Work Injury Benefits Act, the Respondent forwarded a cheque number 0100000304338 for Kenya Shillings one hundred and four thousand in the names of the Applicant as payee, to the Director for onward transmission to the Applicant. The cheque was duly received on the same date.
29. This Court notes the telephone messages between the Respondent and the Applicant's Counsel. I get the impression that the Counsel was aware of the objection and the reviewed amount, and that he moved the Court as he did on

behalf of the Applicant because the Respondent did not settle the amount immediately after the review was made.

30. I have considered the matters raised by the Respondent regarding the propriety of the review proceedings and the award. I am of the view that, under the instant applications and the initial application, they cannot be properly and legally dealt with if the Respondent is aggrieved, as he suggests.
31. To the extent that the Respondent was aware of the reviewed amount, but nonetheless deliberately concealed the matter from the court, leading the court to erroneously adopt an award, which erroneously made the adoption award referred to hereinabove, I find the Applicant's application merited. This Court's order of 17th February 2025 is hereby set aside.
32. Further, under the inherent jurisdiction of this Court, the application dated 8th November 2024, which was anchored on a deliberate misrepresentation of facts and non-disclosure of material facts, is hereby dismissed.
33. This file is closed.

Read, Signed and Delivered this 27th Day of February 2026.

SIGNED
JUSTICE OCHARO KEBIRA