



Makau v Occidental Insurance Company Limited (Miscellaneous Application E013 of 2025) [2026] KEELRC 570 (KLR) (17 February 2026) (Ruling)

Neutral citation: [2026] KEELRC 570 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E013 OF 2025**

SC RUTTO, J

FEBRUARY 17, 2026

BETWEEN

URBANUS MAKAU APPLICANT

AND

OCCIDENTAL INSURANCE COMPANY LIMITED RESPONDENT

RULING

1. Vide a Ruling delivered on 3rd October 2025, the Court allowed the Applicant/Respondent's (hereinafter 'the Applicant') Notice of Motion dated 22nd January 2025, awarding him Kshs. 16,661,604.00, as assessed by the Director of Occupational Safety and Health Services (the Director) on 5th September 2024. The Court further ordered interest on the said sum at the applicable court rates from the date of the decision until full payment.
2. Following the aforementioned Ruling, the Respondent/Applicant (hereinafter 'the Respondent') filed the present Notice of Motion, amended on 31st October 2025, seeking the following reliefs:
 1. Spent.
 2. That this Honourable Court be pleased to review its orders given on the 3rd of October 2025 enforcing the award of Kshs. 16,661,604/= awarded by the Director of the Directorate of Occupational Safety and Health Services
 3. That once this Honourable Court reviews its orders, this Honourable Court be pleased to find that the Claimant's/Respondent's Notice of Motion dated the 22nd day of January, 2025 was prematurely filed and set aside owing to:-
 - i. New facts and evidence have emerged subsequent to the delivery of the ruling and issuance of the orders of 3rd October, 2025, including the discovery that the Respondent/Applicant had already lodged an appeal against the DOSH award



through a formal letter of appeal dated 17th day of September 2024 addressed to the Director which appeal remains pending consideration.

- ii. In view of the pending appeal before the Director, and the fact that the said appeal has not yet been determined nor responded to, the adoption and enforcement proceedings leading to the issuance of the orders of 3rd October, 2025 were premature, irregular and in violation of due process hence liable to be reviewed and set aside to prevent miscarriage of justice.
4. That there be a stay of execution of the award given by the court on the 3rd of October 2025 pending hearing and determination of this application, to forestall the imminent risk of execution and to safeguard the Respondent/Applicant's right to fair hearing.
5. That the costs of this application be provided for.
3. The Amended Notice of Motion is anchored on the grounds stated therein and is supported by the Affidavit sworn on 31st October 2025 by Michael Shisia, the Respondent's Legal Officer.
4. Grounds in support of the Motion are that the Applicant was awarded Kshs. 16,661,604/- by the Director on 5th September 2024 as compensation for an alleged road traffic accident. The Respondent was surprised by the award, as the said accident was self-inflicted and occurred outside the scope of employment, placing it beyond the jurisdiction and mandate of the Director under the Work Injury Benefits Act (WIBA).
5. Mr. Shisia avers that upon becoming aware of the award, the Respondent, exercising its statutory right of appeal, promptly lodged an appeal on 17th September 2024 by way of a letter addressed to the Director pursuant to Section 51(1) of WIBA. The appeal letter was duly received and acknowledged by the Director's office, and the Respondent has since awaited formal determination of the appeal, which remains pending to date.
6. He further avers that notwithstanding the existence of the pending appeal, the Applicant filed a Notice of Motion dated 22nd January 2025 seeking enforcement of the Director's award of Kshs. 16,661,604/-, which was subsequently granted by the Court on 3rd October 2025.
7. Mr. Shisia contends that the Court's decision to enforce the award was based on the premise that the Respondent had not exercised its right of appeal against the Director's decision.
8. He asserts that this was a mistake and an error apparent on the face of the record, as the Respondent had exercised its right of appeal under Section 52 of WIBA by formally lodging an appeal on 17th September 2024. He maintains that the appeal was duly delivered, acknowledged, and stamped as received by the Director's office. In his view, the existence of this pending appeal demonstrates that the enforcement proceedings were premature and procedurally irregular.
9. Mr. Shisia avers that despite the appeal being properly filed and still pending, the Director has neither responded to nor determined it. Consequently, the enforcement of the award of Kshs. 16,661,604/- by this Honourable Court was premature, legally untenable, and therefore null and void, contravening the mandatory procedural safeguards under WIBA.
10. Mr. Shisia avers that unless this Honourable Court sets aside its Ruling of 3rd October 2025, which adopted the erroneous award of the Director, the Respondent stands to suffer irreparable loss and prejudice, including being condemned unheard and facing significant financial detriment.



11. In response to the Respondent's Motion, Urbanus Makau, the Applicant herein, filed a Replying Affidavit dated 13th November 2025.
12. Mr. Makau deposes that at the time of adopting the Director's award, this Honourable Court rightly found that no evidence had been presented challenging the award under the WIBA, nor that the Respondent had taken steps to satisfy it.
13. He further avers that the Respondent has always been aware of the proceedings before the Director, as well as the adoption proceedings before this Court.
14. Mr. Makau states that the Respondent initiated proceedings in 2023 through an application to the Director. He contends that the Respondent has not provided any evidence showing that they lodged a formal objection in the prescribed format.
15. He avers that he nevertheless informed this Court that the Respondent had submitted a complaint letter dated 17th September 2024, requesting a further medical examination before settling the award.
16. Mr. Makau avers that in the absence of a formal objection, the Director responded to the complaint letter on 28th November 2024, indicating that the process before him had been exhausted and effectively dismissing the Respondent's complaints, which lacked evidentiary support.
17. According to Mr. Makau, the Respondent was fully aware of the Director's response and was further reminded of it via a letter from Walker Kontos Advocates dated 3rd October 2024.
18. He asserts that the Respondent, aware of their rights, was required to appeal to this Court under Section 52(2) of the WIBA, but no appeal was filed.
19. Mr. Makau contends that the Respondent, despite being aware of the Director's award, failed, refused, or neglected to challenge the award in the manner prescribed by law or to settle it.
20. He further contends that the Respondent, though served with the Applicant's Notice of Motion seeking adoption of the Director's award, did not take steps to stay the adoption or otherwise challenge or settle the award.
21. In Mr. Makau's view, there is no new evidence as alleged by the Respondent, since all evidence presented in their amended application was within their knowledge and could have been produced before adoption of the award, but was willfully withheld. He asserts that there is no error apparent on the face of the record in this Court's Ruling of 3rd October 2025.
22. Mr. Makau further contends that the Respondent's Notice of Motion raises allegations that should have been brought in a proper challenge to the Director's award, but were not pursued through the prescribed channels.
23. He further avers that the current application seeks to have this Court reconsider its own Ruling by addressing issues that were never brought before it or properly canvassed under the law.
24. Mr. Makau asserts that the Respondent has not demonstrated that the Director's award was irregularly adopted as a judgment of this Court or that the Court failed to consider all relevant facts in adopting the award.
25. Mr. Makau holds that the Respondent's application is an afterthought, aimed solely at frustrating him from realizing the award duly issued and rightfully adopted by this Court.



Submissions

26. In support of the Motion, the Respondent submits that, in light of the pending and undetermined objection before the Director, the award lacked finality and was not ripe for adoption. The Respondent posits that the Applicant's application was premature, procedurally irregular, and contrary to the statutory dispute-resolution framework under WIBA.
27. Referencing *Republic v Public Procurement Administrative Review Board & 2 others* [2018] eKLR, the Respondent contends that the present application meets the strict statutory requirements for review under Order 45 Rule 1 of the Civil Procedure Rules which allows for review where material evidence is discovered that was "not within the knowledge of the Applicant or could not be produced at the time the decree was passed despite the exercise of due diligence."
28. The Respondent further submits that a comprehensive reorganization of its internal structures, including the relocation and reassignment of key personnel, temporarily delayed access to crucial records and documentation necessary to substantiate the pending appeal. It is submitted that it was only after completing internal verifications and reconciling records that the Respondent was able to establish conclusively that the appeal was pending and that the DOSH award was therefore neither final nor enforceable. As such, the evidence could not have been reasonably presented prior to the Court's orders of 3rd October 2025, despite the Respondent having acted diligently and in good faith.
29. The Respondent argues that, for purposes of review, it is not necessary that the newly discovered matter be outcome-determinative; it is sufficient that, had the Court been aware of it, the Court may have reached a different conclusion or refrained from ordering enforcement.
30. The Respondent has urged the Court to find that the Applicant's Notice of Motion dated 22nd January 2025 was premature, as it sought adoption of the DOSH award as a Court judgment before the statutory appeal lodged on 17th September 2024 had been determined.
31. On its part, the Applicant submits that the Respondent has not satisfied the threshold for seeking review of this Court's orders arising from its Ruling of 3rd October 2025.
32. According to the Applicant, the letter of objection dated 17th September 2024 does not constitute new or material evidence that was unknown to the Respondent or could not have been produced before this Court prior to the Ruling of 3rd October 2025.
33. The Applicant contends that, as the author of the alleged letter of objection, the Respondent has always had possession and knowledge of the document and its contents. Consequently, they cannot claim ignorance of its existence or assert that it was unavailable prior to the Court's Ruling.
34. The Applicant further posits that both the Respondent and the Court had sufficient opportunity to consider the contents of the letter dated 17th September 2024, and it therefore cannot be considered new or material evidence that was unknown to the Respondent or could not have been produced with due diligence.
35. Citing *Gwaro v Kenya Revenue Authority* (2025) KECA 1120 (KLR), the Applicant submits that the Respondent is estopped from raising issues relating to the letter in the current Application for Review, and that the Court should not entertain them.
36. The Applicant further asserts that there is no pending objection before the Director-DOSH requiring determination, as will be demonstrated below.



37. It is the Applicant's further submissions that the alleged letter of objection does not comply with the mandatory requirements of Section 51(2) of WIBA. That further, no material has been presented to suggest that DOSH failed to perform its obligations under WIBA.
38. The Applicant maintains that, in the absence of a formal objection lodged with DOSH and no appeal filed in this Court by the Respondent, the WIBA award remained unpaid, and he was therefore entitled to initiate enforcement proceedings against the Respondent.
39. Referencing *Karanja v Murigi* (2025) KECA 517 (KLR), the Applicant submits that the Respondent's current application for review is in substance an appeal on the merits of the WIBA award, which cannot properly be raised before this Court through a review application.

Analysis and Determination

40. The Court has carefully considered the Respondent's Amended Notice of Motion, the Applicant's Replying Affidavit as well as the rival submissions, and it is apparent that the sole issue for determination is whether the Respondent has met the legal threshold for obtaining an order of review.
41. Rule 74(1) of the Employment and Labour Relations Court (Procedure) Rules, 2024, expressly provides that the Court may review its judgment or ruling only where any of the following grounds are established:
 - a. if there is discovery of a new and important matter or evidence which, despite the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
 - b. on account of some mistake or error apparent on the face of the record;
 - c. if the judgment or ruling requires clarification; or
 - d. for any other sufficient reason.
42. The primary ground relied upon by the Respondent in seeking review and setting aside the Court's Judgment is the alleged discovery of new facts and evidence arising after the delivery of the Ruling on 3rd October 2025. The Respondent asserts that it discovered it had previously lodged an appeal against the Director's award under WIBA through a formal letter dated 17th September 2024, which was duly received and acknowledged by the Director.
43. In the Respondent's view, the enforcement proceedings leading to the adoption of the Director's award were therefore premature, procedurally irregular, and a violation of due process, warranting review and setting aside of the Court's Ruling.
44. The Respondent further submits that it has been awaiting formal communication and determination of its appeal, which remains pending and unresolved to date.
45. Opposing the Motion, the Applicant contends that the Respondent has not provided evidence demonstrating that an objection was lodged in the manner prescribed by law with the Director.
46. The appeal referenced by the Respondent in its Amended Motion is the letter dated 17th September 2024 addressed to the Director, protesting the award issued on 5th September 2024 in favour of the Applicant.
47. It is notable that the said letter was annexed to the Applicant's Notice of Motion dated 22nd January 2025. Nevertheless, the Respondent did not address itself to the said letter during the enforcement



proceedings. Instead, it filed a preliminary objection asserting that the award was unlawful, null, and void on the basis that the Applicant's injuries did not occur in the course of employment.

48. With regard to the discovery of new and important evidence, the Court of Appeal in *Rose Kaiza v Angelo Mpanju Kaiza* [2009] KECA 422 (KLR) referenced Mulla's commentary on provisions of the Indian Civil Procedure Code, 15th Edition, at page 2726, stating thus: –

“Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made.”

49. In essence, an applicant seeking review of a Court's decision must demonstrate that the evidence relied upon is both new and material, that due diligence was exercised, and that the evidence was not within their knowledge at the relevant time.
50. Since the letter dated 17th September 2024, relied upon by the Respondent, was annexed to the Applicant's Motion dated 22nd January 2025, it cannot properly be considered new evidence. In these circumstances, it cannot be said that the said evidence was beyond the Respondent's reach or unknown to it prior to the delivery of the Ruling on 3rd October 2025.
51. What's more, the Applicant annexed to the Motion dated 22nd January 2025 a copy of a letter dated 28th November 2024 from the Director, in which Dr. Andrew Muruka notified the Applicant that the settlement of the claim was long overdue and that the work injury compensation process had been exhausted.
52. Notably, the said letter was copied to the Respondent. Despite this, the Respondent did not address the contents of the said letter in its response to the motion dated 22nd January 2025 or in its present Motion. Indeed, it is puzzling why the Respondent did not take this as an opportunity to follow up on the status of its letter dated 17th September 2024 before the conclusion of the enforcement proceedings.
53. It is therefore apparent to the Court that the evidence the Respondent relies upon in seeking to review and set aside the Ruling of 3rd October 2025 was already available during the enforcement proceedings. As such, it cannot be regarded as “new” evidence.
54. Furthermore, the Respondent's assertion that the process before the Directorate of Occupational Safety and Health Services is still ongoing is undermined by the 28th November 2024 letter from the Director, which expressly states that the work injury compensation process had been exhausted.
55. In view of the foregoing, the Court is not persuaded that the Respondent has satisfied the threshold under Rule 74(1) (a) of the Court's Rules, specifically that there is a discovery of new and important evidence which, to warrant a review of the Court's Ruling delivered on 3rd October 2025.
56. Further, in light of the letter dated 28th November 2024, the Court is not persuaded that there is a pending appeal/objection before the Directorate of Occupational Safety and Health Services.



57. In the end, the Court finds that the Amended Notice of Motion dated 31st October 2025 lacks merit, the Respondent having failed to establish any valid ground for review of the judgment.

58. Accordingly, the Notice of Motion is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 17TH DAY OF FEBRUARY, 2026.

.....

STELLA RUTTO

JUDGE

In the presence of:

For the Applicant/Respondent Mr. Ondego

For the Respondent/Applicant Mr. Karsiye instructed by Ms. Muema

Court Assistant Ndati

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

