

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

MISC. APPLICATION NO. E310 OF 2025

(Before Hon. Lady Justice Agnes Kitiku Nzei)

**NZISA MUTUNGA & MUKAMI NDUVA (Suing
for and on behalf of James Mutuku Nduva).....APPLICANT**

VERSUS

KINSFOLK LIMITED1ST RESPONDENT

**INTRA AFRICA INSURANCE COMPANY LTD.....2ND
RESPONDENT**

RULING

1. Before the Court for determination is the Applicant's Notice of Motion dated 26th August, 2025. The Applicant seeks the following Orders:-

(a) *That the Court be pleased to adopt as its Judgment the assessment/award of the Director of Occupational Safety and Health Services made on 12th March, 2024.*

(b) *That a decree do issue against the Respondent's jointly and severally for:-*

- (i) The sum of **Kshs.2,995,200/=** being the Director's award/assessment made on 12th March, 2024.
- (ii) Reasonable burial expenses of **Kshs.752,400/=** and interest on the assessed/awarded sum at Court rates (14%) from the date of the award (**12th March, 2024**) until payment in full.
- (iii) That costs of the application be awarded to the Applicant.

2. The application sets out on its face the grounds upon which it is brought, and is based on the Applicant's supporting affidavit sworn on 26th August, 2025. It is deponed in the said supporting affidavit, **inter-alia:-**

- (a) that the deceased was employed by the Respondent as on 10th January, 2024 when he sustained work-related injuries while at work, which led to his death.
- (b) that the incident was reported to the Director of Occupational Safety and Health Services-Thika vide **DOSH/FORM 1** and upon assessment, the deceased was found to have suffered 100% permanent

incapacity; that compensation payable to his estate was assessed at **Kshs.2,995,200/=**, and **DOSH/FORM 4** was consequently issued on **12th March, 2024**.

(c) that in addition to the said compensation, the Respondent is bound by law (**Section 34 of WIBA**) to compensate the deceased's estate such reasonable sum towards the deceased's funeral, which in the present case is approximately **Kshs.752,400/=**.

(d) that the Respondent was required to effect the said payment within **90 days**, upon which the Director would remit the same to the Applicant within **30 days**.

(e) that despite having been notified of the assessment on **12th March, 2024**, the Respondent never objected or appealed as by law provided.

(f) that noting the delay in effecting payment, the Director demanded payment by the Respondent vide a letter dated **7th August, 2025**, which letter never elicited any response from the Respondent.

3. Documents annexed to the said supporting affidavit include copies of a Grant of Letters of Administration Ad Latem dated **26th August, 2025, DOSH/FORM 1**, receipts on funeral expenses and **DOSH/WIBA 4**, among others.
4. The application is opposed by the 1st Respondent vide a replying affidavit of **Simon Kimani** (the 1st Respondent's Director) sworn on **2nd October, 2025**. It is deponed in the said affidavit:-
- (a) *that the award issued by the Director of Occupational Safety and Health Services of **Kshs.2,995,200/=** is not only sufficient, but also reasonable to cater for just compensation and burial expenses.*
- (b) *that the burial expenses of **Kshs.752,400/=** sought in the application are exorbitant and excessive, are meant to unjustly and unfairly enrich the Applicant; and the attached receipts are **not** verified.*
- (c) *that the interest sought, from the date of award to payment in full, is not only unjust but also unfair.*

5. On its part, the 2nd Respondent filed a Notice of Motion dated **7th October, 2025**, seeking to have its name struck off from the proceedings herein on grounds:-

- (a) that there was no privity of contract between the Applicant and the 2nd Respondent.*
- (b) that there was no employer-employee relationship between the Applicant and the 2nd Respondent.*
- (c) that the 2nd Respondent was not a party to the alleged proceedings before the Director of Occupational Safety and Health Services, and cannot be joined in the execution proceedings.*
- (d) that the suit herein does not disclose any reasonable cause of action against the 2nd Respondent, and should be struck out.*
- (e) that the alleged award of the Director was not addressed to the 2nd Respondent.*

6. The Applicant responded to the 2nd Respondent's foregoing application vide a replying affidavit sworn on 20th October, 2025, and filed a supplementary affidavit (sworn on even date) in response to the replying affidavit sworn on behalf of the 1st Respondent, both of which I have considered.

7. On **22nd October, 2025**, Counsel for the 2nd Respondent asked the Court to treat the 2nd Respondent's Notice of Motion dated **7th October, 2025** as the 2nd Respondent's response to the Applicant's Notice of Motion dated 26th August, 2025. The Court granted that prayer, and ordered, *inter-alia*, as follows:-

“(1) As prayed by Counsel for the 2nd Respondent, the 2nd Respondent's Notice of Motion dated 7th October, 2025 and the affidavit sworn in support thereof are hereby deemed as the 2nd Respondent's Response to the Notice of Motion dated 26th August, 2025.”

8. Parties filed written submissions on the Applicant's Notice of Motion dated 26th August, 2025 pursuant to the Court's directions in that regard.

9. Having considered the application and the Respondents' responses thereto, issues that fall for determination, in my view, are as follows:-

(a) Whether there was privity of contract between the deceased employee (James Mutuku Nduva-deceased) and the 2nd Respondent.

(b) Whether the Orders sought by the Applicant are deserved.

10. On the first issue, documents filed herein by the Applicant, and particularly the **Notice by Employer of an Occupational Accident (DOSH FORM 1)**, clearly show that the deceased was employed by the 1st Respondent as a mason in a construction site, and that the cause of the fatal work injury was electrocution. The 2nd Respondent's name is indicated on the said document **as the 1st Respondent's Insurer.**

11. Further, **liability** in work injury matters is determined by the Director of Occupational Safety and Health Services (**the Director**) pursuant to **Section 23(1) of the Work Injury Benefits Act (WIBA)** which provides as follows:-

“(1) After having received notice of an accident or having learned that an employee has

been injured in an accident, the Director shall make such inquiries as are necessary to decide upon any claim or liability in accordance with this Act.”

12. The issue of **liability** does not appear to have been in dispute before the Director, as the **1st Respondent** had already issued and sent to the Director a Statutory Notice by Employer to the Director (**DOSH FORM 1**) reporting a fatal work injury to its employee (the deceased) and giving all the required details of his employment.
13. Having assessed the compensation payable to the deceased employee's estate, the Director sent his decision (**DOSH/WIBA 4**) and demand for payment, dated 12th March, 2024, to the 1st Respondent, which **never objected** to the same pursuant **to Section 51 of the WIBA**. The assessed sum of **Kshs.2,995,200/=** has since become payable to the deceased's estate **by the 1st Respondent**.
14. There is a clear misjoinder of parties in the proceedings herein, as there was no privity of contract between the

deceased employee and the 2nd Respondent. No liability attaches to the 2nd Respondent, in view of the foregoing. The Applicant's suit against the 2nd Respondent cannot succeed, and must fall by the way side. It is hereby struck off with no order as to costs.

15. On the second issue, the 1st Respondent does **not** object to judgment being entered in terms of the Director's award of **Kshs.2,995,200/=**. The 1st Respondent **only** opposes the claimed sum of **Kshs.752,400/=** which the Applicant depones is made up of funeral expenses, relying on **Section 34 of WIBA**. Section 34(4) of the Work Injury Benefits Act provides 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 Cabinet Secretary, after consultation with the Council.”

16. **“Council”** in the foregoing context refers to the National Council for Occupational Safety and Health, as defined in **Section 2 of the Act.**

17. It is clear from the foregoing that this Court **cannot** determine what **“reasonable expenses for the funeral of the deceased employee”** is, as such determination falls within the province of the Cabinet Secretary in consultation with the National Council for Occupational Safety and Health. In my view, what is reasonable funeral expenses for a deceased employee in each individual case should be determined by the Director, subject to the maximum amount determined by the Cabinet Secretary in consultation with the Council. Once determined, this Court can enforce the same. There is no such determination in the present case.

18. Regarding enforcement of the director’s decision/award dated **12th March, 2024**, this Court stated as follows in my decision in the case of **Amir Swaleh Omar - vs - Mackezie Maritime (E.A) Limited [2022] eKLR:-**

“17. The Act (WIBA) is silent on how the awards of compensation made by the Director in favour of

employees involved in occupational accidents or who suffer occupational deceases are to be enforced. At the same time, the Act does not expressly divest this court of Jurisdiction to enforce such awards; and especially where the award of compensation by the Director has not been objected to and the employer has refused to pay the assessed compensation. Did Parliament intend that an employee caught up in such a situation would be left at the mercy of an employer who may choose either to pay or not to pay the assessed sum? I do not think so.

18. What would be the purpose of the Director making or undertaking enquiries in order to determine the issue of liability and proceeding to assess the compensation payable if the compensation assessed by the Director was not meant to be paid to the injured employee? In my view, once the Director assesses the compensation payable and the same is not objected to pursuant to Section 51 of WIBA, the assessed sum becomes the injured employee's right and entitlement regarding which

the employee can move to Court and seek enforcement of that right by seeking entry of Judgment in terms of the Director's assessment, and issuance of a decree which can then be executed to realise that right.

19. *Indeed, failure by an employer to pay a demanded compensation that has been assessed by the Director and to which no objection has been lodged creates a dispute over a liquidated claim, which this court can entertain and determine. Article 50(1) of the Constitution of Kenya 2010 provides:-*

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, or if appropriate, another independent and impartial tribunal or body.”

19. Having said that, and having considered written submissions filed on behalf of the parties herein, the Applicant's Notice of

Motion dated 26th August, 2025 is hereby allowed in the following terms:-

- (a) The award by the Director of Occupational Safety and Health Services made on 12th March, 2024 is hereby adopted by this Court and accordingly, Judgment is hereby entered for the Applicants against the 1st Respondent in the sum of Kshs.2,995,200/=, being the sum awarded by the Director.**
- (b) A decree shall issue, and shall be enforceable in accordance with the Civil Procedure Rules pursuant to Section 13 of the Employment and Labour Relations Court Act.**
- (c) The decreed sum shall attract interest at Court rates, to be calculated from the date of this Ruling until payment in full.**

20. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS

13TH DAY OF MARCH 2026

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. Odunga for the Applicant

No appearance for the 1st Respondent

Miss Odira for the 2nd Respondent