

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS
COURT AT NAKURU

ELRC JUDICIAL REVIEW NO. E004 OF 2025
(Before Hon. Lady Justice Anna Ngibuini Mwaure)

REPUBLIC.....

APPLICANT

VERSUS

**THE DIRECTOR, DIRECTORATE OF
OCCUPATIONAL SAFETY &
HEALTH SERVICES.....**
.....RESPONDENT

AND

**CAROLINE GESARE MOGIRE
(Sued as the legal administrator of the
ESTATE OF THE VINCENT MOGIRE ASIAGI)
.....INTERESTED PARTY**

AND

**VALLEY CONFECTIONERY LIMITED.....EX-PARTE
APPLICANT**

RULING

Introduction

1. The Ex-parte Applicant filed a Notice of Motion dated 2nd October 2025 seeking the following orders that:

***1. This Honourable Court be pleased to issue
an order of Certiorari to remove into this
court for quashing and to quash the award
made by the Director of Occupational
Safety and Health Services on 7th July 2023***

and adopted by the court vide Nakuru MC ELRC Misc App No. E336 of 2023 on 18th February 2025 and all consequential orders.

2. This Honourable court be pleased to issue an order of Mandamus compelling the Director of Occupational Safety and Health Services to recall the award made on 7th July 2023 and adopted by the court vide Nakuru MC ELRC Misc App No. E336 of 2023 on 18th February 2025 for purposes of reviewing the decision made on 7th July 2023.

3. The Respondent pay the Ex parte Applicant's costs of this application.

2. The application is brought under **sections 8 & 9 of the Law Reform Act, Order 53 Rule 3(1) of the Civil Procedure Rules, Rule 10 of the Employment and Labour Relations Court (Procedure Rules) 2024 and Articles 22, 23, and 159(2) of the Constitution of Kenya.**

Ex-parte Applicant's supporting affidavit

3. The application is supported by the affidavit of Evelyne Gathoni Mwangi, the Ex-parte Applicant

Human Resource Manager, dated 30th September 2025.

4. The *Ex parte* Applicant avers that it had employed the late Vincent Mogire Asiagi as a boiler operator until his death on 22nd May 2023, which was reported to the Respondent as required.
5. Despite this, the *Ex parte* Applicant avers that the Respondent assessed the claim without involving it and ordered payment of Kshs.1,422,720/= plus 14% interest, even though a post-mortem revealed the death was due to natural illness “cardiac tamponade due to ruptured aortic dissection” unrelated to work.
6. The *Ex parte* Applicant argues that the Respondent acted without jurisdiction under the Work Injury Benefit Act (WIBA) 2007, failed to notify it of the award, and that the subsequent adoption of the award by the court was procedurally flawed.
7. The *Ex parte* Applicant further avers that its insurer declined to settle the claim as the death was not work-related, and that auctioneers have since moved to attach its property based on irregular warrants. It contends the award is a nullity, time does not run on nullities, and unless quashed, it will suffer substantial loss by being compelled to pay an unlawful award.

8. The *Ex parte* Applicant therefore seeks the court's intervention to recall and set aside the award in the interest of justice.

Respondent's replying affidavit

9. In opposition to the application, the Respondent filed a replying affidavit dated 16th February 2026, sworn by Judith Muteitsi, the Respondent's Deputy Director in charge of Naruku County.

10. The Respondent avers that a formal notice of death at the workplace was duly received, with the *Ex parte* Applicant specifically notifying the authorities that the death was work-related.

11. The Respondent avers that there was a confirmation receipt of a Certificate of Dependency from the Assistant County Commissioner, which identifies the deceased's dependents entitled to compensation.

12. The Respondent avers that an inquiry was conducted into the cause of death as reported by the *Ex parte* Applicant, with a recommendation for a post-mortem to establish the cause.

13. However, the Respondent avers that the authorities stated that they were not supplied with the post-mortem report, and noted that if it had shown the

death was natural, no award would have been made.

14. The Respondent further avers that a demand for payment was issued on 7th July 2023, which was collected by a representative of Ex parte Applicant on 11th July 2023.

15. Consequently, the Respondent disputes the Ex-parte Applicant's claim of only learning about the award after filing MC ELRC MISC. App E336 of 2023, and urged the court to dismiss the application.

Interested party's replying affidavit

16. The Interested party also opposed the application vide a replying affidavit sworn by Caroline Gesare Mogire dated 16th October 2025.

17. The Interested party avers that the application is incompetent, bad in law, and an abuse of the court process and accuses the *Ex parte* Applicant of attempting to misuse the court to evade obligations imposed by an earlier order of 18th February 2025.

18. Additionally, the Interested party avers that on 4th December 2023, she filed a Notice of Motion under Misc. Appl. No. E336 of 2023 in the Nakuru ELRC, seeking adoption of an award by the Director of Occupational Health and Safety following the death

of her husband at work, which she attributes to the *Ex Parte* Applicant's fault.

19. The Interested party avers that the *Ex parte* Applicant's litigation history, beginning with Misc. Application No. E016 of 2024, filed on 22nd March 2024, which Lady Justice Hellen Wasilwa later dismissed on 11th June 2024.
20. Subsequently, the Interested party avers that the *Ex parte* Applicant's earlier application of 16th November 2023 was allowed on 18th February 2025, and the Director of Occupational Health and Safety's award of Kshs.1,422,720/= was adopted as a court judgment.
21. When the *Ex parte* applicant failed to pay, the Interested party asserts that warrants of attachment were issued to Brave Auctioneers, who proclaimed and subsequently seized the applicant's motor vehicles, issuing a notification of sale.
22. In response, the Interested party avers that the *Ex parte* Applicant sought judicial review on 1st October 2025, which the respondent argues is belated, intended only to forestall execution, and unsupported by valid reasons.

23. The Interested party emphasizes that the award has already crystallized into a court judgment, cannot be quashed, and that dismissing the application would not prejudice the *Ex parte* applicant, whereas allowing it would cause undue harm and delay.

Ex parte Applicant further affidavit and supplementary affidavit

24. The *Ex parte* Applicant filed a further affidavit and supplementary affidavit, both dated 3rd November 2025 and 23rd February 2026.

25. In the further affidavit, the *Ex parte* Applicant challenges the legality of the execution process in Nakuru Misc. ELRC App No. E336 of 2023, arguing that the Interested party failed to comply with procedural requirements such as serving a draft decree, decree, and certificate of costs before execution.

26. The *Ex parte* Applicant avers that the irregularities include unlawfully obtained warrants of attachment and sale, backdating of proclamations, premature attachment of property before the lapse of the statutory seven-day period, and attachment of vehicles not previously proclaimed.

27. The *Ex parte* Applicant avers that these actions by Brave Auctioneers were procedurally flawed and unlawful, rendering the entire execution exercise invalid.
28. In the supplementary affidavit, the *Ex parte* Applicant avers that the reporting and investigation of the deceased's incident were made to the Respondent and the DCI Nakuru East offices, followed by a workplace inspection and verbal recommendations on safety compliance.
29. The *Ex parte* Applicant emphasizes that the Respondent did not share its inquiry report or recommendations with it, including the directive for a post-mortem report. Nonetheless, the DCI requested and oversaw a post-mortem on 23rd May 2023, which family members attended, as it covered the costs.
30. On 25th May 2023, the *Ex parte* Applicant avers that the Health and Safety Committee Report, found that the post-mortem findings, and death certificate were forwarded to the Respondent, confirming the cause of death as natural.
31. The *Ex parte* Applicant asserts that despite being aware of this evidence, the Respondent ignored it

and proceeded to issue an award on 7th July 2023, contrary to the established findings.

32. The *Ex parte* Applicant asserts that the Respondent itself admitted that the deceased's death was due to natural causes, which meant it lacked jurisdiction to issue the contested award.

33. The *Ex parte* Applicant emphasized that the post-mortem report clearly confirmed the death was not work-related, making the award legally null and void, and should be quashed.

34. The *Ex parte* Applicant further argues that since both the Respondent and the Interested Party were aware of the true cause of death yet opposed the application, they should bear the costs of the proceedings.

35. Overall, the *Ex parte* Applicant supports the position that the Respondent acted without mandate in making the award.

36. Parties canvassed the application by way of written submissions.

Ex-parte Applicants' written submissions

37. The *Ex parte* Applicant relied on the case of

Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR) Justice

Nyarangi stated that once a court determines it lacks jurisdiction, it must “down tools” immediately, as any decision made without jurisdiction amounts to nothing. Jurisdiction refers to the authority granted by statute or law to decide matters, and if exercised without a proper basis, the resulting decision is a nullity.

38. The *Ex parte* Applicant argued that under **section 10(4) of the Work Injury Benefits Act (WIBA)**, compensation is only payable for work-related injuries or diseases. Since the deceased’s death was due to natural causes and not work-related, the Director of Occupational Safety and Health lacked jurisdiction to issue the award, rendering it illegal and void. The *Ex parte* Applicant also argued that the award issued by the Director of Occupational Safety and Health was made illegally, procedurally flawed, and without jurisdiction since the deceased’s death was due to natural causes and not work-related.

39. The *Ex parte* Applicant submitted that it reported the incident as required under **sections 22, 23, and 53(2)(d) of the WIBA**, but the Respondent failed to conduct proper inquiries. A post-mortem dated 23rd May 2023 confirmed the cause of death

as cardiac tamponade due to ruptured aortic dissection, which is neither an occupational accident nor a disease under **section 10(4) or the Second Schedule of WIBA**. The Interested Party did not dispute this evidence, citing **Republic v Chief of General Staff & another [2017] KECA 524**, where the Court of Appeal expressed itself as follows:

“Further, that contrary to the appellant’s complaints that there was a breach of the rules of natural justice, his failure to file a further affidavit to rebutt the respondents’ averments in the replying affidavit together with the annexures thereto left the respondents assertions therein already reflected above unshaken, all of which went to demonstrate existence of a fair process.”

40. From the above cited case, the Applicant stresses that unchallenged affidavits establish fair process, and since the cause of death was natural, the Respondent lacked jurisdiction to proceed. The insurer also declined to settle the award on the same basis. Consequently, the award is a nullity, and the court is urged to quash it and prevent the Interested Party from benefiting from an illegality,

even though it has already been adopted as a court order.

41. The *Ex parte* Applicant also relied on the cases of ***Stephen Kibowen v Chief Magistrate's Court, Nakuru & 2 others [2017] eKLR***, which held that nullities cannot trigger statutory limitation periods. In ***Republic v Judicial Commission of Inquiry into the Goldenberg Affair & 3 others Ex Parte Mwalulu [2004] eKLR***, affirming courts' inherent jurisdiction to quash illegalities. In ***Githunguri v Republic [1986] KLR 1***, recognizing that nullities are outside limitation rules; ***Republic v The Business Premises Rent Tribunal & 2 Others [2008] eKLR***, which stressed that no litigant should benefit from illegalities; and ***Indo Company Ltd & 4 others v Senior Resident Magistrate City Court [2008] eKLR***, which reiterated that "once a nullity, always a nullity." The *Ex parte* Applicant therefore submitted that time does not run on nullities and urged the court to quash the award to prevent enforcement of an illegality.

42. The *Ex parte* Applicant submitted that the Interested Party irregularly obtained and executed a decree following the ruling of 18th February 2025

without complying with the mandatory provisions of **Order 21 Rule 8 of the Civil Procedure Rules**, since no draft decree was ever served upon the Ex parte Applicant for approval. Reliance is placed on **David Makau v Maua Mutie Ndunda [2017] eKLR**, where the court held that failure to serve a draft decree for approval renders the decree defective and amounts to breach of the right to fair hearing under **Article 50(1) of the Constitution**, and on **Landmark Holdings Limited v Robert Macharia Kinyua [2018] eKLR**, which emphasized that forwarding a draft decree alerts the other party and ensures due process before execution.

43. The *Ex parte* Applicant further submitted that the Interested Party failed to comply with **Order 21 Rules 9A to 9D of the Civil Procedure Rules**, which require service of a written request, statement of costs, and supporting documents before assessment of costs, and that no certificate of costs or decree was ever served. Instead, auctioneers purported to execute inconsistent decrees dated 15th October 2025 and 18th February 2025, both of which were procedurally flawed. The Ex parte Applicant contended that the Interested Party exaggerated costs contrary to **Schedule VII**

Rule 2 of the Advocates Remuneration Order, which caps costs in matters where no specific sum is claimed. Consequently, the entire process of decree extraction and execution is said to be illegal, null, and void, and the court is urged to recall and set aside the decree and certificate of costs, cancel the warrants, and recognize that since the award itself was a nullity, there was nothing valid for the court to adopt.

44. The *Ex parte* Applicant submitted that the attachment of its property was unlawful because the auctioneers failed to comply with the mandatory procedure under **Rule 12 of the Auctioneers Rules, 1997**, which requires proper proclamation, a seven-day redemption notice, and lawful attachment only after the lapse of that period. The auctioneers backdated the proclamation to **18th September 2025**, but actually carried it out on 23rd September 2025, then proceeded to attach the goods on 29th September 2025, before the expiry of the statutory notice period. Moreover, they attached motor vehicle KDG 176J, which had not been proclaimed, contrary to Rule 12(2), without seeking leave of court.

45. To reinforce this argument, the Ex parte Applicant cited the case of ***Wanjala v Walukhuchi & 3 others [2023] KEELC 21540***, which emphasized that proclamation, attachment, and auction are distinct steps requiring strict compliance; ***Ongaga Nyambuogi David & Two Others v Paul Wafula Bakaya, Nairobi HCCA No. E200 of 2022***, which held that inventories and seven-day notices are mandatory safeguards; ***Lakeland Motors Limited V Harbhajan Singh Sembi [1998] KECA 246 (KLR)***, which found disregard of auctioneer rules to be abuse of process; and ***Hughes Limited V Mohammed S Kassam [2008] KEHC 469 (KLR)***, which condemned flagrant disregard of auctioneering rules as gross irregularity. On this basis, the Ex parte Applicant submitted that the attachment was irregular, unlawful, and an abuse of court process, and therefore should be set aside.

46. The Ex parte Applicant submitted that while the award of costs lies within the discretion of the court, the general principle is that costs follow the event. As affirmed in ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR***, costs are not meant to penalize the losing party but

to compensate the successful litigant for expenses incurred in prosecuting or defending the suit. The *Ex parte* Applicant has demonstrated a proper case warranting the relief sought, noting that the Respondent's improper conduct necessitated these proceedings and that the Interested Party pursued an illegality despite knowing the death was not work-related. Accordingly, costs should be awarded to the *Ex parte* Applicant, payable jointly and severally by the Respondent and the Interested Party. As for the Auctioneers, if any costs are due that are disputed, they should be borne solely by the Interested Party. Finally, the sums deposited by the *Ex parte* Applicant to cover the decretal sum and Auctioneer's costs ought to be released back to the depositor.

Interested party's written submissions

47. The Interested Party submitted that the *Ex Parte* Applicant's application is incompetent, time-barred, and an abuse of court process, as the Respondent's award was lawfully adopted as a judgment of the court, rendering the court ***functus officio***. The Interested party argued that the Applicant failed to lodge an objection or appeal under ***section 52 of***

the WIBA within the prescribed timelines, and instead improperly sought to reopen matters already litigated. Reliance is placed on the doctrine of exhaustion as articulated in ***Speaker of the National Assembly v Karume [1992] KECA 42 (KLR)***, where the Court of Appeal held that statutory procedures must be strictly followed, and on ***Nangurai v County Government of Kajiado & 2 others; Chief Land Registrar [2025] KEELC 7438 (KLR)***, which reinforced that specialized statutory bodies must first determine disputes within their mandate. The Interested Party further cites the cases of ***Ngoge v Kaparo & 5 others [2012] KESC 7 (KLR)***, emphasizing respect for judicial hierarchy, and ***Lameck Nyakundi Anyona v W.J.J Kenya Construction Company Limited [2022] KEELRC 976 (KLR)***, which clarified that the ELRC cannot exercise original jurisdiction over contested facts arising from the Director's award. The Interested Party contended that the judicial review was filed after an unreasonable delay beyond the six-month limit under ***Order 53 Rule 2 of the Civil Procedure Rules***, and therefore urged the court to dismiss the application with costs.

48. At the time of writing this ruling, the Respondent did not file their respective written submissions.

Analysis and determination

49. The court has considered the pleading herein in relation to the application and the rival submissions by the parties; the issue for determination is

- (1) *Whether the award by Director of Occupational Health and Safety Services is legal and did the worker die from work related cause or natural causes?*
- (2) *Should the award then be quashed?*

50. In ***Kenya National Examination Council v Republic; GGN & 9 others (Ex parte)***

[1997] KECA 58 (KLR), the Court of Appeal held that judicial review is limited to ensuring decisions are lawful, rational, and procedurally fair, but not to substitute the court's judgment for that of the decision-making body.

51. In this instant case, the deceased worked for the *Ex parte* Applicant as a boil operator and died in the course of work on 22nd May 2023 near the boiler at the *Ex parte* Applicant's premises. The *Ex parte* Applicant reported the incident to the Respondents, who later assessed the compensation to Kshs.1,422,720/= plus 14% interest. He issued an

award on 7th July 2023. A post-mortem was conducted, which revealed that the deceased died of “cardiac tamponade due to ruptured aortic dissection.” The post mortem report is dated 23rd May 2023 and is stamped by the Director of Safety and Health as received on 25th May 2023. The Respondent, on the other hand, argued that it discharged its duty after the assessment of the compensation and confirmed that the award was made and the same was collected by the *Ex parte* Applicant on 11th July 2023. The Interested party, on the other hand, argued that vide Misc. Appl. No. E336 of 2023, she sought adoption of an award by the Respondent after her husband’s death at work, blaming the Ex Parte Applicant. She notes the Applicant’s litigation history, including Misc. Appl. No. E016 of 2024, which was dismissed, and a later successful application that led to the adoption of the award of Kshs. 1,422,720/= as a court judgment on 18th February 2025. When the Ex parte Applicant failed to pay, auctioneers seized his vehicles, prompting him to file a belated judicial review on 1st October 2025. The Interested Party argues this review is only meant to delay execution, stressing that the award has already crystallized into a judgment that cannot be quashed, and dismissing

the application would not prevent undue harm to the Interested Party.

52. The court finds the application is not merited as the *Ex parte* Applicant did not object to the award of Kshs.1,422,720/= within the prescribed timeline as set out in sections 51 and 52 of the WIBA, which provides as follows:

“Any person aggrieved by a decision of the Director on any matter under this Act, may, within sixty days of such decision, lodge an objection with the Director against such decision.

The objection shall be in writing in the prescribed form, accompanied by particulars containing a concise statement of the circumstances in which the objection is made and the relief or order which the objector claims, or the question which he desires to have determined.

52. Director’s reply

(The Director shall, within fourteen days after the receipt of an objection in the prescribed form, give a written answer to the objection, varying or upholding his decision and giving reasons for the

decision objected to, and shall within the same period send a copy of the statement to any other person affected by the decision.

An objector may, within thirty days of the Director’s reply being received by him, appeal to the Industrial Court against such decision.”

53. In ***Charles v Cheto [2025] KECA 784 (KLR)***, the Court of Appeal stated as follows:

“As the learned Judge correctly observed, there is a lacuna in the law with regard to the procedure for enforcement of the Director’s decision in that there is no express provision of the WIBA stipulating the procedure for enforcement. Be that as it may, Employment and Labour Relations Courts have aptly held that enforcement of the Director’s decisions properly lies with the ELRC as the court with the jurisdiction to deal with employment and labour relations claims and for connected purposes, and as provided for under sections 86 and 89 (formerly sections 87

and 90) of the Employment Act (Cap. 226).”

54. The deceased was found dead at the premises of the *Ex parte* Applicant near the boiler. Accordingly, the *Ex parte* Applicant owed him a duty of care to ensure safe work environment given that the death occurred in the course of duty. The post mortem just stated that death was due to temponade due to ruptured aortic desection. That did not specify what exactly was the cause of death and if it was normal or was caused by work related factors. The assessment was carried out by the Director of Safety and Health way back on 7th July 2023.
55. The *Ex parte* Applicant claims the award was a nullity. But in litigation, a legal order by a legal tribunal cannot be ignored even if it is regarded as a nullity. The *Ex parte* Applicant should have challenged the same in good time. The Respondent avers the *Ex Parte* Applicant was issued with the award immediately and so cannot claim they were unaware of the same.
56. The court would find that the *Ex Parte* Applicant in filing a Judicial Review about three years since the award was issued on 7th July 2023 was too late in

the day and would not satisfy the equity maxim that “*equity assists the vigilant not the indolent.*”

57. The principles set out in support of granting of conservatory orders in ***GIELLA -VS- CASSMAN BROWN (1973) EA 358*** are clearly not met in this Judicial Review application. There is no evidence of a *prima facie* case with high chances of success and no evidence that the *Ex parte* Applicant will suffer damages that cannot be compensated. The *Ex parte* Applicant is only being called to settle compensation to his former employee who met his death in the course of duty.

58. In any event, since the *Ex Parte* Applicant did not lodge any objection to the Respondent’s award, the Interested Party properly moved the Court through Misc. Appl. No. E336 of 2023, wherein the award was adopted as an order of the Court. Upon such adoption, the Court became *functus officio*, having fully discharged its mandate, and therefore lacks jurisdiction to reopen or revisit the matter. The court is not clear if it is being called upon to review the adoption order to rule on appeal. Neither of the two can be entertained under this application.

59. Having analysed the application and the submissions, the decisional laws and the facts of the

case the court finds the *Ex parte* Applicant's application has not been proved. It is therefore dismissed.

60. It is the court's discretionary right to rule on costs. In this case the court orders each party to meet their costs of the application.

It is so ordered.

**Dated, Signed and Delivered virtually at Nakuru
this 13th Day of
March, 2026.**

**ANNA NGIBUINI MWAURE
JUDGE**

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 has 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE
JUDGE