

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**  
**AT NAIROBI**

**ELRC JUDICIAL REVIEW NO. E037 OF 2025**  
*(Before Hon. Lady Justice Hellen Wasilwa, J)*

**KIKUYU PIPES AND FITTINGS CENTER LIMITED..**  
**....APPLICANT**

**VS**

**THE COUNTY DIRECTOR OF OCCUPATIONAL**  
**SAFETY AND HEALTH SERVICE -**

**KIAMBU COUNTY.....1<sup>ST</sup>**  
**RESPONDENT**

**ANNASTASIAH WAIRIMU MWAURA (Being sued**  
**as the personal representative of the**

**Estate of Benard Kilonzo Kaleli (Deceased).....2<sup>ND</sup>**  
**RESPONDENT**

**HON. ATTORNEY GENERAL.....3<sup>RD</sup>**  
**RESPONDENT**

**RULING**

- 1 The Applicant filed Chamber Summons application dated 19<sup>th</sup> June 2025 seeking orders that: -
- i. the Applicant be granted leave to institute Judicial Review proceedings to apply for:*
    - a. AN ORDER OF MANDAMUS does issue directed at the 1<sup>st</sup> Respondent compelling that the 1<sup>st</sup> Respondent hears to conduct proper investigation*

*on the place of the road traffic accident and the circumstances leading to the said accident.*

- b. AN ORDER OF MANDAMUS does issue directed at the 1<sup>st</sup> Respondent compelling that the 1<sup>st</sup> Respondent to provide sufficient reasoning for their decision to find that the accident occurred while the deceased was in the course of employment.*
  - c. AN ORDER OF MANDAMUS does issue directed at the 1<sup>st</sup> Respondent compelling that the 1<sup>st</sup> Respondent hears and determines the claim lodged by the 2<sup>nd</sup> Respondent against the Applicant herein on merit.*
  - d. AN ORDER OF CERTIORARI to bring into this Honourable Court and quash the decision of the 1<sup>st</sup> Respondent dated 29/01/25 effecting that the Applicant be liable to pay a sum of Kshs. 2,745,599.90 as compensation for the death of the deceased.*
  - e. AN ORDER OF PROHIBITION does issue prohibiting the 2<sup>nd</sup> Respondent and/or any of her agents, servants, representatives and their successors from proceeding seeking enforcement of an illegal, unfair and unreasonable award.*
- ii. Cost of the application be provided for.*

### **Applicant's Case**

- 2 The Applicant avers that the deceased was not an employee of the Applicant but rather engaged on a

contractual basis whenever the need arose. The deceased would be engaged for specific tasks and paid on a weekly basis during the period of engagement, and upon completion of the assigned work he would be released until a new assignment or contract became available.

- 3 It was the Applicant's case that following the demise of the deceased, the 2<sup>nd</sup> Respondent, acting on behalf of the deceased's estate, lodged a claim with the 1<sup>st</sup> Respondent alleging that the deceased died in the course of duty and was therefore entitled to compensation.
- 4 The Applicant states that upon receipt of the claim, the 1<sup>st</sup> Respondent wrote to the Applicant informing it of the claim and indicating that the Applicant had a responsibility to report the death within 7 days and thereafter submit its response explaining its position regarding the alleged liability.
- 5 The Applicant avers that it complied with the 1<sup>st</sup> Respondent's directions and filed its correspondence explaining why it could not be held liable for the death of the deceased. The correspondence stated that the deceased, together with one Mr. Evans Oduor, had requested permission from their supervisor to attend the funeral of a distant relative in Homabay County, Nyanza, who was both their personal friend and colleague. Also, the deceased was not sent to Nyanza by the Applicant but travelled there on his own volition.

- 6 It was further stated that the deceased died as a result of a road traffic accident and at the time of the accident he was neither riding a motorcycle nor travelling in a motor vehicle owned by the Applicant; and the individuals responsible for causing the accident were still at large and that investigations were ongoing with the possibility of identifying the actual perpetrator responsible for the accident that resulted in the deceased's death.
- 7 The Applicant avers that the 1<sup>st</sup> Respondent subsequently instituted an inquiry into the matter and convened a meeting on 10<sup>th</sup> June 2024 with it, however, in the meeting one Mr. Evans Oduor was missing yet he was the star witness of the death of the deceased.
- 8 It is the Applicant's case that no proper hearing was conducted; as the 2<sup>nd</sup> Respondent did not present any evidence in its presence, and the Applicant was never supplied with any evidence that was intended to be relied upon in determining the claim.
- 9 The Applicant avers that it was shocked when the 1<sup>st</sup> Respondent issued its determination through a letter dated 29<sup>th</sup> January 2025 citing the Applicant liable, yet the 1<sup>st</sup> Respondent had not heard the testimony of Mr. Evans Oduor and the Investigating Officer in the road traffic accident whose testimonies would vindicate the Applicant.

- 10 It is the Applicant's case that the 1<sup>st</sup> Respondent's decision of the 1st Respondent was biased, irrational and based on irrelevant considerations. The Applicant contends that the decision was unfair, unjust and made in bad faith.
- 11 The Applicant maintains that this Court has jurisdiction to grant the leave sought *ex parte* in order to ensure that the ends of justice are met and that the impugned decision is properly interrogated.
- 12 The Applicant further responded to the 1<sup>st</sup> and 3<sup>rd</sup> Respondent's preliminary objection vide a replying affidavit dated 1<sup>st</sup> December 2025.
- 13 The Applicant submitted that the said objection is misguided as the doctrine of *sub judice* can only be established where it is demonstrated that there exists a previously instituted suit involving the same parties, substantially similar issues, and pending before a court of competent jurisdiction. Such elements cannot be presumed but must be demonstrated through evidence, including pleadings from the alleged earlier suit.
- 14 It is the Applicant's position that a proper preliminary objection must raise a pure point of law capable of determination without the Court having to examine disputed facts. In the present case, the Respondents did not avail any pleadings from the alleged earlier matter nor demonstrate with precision that the parties, issues, or

subject matter are identical, and therefore the issue of *sub judice* cannot be determined at the preliminary stage.

- 15 In the alternative, the Applicant avers that the present suit is distinct from *Miscellaneous ELRC Application No. E194 of 2025* which concerns an application seeking leave to object against the 1<sup>st</sup> Respondent's decision out of time. The instant suit seeks judicial review of the manner in which the 1<sup>st</sup> Respondent conducted its proceedings and the decision arising therefrom. The present application seeks orders of mandamus, certiorari and prohibition, which are substantially different from the reliefs sought in the earlier application.
- 16 The Applicant avers that this Court is properly seized of jurisdiction to entertain the matter as affirmed by the Court of Appeal in ***Charles v Cheto [2025] KECA 784 (KLR)***, where it was held that the Court has jurisdiction to hear judicial review applications concerning statutory decisions made by the Directorate of Occupational Safety and Health Services where there are allegations of violation of the right to a fair hearing.
- 17 It is the Applicant's case that this Court is properly clothed with jurisdiction to interrogate the legality, rationality and propriety of the decision of the Directorate of Occupational Safety and Health Services through judicial review. Therefore, it contends that the preliminary objection fails

both in form and substance as it is based on contested facts and is contrary to binding Court of Appeal precedent.

### **1<sup>st</sup> and 3<sup>rd</sup> Respondent's Case**

18 In opposition to the application, the 1<sup>st</sup> and 3<sup>rd</sup> Respondents filed a Notice of Preliminary Objection dated 5<sup>th</sup> November 2025 on the point of law that the Honourable Court lacks jurisdiction to hear and grant the orders sought as there is no justiciable cause of action before the Court these proceedings being an abuse of the Court process and barred by the principle of sub judice, the Exparte Applicant herein having similar proceedings pending before the Court being *NRB ELRC Appeal No. E194/2025, Kikuyu Pipes and Fittings Centre Limited Vs Kiambu County Director of Occupational Safety & Health Services and Annastasiah Wairimu Mwaura*. These proceedings are currently pending ruling on 29<sup>th</sup> January, 2026 before Hon. Justice Manani.

### **2<sup>nd</sup> Respondent's Case**

19 In opposition to the application, the 2<sup>nd</sup> Respondent filed a replying affidavit dated 21<sup>st</sup> November 2025.

- 20 The 2<sup>nd</sup> Respondent avers that the Applicant had previously instituted *Miscellaneous Application No. E194 of 2025* before this Court on 5<sup>th</sup> June 2025 against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The said application has already been heard and is currently awaiting ruling scheduled for 29<sup>th</sup> January 2026.
- 21 The 2<sup>nd</sup> Respondent avers that in the Miscellaneous Application, the Applicant sought several orders including a temporary stay of enforcement of the award pending the hearing and determination of the application, leave to object out of time against the 1<sup>st</sup> Respondent's decision dated 29<sup>th</sup> January 2025, and a stay of enforcement of the award pending the hearing and determination of the intended objection. The Applicant also sought costs of the application.
- 22 It is the 2<sup>nd</sup> Respondent's position that in the present judicial review application, the Applicant is seeking orders of mandamus to compel the 1<sup>st</sup> Respondent to conduct proper investigations, to provide sufficient reasoning for the finding that the deceased died in the course of employment, and to compel the 1<sup>st</sup> Respondent to hear and determine the claim lodged by the 2<sup>nd</sup> Respondent against the Applicant.
- 23 The 2<sup>nd</sup> Respondent states that the Applicant seeks an order of certiorari to quash the decision of the 1<sup>st</sup> Respondent dated 29<sup>th</sup> January 2025 together with the

award of Kshs. 2,745,599.90 issued as compensation for the death of the deceased. Additionally, the Applicant seeks an order of prohibition to restrain the 2<sup>nd</sup> Respondent from enforcing the said award.

- 24 According to the 2<sup>nd</sup> Respondent, the substratum of the present judicial review proceedings is substantially similar to the grounds raised in Miscellaneous Application No. E194 of 2025, which is still pending determination before this Court.
- 25 The 2<sup>nd</sup> Respondent therefore contends that the present proceedings offend the doctrine of *sub judice* as the issues raised are already under consideration by this Court in the earlier application.
- 26 The 2<sup>nd</sup> Respondent avers that the Applicant failed to object to the decision of the 1<sup>st</sup> Respondent dated 29<sup>th</sup> January 2025 within the statutory period of 60 days. The Applicant has admitted in its Statement of Facts that it sought leave to file an objection out of time but that the Director had not responded.
- 27 The 2<sup>nd</sup> Respondent avers that by failing to lodge an objection within the time prescribed under Section 51 of the Work Injury Benefits Act (WIBA), the Applicant forfeited its right to approach this Court directly, having bypassed the statutory dispute resolution framework provided under the Act.

- 28 The 2<sup>nd</sup> Respondent further contends that both in the present judicial review proceedings and Miscellaneous Application No. E194 of 2025, the Applicant has not offered any explanation for its failure to lodge an objection before the Director and ventilate the allegations raised in these proceedings through the statutory process.
- 29 It is the 2<sup>nd</sup> Respondent's position that the Supreme Court has consistently cautioned superior courts against assuming jurisdiction where Parliament has provided a statutory appeal mechanism, and that judicial review should only be invoked in exceptional circumstances. No such exceptional circumstances have been demonstrated in the present case.
- 30 The 2<sup>nd</sup> Respondent maintains that having failed to utilize the appeal procedure provided under Section 52 of the Work Injury Benefits Act, the Applicant cannot properly seek the judicial review remedies sought in the present proceedings.
- 31 The 2<sup>nd</sup> Respondent avers that the Applicant failed to make full disclosure in its Statement of Facts and Verifying Affidavit regarding the existence of Miscellaneous Application No. E194 of 2025. The allegations raised in the present proceedings ought to have been canvassed before the Director through the statutory objection process.

- 32 The 2<sup>nd</sup> Respondent additionally points out that whereas the present judicial review application is dated 19<sup>th</sup> June 2025 and was filed on 23<sup>rd</sup> June 2025, the earlier Miscellaneous Application was dated and filed on 5<sup>th</sup> June 2025.
- 33 The 2<sup>nd</sup> Respondent contends that the present judicial review proceedings constitute a blatant abuse of the court process and are intended to delay enforcement of the award. The 2<sup>nd</sup> Respondent therefore urges the Court to dismiss the Chamber Summons with costs.

### **Applicant's Submissions**

- 34 The Applicant submitted on two issues: whether the Preliminary Objection raised by the Respondents is merited; and who should bear the costs of the objection.
- 35 On the first issue, the Applicant submitted that it is settled law that Preliminary Objection must raise a pure point of law which, if argued at the preliminary stage, may dispose of the suit. A Preliminary Objection cannot be used to determine disputed facts or to invite the exercise of judicial discretion. It cited ***Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others [2014]eKLR*** wherein the court restated the principle from ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors (1969) EA***

**696:** “a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.

Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

- 36 The Applicant submitted that the Respondents’ contention that the present suit is barred by the doctrine of *sub judice* and constitutes an abuse of the court process cannot properly be raised as a preliminary objection.
- 37 It was submitted that the doctrine of *sub judice* requires the Court to ascertain several factual elements including whether there exists an earlier suit, whether the suits involve the same parties, whether the issues in the two suits are substantially similar, and whether the earlier suit is pending before a court of competent jurisdiction.

- 38 The Applicant submitted that such elements can only be determined after examining evidence such as pleadings from the alleged earlier suit. In support of this argument, reliance was placed ***In re Kibet Arap Kimarun (Deceased) [2021] KEHC 6890 (KLR)***, where the Court held that: *“I find that in order to determine whether the rule of sub judice has been offended, the court has to delve into material facts of the case and the Application, call for pleadings, examine and/or interrogate them to help it determine if the facts in issue are similar. This necessarily puts the matter outside the ambit of a Preliminary Objection.”*
- 39 The Applicant further submitted that in the alternative and without prejudice to the foregoing, the present proceedings are not similar to Miscellaneous ELRC Application No. E194 of 2025. The said application concerns a request for leave to lodge an objection against the 1<sup>st</sup> Respondent’s decision out of time, whereas the present proceedings seek judicial review of the decision-making process of the 1<sup>st</sup> Respondent.
- 40 It is the Applicant’s submission that the present suit challenges the manner in which the proceedings were conducted by the 1<sup>st</sup> Respondent and seeks substantially different reliefs, namely orders of mandamus, certiorari and prohibition, therefore, the issues raised in the two matters are distinct.

- 41 The Applicant further submitted that this Court has jurisdiction to entertain the present proceedings through judicial review. In support of this position, reliance was placed on the Court of Appeal decision in **Charles v Cheto [2025] KECA 784 (KLR)**, where the Court held that: *“In this case, the learned Judge correctly observed that sections 51 and 52 of the WIBA are silent on the avenues for redress for a party who becomes aware of the proceedings before the Director after the time for lodging an objection and/or filing an appeal against the Director’s decision has already lapsed. We agree with the learned Judge that the solution in such circumstances would be to lodge a Motion for Judicial Review to quash the award before adoption by the court, and on first seeking to have the adoption proceedings stayed. Notably, the appellant sat back and took no steps to that end.”*
- 42 It is the Applicant’s case that this Court is properly clothed with jurisdiction to interrogate the legality, rationality and propriety of the decisions made by the Directorate of Occupational Safety and Health Services through judicial review proceedings. Therefore, the Respondents’ Preliminary Objection lacks merit and ought to be dismissed.
- 43 On the issue of costs, the Applicant submitted that it is trite law that costs follow the event, although the Court

retains discretion in determining the appropriate order as to costs. Therefore, it urged the Court that since the matter is still at its initial stage and sufficient cause has been demonstrated, the costs of the Preliminary Objection should be in the cause.

### **Respondent's Submissions**

- 44 The Respondents submitted that the present judicial review proceedings are barred by the doctrine of *sub judice* as provided under Section 6 of the Civil Procedure Act; as the Applicant has already invoked the statutory appellate procedure under Section 52 of the Work Injury Benefits Act (WIBA) to challenge the same decision of the 1<sup>st</sup> Respondent, involving the same parties and substantially similar issues.
- 45 The Respondents submitted that in *NRB ELRC Appeal No. E194/2025, Kikuyu Pipes and Fittings Centre Limited Vs Kiambu County Director of Occupational Safety & Health Services and Annastasiah Wairimu Mwaura*, through an application dated 5<sup>th</sup> June 2025, the Applicant sought leave to object out of time against the decision of the 1<sup>st</sup> Respondent. According to the Respondents, the gravamen of both the said proceedings and the present judicial review application concerns the legality, propriety and enforceability of the award of Kshs. 2,745,599.90 made in favour of the 2<sup>nd</sup> Respondent and the dependants of the

deceased. Therefore, the Applicant cannot lawfully pursue parallel remedies before different forums in respect of the same subject matter.

46 The Respondents submitted that the doctrine of *sub judice* is intended to prevent multiplicity of suits, forum shopping and the risk of conflicting decisions. It cited ***Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR***, the Court affirmed that where two proceedings are substantially similar, the later one must yield to preserve judicial order and coherence.

47 It was further submitted that judicial review is a discretionary remedy concerned with the decision-making process, not the merits of the decision itself. Where a statute provides an internal and specialized appellate mechanism, judicial review should not be invoked as a parallel process. In support of this argument, reliance was placed on the Court of Appeal decision in ***Speaker of the National Assembly v James Njenga Karume [1992] eKLR*** held: "*In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.*"

- 48 The Respondents further submitted that Section 9(2) of the Fair Administrative Action Act mandates exhaustion of internal remedies before judicial review, save in exceptional circumstances. Section 9(2) of the Fair Administrative Action Act states as follows; *“The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted”*
- 49 It was the Respondents’ submission that the Applicant has not demonstrated such exceptions; instead, it pursues parallel proceedings, amounting to an abuse of process as was affirmed by the Court of Appeal in **Republic v National Environmental Management Authority [2011] eKLR**. They further relied upon **Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others [2017] KECA 515 (KLR)**: *“The Judge backed up her decision with authorities such R V. BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD [1993] 1 ALL E.R 530. HORSHAM DISTRICT COMMISSION, ex parte WENHAM [1955] 1 WLR 680; HARLEY DEVT INC V. COMMISSION OF INLAND REVENUE [1996] 1 WLR 727; R V. WANDSWORTH COUNTY COURT [2003] 1 WLR 475 and the local case of JAMES NJENGA KARUME V. CR, 192/1992. The principle running through these cases is where there was an alternative remedy and especially where Parliament*

*had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it.*

*The learned trial Judge, in our respectful view, considered these strictures and came to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute. With respect, we agree with the Judge.”*

- 50 The Respondents therefore submitted that having voluntarily invoked the statutory appellate procedure under Section 52 of the Work Injury Benefits Act, the Applicant is estopped from simultaneously maintaining judicial review proceedings challenging the same decision. In support of this position, reliance was also placed on ***Mutanga Tea and Coffee Company Ltd v Shikara Limited & another [2022] KEELC 13349 (KLR)***, where the Court of Appeal reiterated that statutory dispute resolution procedures must be strictly adhered to.

- 51 The Respondents submitted that the Applicant's conduct amounts to an abuse of the court process as defined in ***Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 Others [2009] eKLR***, where the Court defined abuse of court process as the improper use of judicial proceedings, including instituting multiplicity of actions on the same subject matter between the same parties.
- 52 It is the Respondents' submission that having elected to pursue the statutory appeal process under the Work Injury Benefits Act, the Applicant cannot maintain concurrent judicial review proceedings touching on the same decision, as this amounts to forum shopping and creates the risk of conflicting decisions.
- 53 I have considered the averments and submissions of the parties herein. I have also considered the preliminary objection raised by the respondents herein. In the 1<sup>st</sup> instance other respondents raised a preliminary objection to the effect that the applicant had filed a Miscellaneous Application No E194/25 before court on 5/6/2025 against the 1<sup>st</sup> and 2<sup>nd</sup> respondents and amongst orders sought was leave to object out of time against the 1<sup>st</sup> respondents decision dated 29<sup>th</sup> January 2025 and stay of enforcement of the award.
- 54 It is apparent that the applicants seek to sanitise their failure to object to the decision of the director Dosh. The

current application seek orders to quash the decision of Dosh dated 29<sup>th</sup> January 2025.

55 It is apparent what the application seeks to enforce in this application is substantially similar to orders sought in Miscellaneous application.

56 The applicant filed ELRC Application No E194/2025 appealing the decision of the Director Dosh which is pending ruling before Judge Manani. The applicant seems to be on a fishing expedition where he is seeking similar orders through various fora.

57 The contention that the application is sub judice before other courts of equivalent jurisdiction is therefore true and the applicant cannot be allowed to abuse the court process.

58 I find the preliminary objection is merited and this Judicial review application cannot stand. I proceed to strike out this application with costs to the respondents.

**Dated, Signed and Delivered Virtually at Nairobi  
this 18<sup>th</sup> Day of March, 2026.**

**HELLEN WASILWA  
JUDGE**

