REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

ELRC JUDICIAL REVIEW NO. E076 OF 2025

(Before Hon. Lady Justice Hellen Wasilwa, J)

REPUBLIC…… APPLICANT

VS

DIRECTOR OF OCCUPATIONAL SAFETY AND HEALTH SERVICES…….. ……RESPONDENT

AND

KYALO MAKONGE……INTERESTED PARTY

AND

HARRISON MAKAU MUASYA……EX PARTE APPLICANT

RULING

1 The Ex-parte Applicant filed Chamber Summons dated 20th November 2025 seeking orders: -

i. Spent

ii. THAT the Ex-parte Applicant be granted leave to apply for a Judicial review Order of Certiorari to remove into this Honourable Court for purposes of quashing the decision and demand made by the Respondent on 8th April 2025 requiring payment of Kenya Shillings Six Hundred Ninety-One Thousand,

Six Hundred Seventy and Seventy-Six Cents (Kes. 691,670.76/=).

iii. *THAT the Ex-parte Applicant be granted leave to apply for a Judicial review Order of prohibition to prohibit the Respondent, its agents, servants or any persons acting on its behalf from enforcing or implementing the award and demand for payment of Kenya Shillings Six Hundred Ninety-One Thousand, Six Hundred Seventy and Seventy-Six Cents (Kes. 691,670.76/=) dated 8th April 2025.*

iv. *THAT the leave granted do operate as a stay of the proceedings in MILIMANI ELRC MISCELLANEOUS APPLICATION CASE NO. E203 OF 2025 KYALO MAKONGE VERSUS HARRISON MAKAU MUASYA pending the hearing and determination of the substantive judicial review application.*

v. *THAT the costs of this application be provided for.*

Ex-parte Applicant's Case

2 The Ex Parte Applicant's case is that the Respondent issued an award dated 8th April 2025 in the sum of Kshs. 691,670.76 against him without ever effecting service of the said award or any demand for payment.

3 It is his position that this omission was contrary to the requirements of the Work Injury Benefits Act and had the effect of depriving him of his statutory rights, including the right to lodge an objection within sixty (60) days under

Section 51 and the right to settle the award within ninety (90) days under Section 26(4) of the Act.

4 The Applicant avers that he only became aware of the existence of the impugned award on 17th July 2025 when he was served via the WhatsApp platform with pleadings in MILIMANI ELRC MISCELLANEOUS APPLICATION CASE NO. E203 OF 2025 KYALO MAKONGE VERSUS HARRISON MAKAU MUASYA, wherein the Interested Party sought adoption of the award as a judgment of the Court. By that time, all statutory timelines for objection, appeal or settlement had already lapsed, thereby rendering him incapable of responding to, contesting or complying with the decision.

5 It is the Applicant's case that the Respondent's failure to serve the award constitutes a fundamental procedural defect and a violation of his right to fair administrative action as guaranteed under Article 47 of the Constitution.

6 He contends that the prejudice occasioned to him is compounded by the pending proceedings before the Employment and Labour Relations Court, which are scheduled for mention on 26th November 2025, and where there exists a real likelihood that the impugned award may be adopted as a judgment, thereby exposing him to immediate enforcement without having been heard. He maintains that such prejudice is irreparable and would render the intended judicial review proceedings nugatory unless leave and stay are granted.

7 The Applicant also challenges the factual and legal basis of the Respondent's decision. He asserts that at all material times, the Interested Party was not employed by him in his personal capacity but under a sole proprietorship known as Chef Chicken Javaris.

8 He contends that the Respondent failed to properly appreciate and reflect the correct employment relationship and instead improperly imposed liability upon him personally without reference to the business entity through which the Interested Party was engaged.

9 Additionally, the Applicant avers that the Respondent failed to verify critical aspects of the claim, including the Interested Party's employment status, job description, and the circumstances surrounding the alleged injury of 28th June 2024. He maintains that had he been served with the award, he would have exercised his right to object, challenged the medical evidence relied upon, and called witnesses who were present at the time of the alleged accident. The denial of this opportunity, amounts to procedural unfairness and renders the decision unlawful.

10 The Applicant further states that following the alleged accident, the business settled the Interested Party's medical bills at Mama Lucy Kibaki Hospital and Kenyatta National Hospital, paid his salary for June 2024, and catered for his NHIF arrears and general upkeep. He faults the Respondent for failing to take these material payments into account and for issuing an award based on incomplete and inaccurate information.

11 He also disputes the authenticity and origin of the DOSH Form 1 relied upon in the assessment process. He denies ever filling, signing or submitting the said form and points to discrepancies therein, including incorrect contact details, an unfamiliar email address, and a signature that is not his.

12 He further highlights inconsistencies in the Interested Party's averments regarding the authorship of the form, which he argues demonstrate lack of candour and an attempt to sanitize a procedurally defective process.

13 The Applicant also takes issue with the Respondent's assertion that he was notified of the award through the OSHIMS portal, noting that no documentary evidence such as system logs, email notifications, or affidavit of service has been produced to substantiate this claim. He maintains that there was no proper service at all and that he only became aware of the award long after the statutory timelines had expired.

14 Further, the Applicant contends that the Respondent relied on a medical report allegedly prepared by a certain doctor which has not been disclosed or annexed. He notes that the only document available is a case summary from Kenyatta National Hospital, which in his view does not constitute a proper medical report capable of supporting the assessment. He asserts that he was never furnished with any medical report nor afforded an opportunity to interrogate or challenge the medical findings.

15 The Applicant also argues that the enforcement proceedings instituted by the Interested Party were premature, having been filed before the lapse of the ninety-day statutory period for settlement. He contends that this further denied him the opportunity to comply within the framework provided by law.

16 It is therefore the Ex Parte Applicant's case is that the impugned award was made without proper service, without affording him a fair hearing, without a valid medical foundation, and on the basis of unverified and erroneous information.

17 He asserts that the Respondent's decision is unlawful, unreasonable, procedurally unfair, irrational, and in violation of the Constitution and the principles of natural justice, thereby warranting the intervention of this Court at the leave stage.

Respondents' Case

18 In opposition, the Respondent filed a replying affidavit dated 1st December 2025, sworn by the Assistant Director of Occupational Safety & Health in charge of DOSHS – Athi River, Eugene Oduori Anyimi.

19 The Respondent denies the allegations that it failed and/or refused to involve or notify the Ex-Parte Applicant in the claim process and maintains that the claim was processed strictly in accordance with the provisions of the Work

Injury Benefits Act, 2007 (WIBA) and the prescribed statutory procedure.

20 It reiterates the statutory framework governing work injury claims as follows: that upon occurrence of an accident, notification is made to the Directorate through the prescribed DOSH Form 1 within seven (7) days for non-fatal injuries pursuant to section 22 of WIBA and within twenty-four (24) hours for fatal injuries pursuant to section 21 of WIBA; that upon receipt of the notification, the Directorate undertakes investigations in accordance with section 23 of WIBA; and that in cases of non-fatal injuries, the injured employee is assessed by a medical practitioner who indicates the degree of incapacity in Part II of DOSH Form 1 pursuant to section 30(2) of WIBA.

21 The Respondent further states that upon receipt of the medical assessment and supporting documentation including DOSH Form 1, letter of appointment, payslips, medical reports (discharge summary/sick sheet), police abstract (where applicable), P3 form (in assault cases), and a copy of ID—the Directorate computes compensation in accordance with sections 30 and 37 of WIBA. Thereafter, a demand is issued to the employer through the prescribed DOSH/WIBA Form 4, and with effect from May 2024, such demand is transmitted electronically through the OSHIMS portal. The employer is then required to settle the claim within ninety (90) days pursuant to section 26 of WIBA, while any aggrieved party may lodge an objection or appeal within sixty (60) days pursuant to

section 51 of WIBA, with a further appeal mechanism under section 52 of WIBA.

22 Applying the above framework to the present case, the Respondent avers that the Interested Party sustained injuries on 28th June 2024 while at work and that the occurrence of the accident was duly notified to the Directorate through ML/DOSHS Form 1, which was submitted by the Ex Parte Applicant or his agent in compliance with section 22 of WIBA.

23 It maintains that the employer details captured in the said form were provided by the Ex Parte Applicant and were relied upon in processing the claim and generating the demand. The Respondent asserts that it does not generate employer details independently, therefore, the Ex Parte Applicant cannot deny the contents of a document he submitted.

24 The Respondent contends that the Ex Parte Applicant has not provided any documentary evidence, such as payslips or a letter of appointment, to demonstrate that he was not the employer of the Interested Party.

25 It further states that the annexures relied upon by the Ex Parte Applicant do not establish the identity of the employer. In particular, the CR 13 annexed by the Applicant merely shows a business name *'Chef Chicken Javaris'* which is a sole proprietorship and not a limited liability company, thus, it cannot exist independently of

the Ex Parte Applicant. Therefore, liability was properly attributed to the Ex Parte Applicant.

26 The Respondent also disputes the Applicant's reliance on alleged payments made to the Interested Party, including medical expenses, NHIF remittances, and other upkeep, stating that such payments are statutory obligations under sections 45, 46, and 47 of WIBA and do not negate or replace the obligation to pay compensation. It further asserts that the alleged payments were not supported by documentary evidence linking them to the employer.

27 It further avers that the Ex Parte Applicant voluntarily completed and submitted Part I of ML/DOSHS Form 1, and was neither coerced nor misled. The Respondent notes that the Applicant has not claimed illiteracy or inability to understand the contents of the form he signed and submitted.

28 With regard to the assessment, the Respondent states that Part II of ML/DOSHS Form 1 was duly completed and signed by a medical practitioner who assessed the Interested Party's permanent incapacity at 23%, with a period of 425 days of temporary incapacity. Based on this medical assessment, compensation was computed on 8th April 2025 pursuant to sections 28 and 30 of WIBA, resulting in an award of Kshs. 691,670.76. A demand for payment was thereafter issued to the Ex Parte Applicant through ML/DOSH/WIBA Form 4 dated 8th April 2025, and

transmitted via the prescribed process, including through the OSHIMS portal.

29 The Respondent maintains that the Ex Parte Applicant failed to invoke the statutory dispute resolution mechanisms provided under WIBA. In particular, it avers that no objection or appeal was lodged within sixty (60) days as required under section 51 of WIBA, nor did the Applicant seek leave to lodge an objection out of time. It further states that the Applicant has not demonstrated any attempt to pursue the internal mechanisms before approaching the Court.

30 The Respondent therefore contends that due process was followed at all material times, it acted within its statutory mandate, and did not act in contravention of the Constitution or the Fair Administrative Action Act.

31 The Respondent denies any procedural impropriety, illegality, or unreasonableness and asserts that the present proceedings are unwarranted in light of the Ex-Parte Applicant's failure to comply with the statutory framework governing objections and appeals under Sections 51 and 52 of WIBA.

Interested Party's Case

32 In opposition, the Interested Party filed a Replying Affidavit dated 19th December 2025.

33 The Interested Party avers that the present application is misconceived, incompetent, devoid of merit, and constitutes a delaying tactic brought in bad faith and an abuse of the court process, and ought to be dismissed with costs.

34 The Interested Party avers that he was employed by the Ex Parte Applicant from May 2023 up to 27th June 2024 as a chef. While in the course of his employment, he sustained burn injuries on 27th June 2024 following a gas explosion.

35 It is the Interested Party's case that the occurrence of the accident was duly notified to the Directorate of Occupational Safety and Health Services (DOSHS) through the prescribed ML/DOSHS Form 1 by the Ex Parte Applicant in compliance with section 22 of the Work Injury Benefits Act, 2007.

36 The Interested Party disputes the Ex Parte Applicant's assertion that he only became aware of the award on 17th July 2025 upon being served with pleadings in *Milimani Elrc Miscellaneous Application Case No. E203/2025 Kyalo Makonge -Vs- Harrison Makau Muasya*. He avers that upon assessment of the claim on 8th April 2025, he personally obtained a copy of the assessment (DOSH/WIBA Form 4) from the DOSHS offices on the same day and was informed that the demand had already been served upon the Ex Parte Applicant.

37 He further avers that on 8th April 2025, he personally served the Ex Parte Applicant with a copy of the assessment (DOSH/WIBA Form 4) at the restaurant in Transami where he had been employed, and requested settlement of the assessed sum. Therefore, the Ex Parte Applicant was fully aware of the award as at that date but declined, ignored, and/or refused to settle the same.

38 The Interested Party states that with effect from 11th May 2024, the process of issuing demands upon computation of compensation is undertaken electronically through the OSHIMS portal. On this basis, he maintains that the Ex Parte Applicant was duly served both physically and electronically.

39 On the issue of the employer's identity, the Interested Party avers that the Ex Parte Applicant himself indicated the employer's details in the ML/DOSHS Form 1 as Harrison Makau Muasya and not as Harrison Makau Muasya t/a Chef Chicken Javaris. He contends that DOSHS properly relied on these details in generating the demand.

40 He further states that he was never issued with a letter of appointment, payslip, or employment card, and worked under the direct supervision of the Ex Parte Applicant, whom he therefore considers to be his employer.

41 The Interested Party further avers that he was treated at Mama Lucy Hospital and later at Kenyatta National Hospital, and that Part II of the ML/DOSH Form 1, which constitutes the medical report, was duly completed and

signed by a medical practitioner who assessed his permanent incapacity at 23%.

42 He states that arising from the assessment of 23% permanent incapacity, the Directorate computed compensation on 8th April 2025 pursuant to sections 28 and 30 of the Work Injury Benefits Act, 2007, resulting in an award of Kshs. 691,670.76. He relies on the demand in ML/DOSH/WIBA Form 4 dated 8th April 2025 (annexture "KM4") as evidence of the assessment and demand.

43 The Interested Party also relies on the Respondent's Replying Affidavit to assert that the Ex Parte Applicant was duly served with the demand through the prescribed form and process.

44 It is the Interested Party's case that the Ex Parte Applicant's actions in providing first aid and facilitating hospital treatment were in compliance with sections 45 and 46 of WIBA, and do not absolve him from liability to compensate the Interested Party.

45 It is further the Interested Party's case that despite proper service of the assessment, the Ex Parte Applicant failed to lodge any objection, dispute, or appeal within sixty (60) days as required under section 51 of the Work Injury Benefits Act, 2007, and has not sought leave to file such objection out of time.

46 The Interested Party maintains that due process was duly followed in the assessment and issuance of the award,

that the Ex Parte Applicant was aware of and served with the same on 8th April 2025, and that the present application is an afterthought, frivolous, and an abuse of the court process.

Applicant's Submissions

47 The Applicant submitted on three issues: whether the Ex-Parte Applicant has demonstrated an arguable case warranting the grant of leave; whether the leave granted should operate as a stay of proceedings pending determination of the substantive Judicial Review application; and who bears the costs of this Application.

48 On the first issue, the Applicant submitted that an arguable case is not one that must ultimately succeed but one that discloses issues deserving judicial scrutiny. The threshold at leave stage is intentionally low because denying leave in the face of serious procedural questions would prematurely shut the door to the Court's supervisory jurisdiction.

49 He placed reliance on several case laws including ***Bhojwani & another v Director of Public Prosecutions & another [2025] KEHC 16305 (KLR)*** wherein Aburili J held: *"Order 53 Rule 1 (4) of the Civil Procedure Rules additionally empowers the Court, where leave is granted, to direct that such leave do operate as a stay of the impugned decision pending the hearing of the substantive motion. This framework has been consistently upheld by the courts as serving an important gatekeeping*

function, enabling the court to weed out unmeritorious claims at the preliminary stage while preserving the status quo to prevent futility……Indeed, where the issues raised at the leave stage disclose contested matters between the parties, such disputes often suffice to demonstrate the existence of a prima facie arguable case, warranting consideration at the substantive hearing."

50 It is the Applicant's submissions that he has demonstrated a clear arguable case. Firstly, the impugned award dated 8th April 2025 was never served upon him, and no affidavit of service or OSHIMS notification has been produced by both the Respondent and the Interested Party. Secondly, the sixty-day objection period under section 51(1) of the Work Injury Benefits Act had lapsed without his knowledge, and he contended that Courts have consistently held that procedural fairness cannot be sacrificed at the altar of statutory timelines. Thirdly, the Interested Party had instituted adoption proceedings on 24th June 2025 before the expiry of the ninety-day settlement period under section 26(4) of the Work Injury Benefits Act, thereby raising serious questions of legality, jurisdiction, and fairness.

51 The Applicant submitted that where statutory timelines lapse due to lack of service, judicial review becomes the only meaningful avenue for redress. He relied on ***Charles v Cheto [2025] KECA 784 (KLR)***: *"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. The remedy identified by the learned Judge appears to be the only viable course of action in the circumstances……"

52 It was the Applicant's submission that the Respondent had misidentified the employer, there were contradictions in the DOSH documentation, and the medical assessment relied upon had not been exhibited. He argued that these facts could not be dismissed as trivial. Furthermore, the Respondent had failed to take into account material considerations, including medical expenses already paid by the Applicant to Mama Lucy Kibaki Hospital and Kenyatta National Hospital, which directly affected the computation of the award and the extent of liability.

53 The Applicant submitted that without inviting this Court to determine the correctness of the computation at this preliminary stage, the omission raises an arguable question as to whether the administrative decision was reached on the basis of complete and verified information, thereby further demonstrating that the intended Judicial

Review application discloses issues fit for substantive interrogation.

54 The Applicant argued that the reliance by the Respondent on a purported medical report by Dr. Pras, when only a case summary prepared by another doctor existed, raised questions of rationality.

55 The Applicant submitted that in ***Republic v Director of Public Prosecution & another Ex Parte Rameshchandra Govind Gorasia [2016] eKLR*** the court held:*"Whereas he is not required at that stage to go into the depth of the application, the applicant must disclose the existence of prima facie grounds for the grant of judicial review reliefs. Such grounds must prima facie be based on the facts as averred by the applicant in the verifying affidavit. It is therefore not enough to simply throw the grounds for the grant of judicial review and contend that a prima facie case has been made out. A prima facie case, in my view is made out when the applicant's case if true may justify the grant of the orders of judicial review. Where the facts disclosed, even if true cannot possibly justify the grant of judicial review remedies, a prima facie case, for the purposes of judicial review cannot be said to have been made out."*

56 It is therefore the Applicant's submission that the Chamber Summons Application herein raises serious and arguable questions regarding service of the impugned award, compliance with statutory timelines under the Work Injury Benefits Act, the propriety of the

administrative process leading to the decision dated 8th April 2025, and the procedural fairness afforded to the Ex-Parte Applicant. These matters, taken cumulatively, disclose issues fit for further investigation at a substantive hearing.

57 On the second issue, the Applicant submitted that the purpose of granting stay alongside leave is to preserve the substratum of the proceedings and to prevent the intended judicial review from being rendered academic. Courts have repeatedly stated that where the impugned decision is on the verge of enforcement, failure to grant stay may defeat the ends of justice even before the Court has had an opportunity to interrogate legality.

58 Reliance was placed in ***Republic v Mwato; County Government of Busia (Interested Party) [2025] KEELC 7818 (KLR)***: "RINGERA J (as he then was) in the case of Global Tours & Travels Ltd Nairobi High Court Winding Up Cause No. 43 of 2000 had this to say on stay of proceedings: *" As I understand the law, whether or No.t to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice …. the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or No.t granting the order. And in considering those matters, it should bear in mind such factor as the need for expeditious disposal of cases, the prima facie*

merits of the intended appeal in the sense of No.t whether it will probably succeed or No.t but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously."

59 It is the Applicant's submission that there exists a real possibility that the intended Judicial Review proceedings may be rendered nugatory if the status quo is not preserved; as the impugned award may be adopted as a judgment in *Milimani ELRC Miscellaneous Application No. E203 of 2025* before the legality of the Respondent's decision is interrogated.

60 On the issue of costs, the Applicant submitted that courts have long held that costs follow the events. He argued that, having incurred costs in prosecuting the present application, it was just and equitable that he be awarded the costs of the application.

Respondent's Submissions

61 The Respondent submitted on three issues: whether the Ex-Parte Applicant was the employer of the Interested Party at the time of the accident; whether the Ex-Parte Applicant should pay a sum of KES 691,670.76 to the Interested Party, Kyalo Makonge; whether the Ex-Parte Applicant should be granted leave for orders sought.

62 On the first issue, the Respondent submitted that the Ex-Parte Applicant, Harrison Makau Muasya, was the

employer of the Interested Party, Kyalo Makonge, at the time of the accident on 28th June 2025.

63 He submitted that the assertion by the Ex-Parte Applicant that he was not the employer was without basis and, by law, he fell squarely within the scope of employer liability. The Interested Party was employed at Chef Chicken Chavaris, which was not a limited company, and that the Ex-Parte Applicant, as proprietor trading under that name, was personally liable under the provisions of the Work Injury Benefits Act, 2007 (WIBA).

64 It was submitted that there is no dispute that an accident occurred and that it arose out of and in the course of the Interested Party's employment. The accident involving the Interested Party fall squarely within the precincts of section 10(4) of WIBA which define an occupational accident. The Interested Party is entitled to compensation benefits pursuant to section 10(4) of WIBA, the which states: *'An employee who is involved in an accident resulting in the employee's disablement or death is subject to the provisions of this Act, and entitled to the benefits provided for under this Act'*

65 On the second issue, the Respondent submitted that the Ex-Parte Applicant was fully aware of the accident and had participated in ensuring the Interested Party received medical attention. The only issue that the Ex- Parte Applicant the sceptic about is communication about the award and demand which he alleges not to have been served with; which allegations constitute insincerity.

66 The Respondent argued that the Ex-Parte Applicant was required to report the accident to the Director pursuant to section 22 of WIBA, which mandates notification of occupational accidents within seven days. Submission of MLSSS/DOSH Form 1 was done in compliance with this requirement. Therefore, a notification of an occupational accident to the Director was done and the Ex-Parte Applicant could not expect process to stop and end at that point given that injuries had been sustained. Further, the demand in form of DOSH/WIBA 4 dated 8th April 2025 was clearly addressed to the Ex- Parte Applicant.

67 It submitted that the Ex-Parte Applicant, being aware of the accident and participating in the process, could not allege lack of knowledge of the award and demand. Reliance was placed on ***Nuclear Power and Energy Agency v Director of Occupational Safety and Health Services (DOSH) & 3 others [2026] KEELRC 522 (KLR)***, where it was held that an employer cannot renege an occupational accident being notified to the Directorate where it is very clear that the employee involved in the occupational accident was on duty.

68 It is the Respondent's submission that the injuries so sustained by the Interested Party arose out of and in the course and scope of an employee's employment and notification of such accident was done in accordance with section 22 of WIBA and therefore the Ex- Parte Applicant cannot turn around to allege not having been aware. The

Ex-Parte Applicant should pay a sum of KES 691,670.76 to the Interested Party.

69 On the final issue, the Respondent submitted that the Ex-Parte Applicant did not file any objection to this demand as provided under section 51 of WIBA but proceeded to court seeking for orders under a Judicial Review Application. There is no evidence of any attempt by the Ex-Parte Applicant to seek redress with the Directorate upon his alleged learning about the award and demand.

70 It is the Respondent's submission that Section 52(2) of WIBA provides for an appeal before the ELRC against the decision of the Director by any aggrieved party. The Ex-Parte Applicant had not attained this level to proceed to court. The step to proceed to court was premature as he filed a Judicial Review application instead of an Appeal as provided by law. It arued that this amounts to abuse of the court process as held in ***ASP Company Limited v Director Occupational Health and Safety, Kajiado; Musembi (Interested Party) [2024] KEELRC 1305 (KLR)***.

Interested Party's Submissions

71 It is the Interested Party's submission that the Ex-Parte Applicant's application is frivolous, vexatious and an abuse of the court process, and therefore undeserving of the grant of leave. The Interested Party argued that the application does not disclose any arguable case and is not fit for further consideration. This is because due process was duly followed.

72 The Interested Party relied on established jurisprudence on the purpose of leave in judicial review proceedings. He cited Bosire, Mbogholi-Msagha & Oguk, JJ in ***Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993*** wherein the rationale for the requirement that leave be sought and obtained, before filing applications for judicial review, is to exclude frivolous or vexatious applications which prima facie appear to be abuse of the process of the Court or those applications which are statute barred

73 It was submitted that in ***Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)***, the Court stated: *"Application for leave to apply for orders of judicial review are normally ex parte and such an application does restrict the Court to threshold issues namely whether the applicant has an arguable case, and whether if leave is granted, the same should operate as a stay. Whereas judicial review remedies are at the end of the day discretionary, that discretion is a judicial discretion and, for this reason a court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors which led to the exercise of the Court's discretion. There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without*

making any findings, the scope of the judicial review remedy sought, the grounds and the possible principles of administrative law involved and not forget the ever expanding frontiers of judicial review and perhaps give an applicant his day in court instead of denying him..... Although leave should not be granted as a matter of routine, where one is in doubt one has to consider the wise words of Megarry, J in the case of John vs. Rees [1970] Ch 345 at 402. In the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration."

74 On costs, it is the Interested Party's submission that costs follow the event and successful party will always have costs of success unless the court has good reasons to order otherwise. He therefore urged the court to allow costs as against the ex-parte applicant.

75 I have examined all the averments and submissions of the parties herein. From the evidence on record, the applicants have averred lack of service and participation in the compensation proceedings which they aver renders the entire proceedings a nullity.

76 The applicants have invited the court to allow them seek orders of judicial review to quash the findings of the director. In order for this court to be convinced that the orders sought can be granted, it is imperative for the applicants to demonstrate that they did not know and neither did they participate in the proceedings before the Director Dosh.

77 The respondents have denied the averments of the applicants and contend that the process for assessing the injury on the interested party was followed. The interested party filed his supporting affidavit to oppose the application and attached documents marked KM2 which is a copy of the letter dated 24th October 2024 KMJ2. Comments of Dosh form 1 filled by Harrison Makau Muasya of Roysambu whose email address number is stated. Details of the accidents are also given. The document stated was received by the respondent on 11th March 2025. The applicant contends that he did not fill the document and it contains falsehoods which make the entire claim and assessment a nullity.

78 If the contention by the applicant is that the document is not aver theirs is established, it will potent a case in favour of the applicants. Exh km3 is a medical report showing the injury suffered by the interested party.

79 In view of the averments by the applicants and in relation to the application, the court needs to establish if the applicant has demonstrated an arguable case warranting the grant of leave to be given and the need to establish the truthfulness or otherwise of form 1 dosh and whether the applicant participated in the assessment by Dosh. The applicant seems to have an arguable case which warrants this court to find that leave to file a judicial review application is necessary. It would therefore follow that the court grants leave to file the judicial review proceedings and the same be filed within 14 days. The leave so

granted would operate as stay of further execution pending the determination of the substantive judicial review application. Costs in the application.

Dated, Signed and Delivered Virtually at Nairobi this 13th Day of April, 2026.

HELLEN WASILWA

JUDGE