



Mwakulomba & another (Suing as the Legal Representatives of the Estate of Javan Mwakulomba Mghendi (Deceased)) v YMM Freight Limited; Fidelity Shield Insurance Company Limited (Third party) (Miscellaneous Application E116 of 2024) [2025] KEELRC 781 (KLR) (6 March 2025) (Ruling)

Neutral citation: [2025] KEELRC 781 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E116 OF 2024**

M MBARŪ, J

MARCH 6, 2025

BETWEEN

TOPISTA CHARI MWAKULOMBA 1ST APPLICANT

PERIS MKINDENYI 2ND APPLICANT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF JAVAN
MWAKULOMBA MGHENDI (DECEASED)**

AND

YMM FREIGHT LIMITED RESPONDENT

AND

FIDELITY SHIELD INSURANCE COMPANY LIMITED THIRD PARTY

RULING

1. The applicant filed an application dated 8 November 2024 under the provisions of Rule 69 of the Employment and Labour Relations Court (Procedure) Rules, Section 19(2) and 51 of the [Work Injury Benefits Act](#) (WIBA), and Orders 40 and 51 of the Civil Procedure Rules, seeking orders that the court do adopt the award of the Director of Occupational Safety and Health Services (DOSHS) made on 31 October 2023 as the judgment of the court. The applicant is seeking a decree to issue the sum of Ksh.3, 264,000 being the DOSHS award dated 31 October 2023 and the sum of Ksh.664, 500 being burial expenses with interests and costs of the application.
2. The application is supported by Peris Mkindenyi Mghendi, the legal representative of the deceased employee, Javan Mwakulomba Mghendi. Peris avers that the deceased passed away on 6 August 2022 owing to work-related injuries while working for the respondent. The matter was reported to the



- DOSH, who established 100% incapacity and, on 31 October 2023, awarded Ksh.3, 264,000 to the estate of the deceased.
3. Following the death, the family of the deceased spent Ksh.560, 000 in burial expenses, and the respondent, as the employee, is liable under Section 30 of WIBA to pay reasonable burial costs. Despite notice being issued to the respondent to pay within 90 days, there has been no compliance. No objections or appeals have been filed since 31 October 2023.
 4. Under Section 26(6) of WIBA, the respondent must pay the deceased's estate as directed under DOSH.
 5. The respondent filed a Third-party application dated 14 January 2025 seeking the joinder of Fidelity Shield Insurance Co. Ltd herein. The application is supported by Yahya Mahfudh Mbarak, the respondent's director, who avers that the deceased was an employee. At the same time, the third party issued insurance coverage under Section 7 of WIBA. The insurance cover was intended to indemnify the respondent for any employee work-related injuries.
 6. Yahya avers that on 6 August 2022, the deceased suffered an injury while at work and was denied on the same day. The matter was reported to DOSH and the third party under insurance policy No.MSA/P/605/046954/22 to indemnify the respondent.
 7. The DOSH awarded Ksh. 3,264,000, but the third party only paid Ksh. 1,096,333 and has refused to pay the balance. To avoid the multiplicity of the suit, the third party should be ordered to pay the applicants the due balances under Section 7 of WIBA.
 8. The respondent also filed the Replying Affidavit of Yahya Mahfudh Mbarak, the director, who avers that the deceased was an employee who died due to work-related injuries. His case was reported to DOSH, and an award of Ksh.3, 264,000 made. To secure its employees from work injuries, under Section 7 of the WIBA, the respondent had taken insurance with the third party who refused to settle the full award and only paid Ksh.1, 096,333. The third party having agreed to insure the respondent for all work-related injuries or death of an employee during work, should be directed to pay the award by DOSH.
 9. Both parties attended and filed written submissions and highlighted the same in court.
 10. The third-party did not attend despite being served, and returns were filed to confirm service.
 11. It is not in dispute that the deceased died due to work-related injuries on 6 August 2022. The matter was reported to DOSH, which assessed the Ksh.3, 264,000 award and issued a demand to the respondent.
 12. The respondent had taken insurance cover with a third party under Section 7 of WIBA under insurance policy No.MSA/P/605/046954/22 to indemnify the respondent from any work-related injuries or death of its employees while on duty.
 13. The respondent has admitted that the third party has since paid Ksh.1, 096,333 but failed to pay the balance of the award.
 14. The applicants obtained Letters of Administration Ad litem on 7 November 2024 in Wundanyi Misc. Succession Cause No.E008 of 2024. This is not contested.
 15. The third party has paid the respondent the sum of Ksh.1, 096,333 as a settlement following the fatal injury to the deceased on 6 August 2022.
 16. Under Sections 7 and 10 of WIBA, the employer has a legal duty to insure employees for work-related injuries. In this regard, the respondent took insurance policy No.MSA/P/605/046954/22 with the third party to indemnify it in the event of a work-related injury to the employees or death at work.



17. Despite being served, the third party has not responded to contest the proceedings herein and the fact of insurance policy No.MSA/P/605/046954/22 to indemnify the respondent upon injury or death of its employees due to work-related injury. The issue of third-party proceedings is determined between the defendant and the third party as was enunciated in Kenya Commercial Bank v Suntra Investment Bank Ltd (2015) eKLR, where the court held that law, a third party is enjoined in a suit at the instance of the defendant and through the set procedure under Order 1 Rule 15 to 22 of the Civil Procedure Rules. Liability between the respondent and the third party is determined between the defendant and the third party, but of course, after the court is satisfied that there is a proper question to be tried as to the liability of the third party and the defendant, and has given directions under Order 1 Rule 22 of the Civil Procedure Rules.
18. Third-party issues are triable only between the third party and the respondent and cannot be bona fide issues between the respondent and the applicants.
19. Whether the third party is joined herein or not, liability between the applicants and the respondent is not contested. The applicant herein should not result in contestations between the applicants and third parties. Upon admission of liability, the FDOSH award is directed at the respondent, the entity, to settle and claim from the third party. Given the part payment by the third party, the respondent must seek out and establish why such cover under insurance policy No.MSA/P/605/046954/22 has not assisted in repaying the total award of Ksh.3, 264,000 in full.
20. In this case, the applicants are seeking a decree for Ksh.3, 264,000, the DOSH award dated 31 October 2023, and Ksh.664, 500 burial expenses with interests and costs of the application.
21. Whereas DOSH's award of Ksh.3 264,000 is not objected to, and there is no appeal, under Section 34(4) of WIBA, the employer is liable to pay reasonable expenses for the funeral of the deceased employee subject to the maximum amount determined by the Minister after consultation with the Council. Expenses are special damages. Such expenses should be particularized and supported with evidence.
Under Section 34(4) of WIBA, there should be reasonable expenses.
22. In this case, the items sought to be paid are general expenses for catering services, transport, public address, plastic chairs, canvas tents, and transportation without particulars.
23. Part of the payments the respondent has received from the third party include;
24. Funeral expenses of Ksh.30,000 which are reasonable, and hence, the items on 10 August 2022 for the coffin, transport, and flowers at Ksh.58,000 are found to be reasonable expenses.
25. Accordingly, the application dated 8 November 2024 is allowed. The DOSH award of Ksh.3,264,000 and expenses of Ksh.58,000 are to be paid by the respondent within 30 days, after which the costs due shall accrue from this date. The respondent can claim against the third party on the policy cover secured under Section 7 of the WIBA.

DELIVERED IN OPEN COURT AT MOMBASA THIS 6TH DAY OF MARCH 2025.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

