



**Republic v Director of Occupational Safety and Health Services; Muhuru
(Interested Party); Kel Chemicals Limited (Ex parte Applicant) (Judicial Review
Application E024 of 2022) [2025] KEELRC 1274 (KLR) (24 April 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1274 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
JUDICIAL REVIEW APPLICATION E024 OF 2022**

K OCHARO, J

APRIL 24, 2025

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL
REVIEW ORDERS OF CERTIORARI AGAINST THE DECISION OF THE DIRECTOR
OF OCCUPATIONAL SAFETY AND HEALTH SERVICES DATED 08/07/2022 AND
IN THE MATTER OF: THE WORK INJURY BENEFITS ACT, CAP 236, LAWS OF
KENYA, ORDER 53 OF THE CIVIL PROCEDURE RULES 2010, RULE 7[2] OF THE
EMPLOYMENT AND LABOUR RELATIONS COURT [PROCEDURE] RULES, 2016; THE
CONSTITUTION OF KENYA, AND ALL OTHER ENABLING PROVISIONS OF LAW.**

BETWEEN

REPUBLIC APPLICANT

AND

**THE DIRECTOR OF OCCUPATIONAL SAFETY AND HEALTH
SERVICES RESPONDENT**

AND

HENRY GITAU MUHURU INTERESTED PARTY

AND

KEL CHEMICALS LIMITED EX PARTE APPLICANT

JUDGMENT

Introduction.

1. By a Notice of Motion application dated 29th September 2022, the Exparte Applicant seeks;
 - a. An order for Certiorari to remove into this court and quash the respondent’s award and demand for payment of KShs. 546,472.00 dated 8th July 2022.



- b. An order of prohibition to prohibit the respondent, its agents and employees or whosoever, from implementing the award and demand for payment of Kshs. 546,472.00 dated 8th July 2022.
 - c. The Exparte Applicant shall be awarded costs of this application.
2. The application is anchored on the grounds obtaining on the face thereof and the supporting affidavit sworn on 29th September 2022, by Timothy Rop, the Exparte Applicant's Human Resource Manager.
 3. The Respondent opposed the Application through an affidavit sworn on 28th November 2022, by Charles Kabiru Theuri, an Assistant Director of Occupational Safety and Health Services.
 4. Following this Court's directions, the application was canvassed by way of written submissions.

The Application.

5. The applicant's case was that the Interested Party was its employee at all times, injured on 25 September 2020 while at work as he was attending to his assigned duty of dismantling a platform.
6. Following the injuries sustained by the Interested Party, the Exparte Applicant received three different awards from the respondent with different assessments of permanent incapacity from different doctors at various times.
7. The WIBA Dosh Medical Report filled by Dr. Githae on 11th March 2021, stated that the Interested Party had suffered 0% permanent incapacity. Consequently, the compensation payable was assessed at Kshs. 114,434.00.
8. On 18th August 2021, a second doctor, Dr. Chege Mwangi, without cause, prepared a second medical report and assessed that the Interested Party had suffered 8% permanent incapacity from his injuries.
9. To determine the correct degree of permanent incapacitation, the respondent's office in Thika wrote to the Nairobi office requesting *the constitution* of a panel to assess the proper award.
10. Without reference to the Applicant, the County Occupational Safety & Health Officer in Thika issued another compensation claim dated 6th September 2021, on the Interested Party, and demanded that the Applicant settle the claim within 14 days.
11. The Applicant objected to the director's decision on 3rd February 2022, specifically on the medical assessment and the compensation of KShs. 460, 033.
12. In a letter dated 7th February 2022, the respondent informed the applicant that the first report from Dr. Githae and the subsequent award were invalid, given that further examination was requested before final assessment of incapacity and that the correct medical report was the second one. The respondent, however, directed that the Applicant could dispute the award by organising for the injured employee to undergo another assessment.
13. Following the Director's directions, the Interested Party underwent another medical examination by Dr. Wambugu, who, in a report dated 4 February 2022, assessed that the employee had suffered 0% incapacity.
14. On 15 July 2022, without any engagement, response, or further consultation, the Applicant received an unprocedural claim for Kshs—546, 472.00 from the respondent indicating that the employee had suffered 10% incapacity.



15. The evaluation clinic was conducted on the respondents' terms, without involving the Applicant or addressing Dr. Wambugu's medical report.
16. The decision to conduct an evaluation clinic and award KShs. 546, 472 was ultra vires. The Director didn't have any power to take further action or issue any other award after the lapse of the objection period of 60 days from its earlier decision. Further, the Director didn't have any legal authority to review the decision.
17. The Director does not have the power to enlarge the time for lodging objections or entertaining objections filed out of time under the *Work Injury Benefits Act*.
18. The respondent's decision to conduct a work injury Evaluation Clinic suo moto without affording the applicant a fair hearing, without considering the medical report by Dr. Wambugu or giving reasons why it differed from the others, was unfair, in bad faith and biased.
19. The respondent's decision to award the employee KShs. 546,472.00 was unlawful, unreasonable and tainted with irrationality.

The Respondent's Response.

20. The respondent asserted that it is charged with the responsibility of processing compensation for injuries sustained at work under the provisions of the *Work Injury Benefits Act*.
21. On September 28, 2020, the County Occupational Safety and Health Officer, Kiambu County, received a notice of an occupational accident that had occurred on September 25, 2020, involving the Interested Party, duly completed and signed by Timothy Rop, the respondent's Human Resource Manager.
22. On 11th March 2021, the County Occupational Safety and Health Officer, Kiambu County, received the notification of the occupational accident, duly completed by the Human Resource Manager and Dr. Githae. Dr. Githae awarded the Interested Party 0% permanent incapacity and 66 days of temporary incapacity. He further stated that a chest examination and chest radiograph were required to be carried out on 18th March 2021 before the final assessment of permanent incapacity could be given.
23. On 11th March 2021, the County Occupational Safety and Health Officer, Kiambu County, notwithstanding the award by Dr. Githae dated 3rd March 2021, was not a final award for permanent incapacity, processed the claim amounting to KShs 144,434.00, the compensation only for disablement lasting 66 working days.
24. On 23rd August 2021, the Ex Parte Applicant submitted another notification form, duly completed Parts I and II, to the County Occupational Safety and Health Officer, Kiambu County. The form indicated that the Interested Party had been assessed by Dr. Chege Mwangi on 18th August 2021, awarding him 8% permanent incapacity and 66 days of temporary incapacity.
25. On 23rd August 2021, the Officer wrote to the respondent, requesting him to constitute a medical advisory panel to assess the interested party, which was constituted and, upon reviewing the medical reports by Dr. Githae and Dr. Mwangi, found that the report by Dr. Githae was not a final award and therefore couldn't be considered as an award, and further referred the Interested Party back to the County Occupational Safety and Health Officer, Kiambu County.
26. On September 6, 2021, the County Occupational and Health Officer, Kiambu County, noted the Panel's finding that Doctor Githae's report was not final and, based on Dr. Chege Mwangi's award, processed the claim amounting to KShs. 460, 003.60.



27. On 31st January 2022, almost 5 months after the claim had been lodged, the Officer wrote a demand letter to the Ex-parte Applicant requiring them to settle the claim within 14 days.
28. On 1st February 2022, the Ex-parte Applicant wrote to the County Occupational Safety and Health Officer, acknowledging receipt of the demand dated 31st January 2022. The letter referred to the two awards by Dr. Githae and Dr. Chege Mwangi. The applicant asked whether the respondent had constituted a medical advisory panel. The applicant further requested 30 days to enable the Applicant to have the Interested Party assessed by their doctor.
29. By their letter dated 3rd February 2022, the Respondent referred the Interested Party for assessment by Dr P.W. Wambugu.
30. On 7th February 2022, the County Occupational and Health Officer, Kiambu County, replied to the Applicant's two letters explaining the respondent's decision to process the claim based on the award by Dr Chege Mwangi, and that the report by Dr Githae was not a final award and therefore couldn't be considered for processing the claim.
31. On 24th March 2022, the exparte Applicant submitted to the Officer a medical report, dated 4th February 2022, by Dr. P.W. Wambugu, awarding the Interested Party 0% permanent incapacity. This prompted the Officer to refer the matter to the respondent to constitute an advisory panel to assess the Interested Party.
32. The respondent constituted a medical advisory panel, which assessed the Interested Party and awarded him 10% permanent incapacity. Following this, the Officer revised the award to 546, 472.00. The Exparte Applicant was notified of the revision.
33. The Applicant didn't file any appeal to challenge the award of KShs. 460,033 or any decision by the Director, as contemplated by the law.

The Interested Party's Take.

34. The Interested Party filed a replying affidavit to the Notice of Motion, opposing the same. He asserted that the application is mischievous, full of falsehoods, and vexatious.
35. The Affidavit in support of the Applicant's application is incompetent as it has been sworn by a person who has not shown that he had the authority to swear it.
36. Mischievously, Timothy Rop purported to fill out Dosh forms without his knowledge. He presented them to the Director of Occupational Safety and Health Services on 28 September 2020 while he [the Interested Party] was still hospitalised.
37. He further stated that as a result of the workplace accident, he suffered multiple fractures on his ribs, chest injuries, lung injuries and soft tissue injuries.
38. He underwent surgery to remove a buildup of fluid from his chest cavity at St. Mulumba Hospital, Thika. Post the surgery, he is still suffering from the aftereffects of the injuries. He is under medication continuously, and cannot use his left hand optimally.
39. While the Interested Party was still hospitalised, Timothy Tirop hurriedly filled out a Dosh Form dated 28 September 2020. He presented the same to the Ex-parte Applicant's doctor of choice, Dr. Githae, who filled it out on 3 March 2021 and suspiciously indicated that permanent incapacity was not applicable in his case. On the Form, the Doctor indicated that he was required to undergo further chest examination and a chest radiograph.



40. The award of Kshs. 144, 234 was based on a doctor's report that didn't capture the true extent of his injuries. Additionally, the assessment was not disclosed to him by his employer as they didn't intend to settle the same.
41. It only came to his knowledge that his employer had initiated the compensation process contemplated under the *Work Injury Benefits Act* and that the award hereinabove mentioned had been made after he was informed not by his employer, the Ex-parte Applicant, but by the Office of the Director of Occupational Safety and Health Services, Thika.
42. Upon realising that he was pursuing the matter, the Exparte Applicant's Human Resource Manager filled another Dosh Form dated 7th September 2021, which was presented to the Respondent, and which formed the basis of the assessment by Dr. Chege Mwangi setting his permanent incapacity at 8%. Thereafter, the Respondent assessed compensatory damages payable to him at 460,033.60. Despite a demand and reminders, the Exparte Applicant neglected to pay the amount.
43. At the Ex parte Applicant's protest against the assessment, and instance, he was subjected to a second medical examination by Dr. P.M. Wambugu, a doctor of their choice. He visited the doctor. To his surprise, the doctor just studied the medical documents that he [the interested party] had and didn't examine him.
44. Doctor Wambugu's report stirred confusion and controversy. To resolve the same, the Director constituted a panel of two doctors to re-examine him. The Panel assessed his permanent incapacity at 10% and prepared a report, the basis on which the Director assessed the compensation payable to him as KShs. 546, 472. The Applicant and their Insurer refused to settle this amount, despite a demand by the statutory Respondent.
45. In the circumstances of the matter, it cannot be reasonably said that the Respondent acted unprocedurally.

Analysis and Determination.

46. Undoubtedly, the Employment and Labour Relations Court has jurisdiction in appropriate cases to grant orders of certiorari pursuant to sections 8 and 9 of the *Law Reform Act*, or the stipulations of the Fair Administrative Actions Act or Article 23 of *the Constitution*. Actions of the Director of Occupational Safety and Health Services are subject to challenge by way of judicial review proceedings, as he exercises a quasi-judicial function. As such, it cannot be true that the decisions and actions of the Director can only be challenged under the mechanism provided for under sections 51 and 52 of the *Work Injury Benefits Act*, as suggested in the Interested Party's and the Respondent's submissions.
47. The general impression given by the Ex-parte Applicant, and thus the basis of his application for the judicial review orders of certiorari and prohibition, is that they were unaware of some pivotal steps that the Director undertook and the reasons and or justifications thereof. I disagree with their position for reasons that shall come out shortly hereinafter.
48. The Ex-parte Applicant contends in the supporting affidavit sworn by its Human Resource Manager that the first report [Dr. Githae assessed the Interested Party's incapacity at 0%. In my view, this assertion is deliberately misleading. The doctor didn't indicate the zero per cent on the reportform. All he did was to indicate NA against permanent incapacity, for good reason. I say, and assess temporary incapacity as 66 days. The Respondent aptly explained why the doctor assessed permanent incapacity at the time, as he did. The Interested Party was still to undergo further medical examinations. This explanation wasn't challenged at all.



49. The Ex-parte Applicant didn't challenge the Interested Party's assertion that they hurriedly and without his knowledge initiated the process that culminated in Dr. Githae's assessment.
50. It is my view, therefore, that the report by Dr. Githae was not conclusive in the assessment of the Interested Party's injuries and incapacity. The assessment was reasonably expected to change after further medical examinations. Further, I am persuaded by the Respondent's assertion that the assessed compensation of KShs. 114, 434.00 was for the temporal incapacity.
51. With great respect, in a very pretentious way, and in a manner that reveals the Ex-parte Applicant as a not candid party, the deponent of the supporting affidavit states in paragraph 5 thereof, thus;
- On 18th 2021, a second doctor, Dr. Chege Mwangi, without cause, filed a second Dosh Medical Report and assessed that the employee had suffered 8% permanent incapacity from his injuries.”
52. Dr Chege didn't fill out the second report out of the blue, as the Applicant wants this Court and all to believe. Someone initiated the process leading to the assessment, and that someone was the Applicant through its Human Resource Manager. He initiated the process through a Notice by Employer of an Occupational Accident form dated 28 September 2020.
53. The only reasonable conclusion that can be drawn from this re-initiation of the process is that the Ex-parte Applicant acknowledged that the initial report and subsequent assessment of damages weren't conclusive and wholly, respectively. Based on the second report, the Ex-parte Applicant and any reasonable person, for that matter, would expect the assessed compensation, upon the report's premise, to be higher than the first one.
54. There is no dispute that at the instance of the Ex-parte Applicant, the Director permitted the Interested Party to be examined by Dr. Wambugu, the Ex-parte Applicant's appointed doctor. The doctor came up with an assessment of incapacity that conflicted with Dr. Chege's.
55. One of the responsibilities of the Director under section 53[2] of the *Work Injury Benefits Act* is to ensure that injured employees are compensated in accordance with the provisions of the Act. Faced with the conflicting assessments and the compelling need to ensure compensation for the Interested Party and fairness between the employer [Ex-parte Applicant] and the employee [Interested Party], the Director wasn't helpless statutorily.
56. Section 53[3] provides;
- “The Director of Work Injury Benefits shall be assisted in the performance of the functions specified in subsection 1 by other officers as are necessary for proper administration of the Act.”
- In my view, under the Act, any Member of the medical advisory panel is an officer for purposes of administering the Act, and as such, the Director didn't error in law and cannot be said to have acted without or in excess of his authority when he appointed the two doctors to reassess the workplace injuries of the Interested Party. His appointing the doctors was reasonable, lawful, and necessary to aid him in discharging the responsibility stated above.
57. The structure of the *Work Injury Benefits Act* requires doctors to assess injuries and their impact on injured employees. The responsibility is not directly placed on the Director.
58. In light of the foregoing [paras. 56 and 57], I disagree with Counsel for the Ex-parte Applicant's submissions that the Director and the Panel acted ultra vires.



59. Lastly, having found as I have hereinabove, that the assessment of the injuries sustained by the Interested Party and their effect on him, by the Panel of the two doctors, cannot be faulted, then it follows that the assessment of compensation anchored on their report properly and rightfully ensued.
60. Before I pen off, it becomes imperative to point out that the instant matter is illustrative.
61. In conclusion, I find the Ex parte Applicant's application without merit. It is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MOMBASA THIS 24TH DAY OF APRIL, 2025.

OCHARO KEBIRA

JUDGE

