



**Republic v Director of Occupational Safety and Health Services & another;
Freedom Airline Express Limited (Exparte Applicant) (Judicial Review Application
E033 of 2024) [2025] KEELRC 1727 (KLR) (11 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1727 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
JUDICIAL REVIEW APPLICATION E033 OF 2024**

**HS WASILWA, J
JUNE 11, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

**DIRECTOR OF OCCUPATIONAL SAFETY AND HEALTH
SERVICES 1ST RESPONDENT**

ABDIRAHMAN ABDULLAHI MOHAMED 2ND RESPONDENT

AND

FREEDOM AIRLINE EXPRESS LIMITED EXPARTE APPLICANT

JUDGMENT

1. Pursuant to Sections 8 and 9 of *Law Reform Act*, Cap 26, Section 1A, 1B and 3A of the *Civil Procedure Act*, Cap 21, Order 53 of the Civil Procedure Rules, 2010 and other enabling law; the ex-parte Applicant filed a substantive Notice of Motion application dated 13th August 2024 seeking reliefs THAT: -

1. this Honourable Court be pleased to grant judicial review writs of Certiorari quashing the decision of the 1st Respondent dated 16th May 2024.
2. costs of and incidental to this application be provided for.

Ex-parte Applicant’s Case

2. The ex-parte Applicant avers that the 2nd Respondent was its employee and was involved in an accident at his work place leading to the institution of Nairobi ELRC Petition No. E129 of 2023: Abdirahman Abdullahi Mohamed Vs The Director Occupational Safety and Health Services & Freedom Airline



- Express Limited against itself and the 1st Respondent seeking assessment of compensation by the 1st Respondent due to the 2nd Respondent as a result of the accident.
3. The ex-parte Applicant avers that based on the material before it, the 1st Respondent conducted an assessment and on 7th March 2024, it awarded the 2nd Respondent Kshs. 1,958,400.
 4. The ex-parte Applicant avers that it received a letter from the 1st Respondent on 9th April 2024 inviting it to a hearing on 23rd April 2024 of an objection filed by the 2nd Respondent, which had never been served upon it. The 2nd Respondent then served it a trial bundle on 19th April 2024 at 1 pm, which adduced new evidence in support of a prayer that the award be enhanced from Kshs. 1,958,400 to Kshs. 21,918,620.
 5. It is the ex-parte Applicant's case that it expressed reservations to proceed with the hearing of the appeal having been served on short notice and also due to the 2nd Respondent adducing new evidence not part of the proceedings.
 6. The ex-parte Applicant avers that during the hearing on 23rd April 2023 attended by parties before the 1st Respondent for the disposal of the appeal directed the 2nd Respondent undergoes a medical examination in light of new evidence; the ex-parte Applicant to file receipts proving payment of the 2nd Respondent's medical bills; and hearing of the appeal on 22nd May 2024.
 7. The ex-parte Applicant avers that the 2nd Respondent thereafter proposed for the medical examination be conducted on 13th May 2024, which date it could not readily confirm as it had to plan for attendance and the doctor's fees. However, before the hearing of the appeal, the 1st Respondent proceeded suo muto on 16th May 2024 and awarded the 2nd Respondent Kshs. 19,750,595.80 as prayed in the appeal.
 8. It is the ex-parte Applicant's case that the 1st Respondent's action denied it its right to fair hearing before making the award as it barred any further examination of the Claimant. further, the award ordered the 2nd Respondent to submit more documentary evidence for further assessment of additional amounts to be paid by the ex-parte Applicant.
 9. It is the ex-parte Applicant's case that the award is unfair, unjust, illegal, null and void and subject to judicial review.
 10. The ex-parte Applicant avers that the said award was filed Nairobi ELRC Petition No. E129 of 2023 on 17th May 2024 and is due for adoption on 4th July 2024 and unless the orders herein are issued, the impugned award shall be adopted as a court order despite the contravention of the rules of natural justice.

2nd Respondent's Case

11. The 2nd Respondent avers that he was employed by the ex-parte Applicant as a flight engineer vide an appointment letter dated 1st day of October 2018 as a permanent and pensionable employee.
12. The 2nd Respondent avers that while undertaking his duties on 26th September 2019, he sustained injuries attributed by the ex-parte Applicant's negligence of the 2nd Respondent. Due to the injuries sustained, he underwent treatment in the country and in India.
13. The 2nd Respondent avers that he moved this court vide a petition dated 9th June 2024 to compel the Respondents to assess his injuries and give an award as per the Work Injury Benefit Act.
14. On 7th March 2024, he was awarded Kshs. 1,958,400 by 1st Respondent as compensation for 85% permanent disablement. However, on 27th March and 8th April 2024, he raised an objection to the



- award by the 1st Respondent pursuant to Section 51 of the [Work Injury Benefits Act](#), which award was made with a Demand Note raised on 7th March 2024 vide DOSH WIBA 4.
15. The 2nd Respondent avers that vide a letter dated 8th April 2024, the 1st Respondent informed the parties of the hearing of the objection on 23rd April 2024, and advised them to bring along supporting documentation. Subsequently, on 20th April 2024, his advocates on record served the ex-parte Applicant their trial bundle.
 16. The 2nd Respondent avers that the ex-parte Applicant's right to fair hearing was never denied as the objection hearing was held at 1st Respondent's offices in presence of each party's advocates and representatives from Occupational Health and safety Services and ex-parte Applicant's Advocate was given 7 additional days thereof to supply any document or receipts to support their case, which they have not done till date.
 17. It is the 2nd Respondent's case that after the ex-parte Applicant failed to supply any payment receipts as they had undertaken during the objection hearing, the 1st Respondent rendered his decision on 16th May 2024. Subsequently on 9th July 2024, this court adopted the Director's Award as a judgment and order of this court.
 18. It is the 2nd Respondent's case that 22nd May 2024 was a mention date before this Honourable Court to convey the outcome of the objection hearing, a date which the ex-parte Applicant chose not to attend court; and that the ex-parte Applicant is misleading this Honourable Court by claiming that the appeal/objection was scheduled for hearing on the said date.
 19. The 2nd Respondent avers that by adopting the award by the 1st Respondent vide its ruling on 9th July 2024, this court became functus officio and its decision can only be reversed on appeal; and even so, an appeal is time barred by dint of Section 52 (2) of the [Work Injury Benefits Act](#).
 20. The 2nd Respondent avers that the orders sought are incapable of being executed, as the ex-parte Applicant is praying for writ of certiorari to quash the award by the 1st Respondent which has already been adopted by this court. This amounts to calling this court to sit as an appellate court in its own decision since once the award was adopted, it became judgment of this court.
 21. The 2nd Respondent avers that he is still undergoing treatment in India, requiring me to travel in and out of the country without any source of income, and any further delay in realizing the fruits of his successful litigation is not only inhumane but also contra statutes and rules of natural justice.
 22. It is the 2nd Respondent's case that the ex-parte Applicant has continuously acted in bad faith since his accident till date by failing to report it to the 1st Respondent as required by law and failing to cater for his medical expenses.
 23. It is the 2nd Respondent's case that this motion be dismissed with costs as the ex-parte Applicant has not sufficiently pleaded the procedural impropriety, irrationality, and illegality of the award by the 1st Respondent to warrant intervention of this court.
 24. The 2nd Respondent avers that the ex-parte Applicant has refused to exercise their right to appeal the decision of the 1st Respondent has provided for under Section 52 of [Work Injury Benefits Act](#) and instead it has coined its Appeal as a Judicial review in order to bypass limitation of time.

Ex-parte Applicant's Submissions

25. The ex-parte Applicant submitted on its right to fair hearing was contravened; vide a letter dated 8th April 2024, the 1st Respondent invited the parties for an objection hearing. On 20th April 2024, the



- 2nd Respondent served upon them a trial bundle which included new evidence he intended to adduce during the hearing, the ex-parte Applicant communicated its reservations on proceeding with the hearing on this ground.
26. The ex-parte Applicant submitted that on 23rd April 2024, all the parties attended the hearing wherein the 2nd Respondent was directed to undergo a joint medical examination in view of the newly adduced evidence and that the ex-parte Applicant provides receipts proving payments towards the 2nd Respondent's treatment and the hearing of the appeal be on 22nd May 2024.
27. The Advocates on record subsequently corresponded on the 2nd Respondent's availability for the joint medical examination and the receipts be filed before the scheduled hearing of 22nd May 2024. It is therefore the ex-parte Applicant's submission that the award was issued on the 16th May 2024 before the scheduled hearing date of 22nd May.
28. It is the ex-parte Applicant's submission that the decision maker having granted it the opportunity to be heard and having directed on the procedure to be followed, failed to abide by its direction and proceeded to issue a decision before the set-out date for the hearing as slated by the decision maker. Reliance was placed in the Supreme Court case of *Githiga & 5 others v Kiru Tea Factory Company Ltd* (Petition 13 of 2019) [2023] KESC 41 (KLR) (16 June 2023) (Judgment) where it was held:
- “Procedural fairness in the administration of justice involved the fair hearing rule and the rule against bias. The fair hearing rules required a decision maker to inter alia afford a person an opportunity to be heard before making any decision affecting his/her interests.”
29. The ex-parte Applicant relied on Lord Diplock in the House of Lords decision of *Council of Civil Service Unions v. Minister for the Civil Service* [1984] UKHL 9, [1985] AC 374, [1984] 3 WLR 1174, [1985] ICR 14, [1984] 3 All ER 935, [1985] IRLR 28 to explain that a public authority could be acting ultra vires (that is, beyond the power given to it by statute) if it commits a serious procedural error. His Lordship regarded procedural impropriety as one of three broad categories of judicial review, the other two being illegality and irrationality. Procedural impropriety generally encompasses two things: procedural ultra vires, where administrative decisions are challenged because a decision-maker has overlooked or failed to properly observe statutory procedural requirements; and common law rules of natural justice and fairness.
30. The ex-parte Applicant submitted that the 1st Respondent failed to abide by common law rules having issued directions on the procedure to be followed and the requirements that were attained before issuing its decision/award but it still proceeded to issue an award before the scheduled date and without consideration of the reports and receipts to be produced.
31. It is the ex-parte Applicant's submission that the 1st Respondent's action of issuing an award before a hearing was conducted amounts to an illegality warranting the award to be quashed by this court.
32. The ex-parte Applicant submitted that Section 4 of the *Fair Administrative Action Act* read with Article 47 of *the Constitution* obliges the administrator to accord affected persons an opportunity to attend proceedings, a chance to be heard, an opportunity to cross-examine persons, tender evidence in support of their claim and any necessary procedure required to ensure a fair hearing is achieved.
33. It is the ex-parte Applicant's submission that the 1st Respondent never accorded it a fair hearing; the 1st Respondent rendered a decision before the hearing date fixed on 22nd May 2024 without taking into consideration the medical report and receipts as directed.



34. On costs, the ex-parte Applicant submitted that it is trite law that costs follow an event, having successfully demonstrated how the 1st Respondent contravened his rights costs must follow; therefore, the 1st Respondent be compelled to pay the costs.

2nd Respondent's Submissions

35. The 2nd Respondent submitted on four issues: Whether the ex-parte Applicant's right to fair trial was infringed; whether the Substantive Motion is merited; whether the orders sought can be granted; and who should be bear costs.
36. On the first issue, the 2nd Respondent submitted that the 1st Respondent accorded the parties a fair hearing as provided under Article 47 (1) of *the Constitution* which states: "every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair." The 1st Respondent in undertaking its administrative role conducted the hearing in an expeditious, efficient, lawful, reasonable and procedurally fair manner.
37. It is the 2nd Respondent's submission that the 1st Respondent served the parties with a Hearing Notice dated 8th April 2024 which clearly advised parties to submit documentation in support of their claim. Subsequently, the 2nd Respondent filed and served his trial bundle containing the payment receipts, however, the ex-parte Applicant neither filed any receipts or documents nor came with any documentation during the hearing. Further, even after praying for one day and being granted seven days to file their documentation, the ex-parte Applicant has never filed any.
38. The 2nd Respondent submitted that the 1st Respondent met all the requisite condition for a fair hearing as the hearing notice was served to ex-parte Applicant; it was represented during the appeal hearing; it was granted time to file its documents; and the 1st Respondent's determination was based on materials presented before it and the submissions of each party.
39. On the second issue, the 2nd Respondent submitted that there are three traditional grounds for judicial review being illegality, irrationality and procedural impropriety as held by Lord Diplock in *Council of Civil Service Unions vs Minister for the Civil Service (1985) AC 374, 410*. The ex-parte Applicant has pleaded procedural impropriety as the main ground for judicial review.
40. The 2nd Respondent submitted that there was no procedural impropriety during the appeal hearing before the 1st Respondent. The 1st Respondent notified the ex-parte Applicant of the hearing, conducted the Appeal hearing in presence of every party and it accorded the ex-parte Applicant time to file its alleged documents and or receipts. The ex-parte Applicant merely alleged denial of its right to fair trial without clearly detailing the alleged denial as the Supreme Court held in *Githiga & 5 others v Kiru Tea Factory Company Ltd (Supra)*.
41. On illegality and irrationality, the 2nd Respondent submitted that the same have neither been pleaded nor grounds enunciated thereof. The principle of illegality in judicial review requires that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it.
42. The 2nd Respondent submitted that appeals and objections against the 1st Respondent's decision is provided for under Part VIII of the *Work Injury Benefits Act*. Section 51 of the *Work Injury Benefits Act* provides that 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. Pursuant to these provisions, the 2nd Respondent being aggrieved by the decision of the 1st Respondent filed an objection dated 27th March 2024.



43. The 2nd Respondent submitted that the award was neither illegal nor irrational; after the hearing, the 1st Respondent rendered its decision in line with Section 52 of the [Work Injury Benefits Act](#) after the ex-parte Applicant failed to submit the payment receipts within seven days of the Hearing as prayed. Further, the hearing of the appeal was never adjourned to 23rd May 2024 as alleged by the ex-parte Applicant; the Court record in Milimani ELRC Petition E129 of 2023; Abdirahman Abdullahi v DOSH & Freedom Airline indicates 23rd May 2024 was a mention to adopt the Award by the 1st Respondent.
44. It is the 2nd Respondent's submission that the substantive motion is fatally defective for offending the Doctrine of Exhaustion. Section 9 (2) of the Fair Administrative Actions Act provides that the High Court shall not review an administrative action or decision made unless the mechanism for remedy, including internal mechanisms, have been exhausted; this is a mandatory term.
45. The 2nd Respondent contends that decision subject to judicial review is the decision of the 1st Respondent, which upon appeal, awarded the 2nd Respondent damages under the Work Injury and Benefits Act. Section 52 (2) of the [Work Injury Benefits Act](#) provides that a person aggrieved by the decision of the Director of Occupational Safety and Health, may, within thirty days of the Director's reply being received by him, appeal to the Industrial Court against such decision. It is the 2nd Respondent's submission that the proper way to invoke jurisdiction of this court is through an appeal under Section 52 (2) of the [Work Injury Benefits Act](#) as opposed to the current judicial review motion.
46. On the third issue, the 2nd Respondent submitted that this court lacks jurisdiction to entertain the judicial review by dint of being functus officio after it adopted the award of the Director of Occupational Safety and Health Services on 9th July 2024. The judicial review application challenges an award by the 1st Respondent which was adopted as an order and judgment of this court and can only be varied by appellate court or through an application for review.
47. The 2nd Respondent relied on the Supreme Court case of Fredrick Otieno Outa v Jared Odoyo Okello & 3 others [2017] eKLR which held that;

“.....the Court becomes functus officio once it has delivered Judgment or made a final decision. The stamp of finality with which this Court is clothed should not be degraded except in exceptional circumstances as determined by the Court itself. Were we to hold otherwise, there would be no end to litigation, thus, severely compromising the integrity of the judicial process, and the integrity of this Court.”
48. On costs, the 2nd Respondent submitted that ex-parte Applicant has filed a frivolous and fatally defective judicial review motion, therefore, the ex-parte Applicant should bear costs of the 2nd Respondent.
49. I have examined the averments and submissions herein. The exparte applicant sought orders of certiorari to quash the orders granted by Director OSH assessing the compensation payable to the 2nd respondent at Kshs 21,918,620/-.
50. The 2nd respondents have submitted that this court has the requisite jurisdiction to handle this JR application having already adopted the award of the Director as a judgment of this court in Petition No E129 of 2023.
51. The procedure to be adopted in assessment and award of compensation to an injured employee under the [Work Injury Benefits Act](#) is set out at section 40 of the WIBA. Once the director assess the



compensation payable there is also a process to be followed in case of any disagreement or findings of the director.

52. Section 51 to 52 of WIBA provides as follows:

51.

- (1) 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 an objection against such decision.
- (2) 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.

- (1) 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.
- (2) An objector may, within thirty days of the Director#s reply being received by him, appeal to the Industrial Court against such decision

53. The process is time bound setting out what ought to be done. The decision of the director is subject to objection within 60 days. Once the director considers the objection, the director has 14 days upon the receipt therefore to issue a decision on the objection. Once a decision of the director is now granted the next step then is an appeal to this court.

54. In the current application, the 1st respondent filed objection to the decision of the director upon being awarded compensation. The director indeed considered the objection and re assessed injury suffered by the 1st respondent and issued an amended compensation award. The 1st respondent proceeded to file a petition for adoption of the award. This court proceeded to adopt the award of compensation on 9/7/2024. The applicant has now approached this court seeking striking out of the award given on grounds set out in this application.

55. As demonstrated in this judgment, the procedure to be adopted by an objector upon an award being given by the director is to appeal to this court. In the current case however, the adoption was made by the ELRC and the only recourse the applicant has is to appeal the decision of this court on the adopted compensation.

56. This court is however being asked to quash its own decision and thus sitting on appeal of its own judgment. In this court's understanding, the forum to ventilate the applicant's disappointments is before the Court of Appeal and not to ask this court to divest from its own finding. I do not in the circumstances find the application for Judicial review warranted and dismiss it accordingly. There will be no order of costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 11TH OF JUNE, 2025.

HELLEN WASILWA

JUDGE

