



Nyamwaya (Suing on Her own Behalf and On behalf of the Estate of the Late Samuel Onyancha Kinanga (Deceased)) v Dock Workers Union (Miscellaneous Application 16 of 2024) [2025] KEELRC 2407 (KLR) (17 July 2025) (Ruling)

Neutral citation: [2025] KEELRC 2407 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION 16 OF 2024**

**K OCHARO, J
JULY 17, 2025**

BETWEEN

**MARDARET BOSIBORI NYAMWAYA APPLICANT
SUING ON HER OWN BEHALF AND ON BEHALF OF THE ESTATE OF THE
LATE SAMUEL ONYANCHA KINANGA (DECEASED)**

AND

THE DOCK WORKERS UNION RESPONDENT

RULING

1. By a Notice of Motion application dated 30th January 2025, expressed to be under the provisions of Articles 47, 48 and 50 (1) of *the Constitution* of Kenya 2010, Section 87 and 90 of the *Employment Act* 2007, and Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016, the Applicant seeks the following orders.
 - a. That the application be certified urgent and heard ex parte in the first instance.
 - b. That the Honourable Court be pleased to adopt as the judgment of this Court, the award of the Director of Occupational Safety and Health Services made on 11.03.2022
 - c. That judgment be entered for the Applicant against the Respondent for the sum of Kshs: 16,482,336.00/= plus interest at Court rate.
 - d. The costs of the Application are to be provided for.
2. The application is based on the reasons outlined in the face of the application and the Supporting Affidavit by Margret Bosibori Nyamweya, dated 31st January 2024. The Respondent opposes the application, citing the grounds brought out in the affidavit sworn by Simon Kiprono Sang on 19th April 2024.



The Applicant's Application.

3. The Applicant states that she is the Widow of the Deceased, who died in the course of employment while providing his services to the Respondent herein as chief accountant.
4. She brings the instant application as a legal representative of the estate of the deceased after obtaining letters of administration ad litem for purposes of instituting and prosecuting the application to recover the sum awarded to the Estate of the deceased by the Director of Occupational Safety and Health Services, costs and interest until payment in full.
5. On 29.01.2020, the deceased sustained severe physical injuries from gunshots while performing their duties as a Chief Accountant
6. The matter was reported to the Director of Occupational Safety and Health Services by the Respondent.
7. The Director of Occupational Safety and Health Services on 03.11.2022 assessed the Applicant's compensation and in his ruling stated that the Applicant was entitled to Kshs. 16,482,336/=, a sum that was arrived at based on the 100% permanent incapacity the deceased suffered and his monthly earnings, Kshs. 171,691/=, at the time of the incident.
8. The Respondent did not object to or appeal the decision of the Director within 90 days as required by law, but instead engaged the Applicant in a game of cat and mouse whenever she visited their offices to inquire about compensation on behalf of the deceased.
9. The Respondent's Human Resource Manager has always confirmed to the Applicant that the deceased's dues were assessed by the Director of Occupational Safety and Health Services. He sees no reason why the Respondent hasn't settled the award.
10. The Respondent has not paid a single cent to the deceased's estate in compensation, and all efforts to have the Respondent compensate the estate of the deceased as per the Director's assessment have failed. Only unfulfilled promises are made, despite the Respondent being involved in the process of assessing compensation and acknowledging that the deceased ought to be compensated.
11. Since the Work Injury Benefit Act does not have an enforcement mechanism, the Applicant has no choice but to approach the Court through this Application. This Honourable Court has unlimited original and appellate Jurisdiction in disputes relating to employment and labour relations pursuant to article 162(2)(a) of *the Constitution*, the Honourable Court has inherent jurisdiction to adopt as a judgment the director's award for purposes of execution.
12. Further, article 50 (1) of *the Constitution* of Kenya states that every person has the right to have any dispute that the application of law can resolve decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
13. The process of execution can only be invoked after the Ruling by the Director is adopted as a judgment by the Court; as it is now, the Applicant cannot initiate execution proceedings.
14. The Respondent's continued neglect and refusal to pay the awarded sum by the Director amounts to injustice to the Applicant. Unless this Honourable Court adopts the award as a judgment, the Claimant will not have an opportunity to execute in recovery of the said amount.
15. The Respondent shall not suffer any prejudice if the orders are granted, since this is a procedural issue, considering that substantive issues of determining the award have already been determined without opposition from the Respondent.



16. The Director issued a certificate of dependency upon request by the Respondent, but the Respondent has never effected payment in this matter as directed. The Respondent is buying time so that the present can become statute-barred and claim that the Respondent's claim is extinguished.
17. The Respondent asserts that it was incorporated pursuant to Section 21 of the [Labour Relations Act](#) as a trade union and therefore is not a limited company as sued.
18. Samuel Onyancha Kinaga (the deceased person) was its employee until his death on 29th January, 2020. Contrary to the Applicant's assertion, he was not their Chief Accountant. Further, his death was not occasioned by a lack of occupational safety or work injury associated with the Respondent's workplace.
19. Respondent states that they reported the death of the deceased to the Director of Occupational Safety and Health Services via Dosh Form 1, dated 18th February 2020. However, the same was purely in answer to a procedural requirement and did not carry the alleged liability.
20. The Respondent further states that it conducts its business on the first floor of its building, located along Jomo Kenyatta Avenue (Sparki) in Mombasa, alongside other businesses operated by different individuals in the same building. Unknown assailants shot the deceased on the ground floor of the Dock Workers Union's building, where the Respondent does not operate or conduct any business. Additionally, the deceased was not shot and killed within the workplace or while engaged in any business activities on the ground floor.
21. The Respondent contends that it didn't receive an assessed compensation from the Director of Occupational Safety and Health Services dated 11th March, 2022. It only became aware of the assessment's existence when it was served with submissions in Miscellaneous Application No. E 031 of 2023, which this Honourable Court dismissed by its ruling delivered on 30th November, 2023.
22. The Director of Occupational Safety and Health Services did not involve the Respondent in the processes leading to the assessed sum. Furthermore, the Director failed to conduct inquiries and investigations as required by law. He indeed erred when he calculated the compensation based on a salary of Kshs.271, 691, whereas the deceased's gross salary was actually Kshs. 171, as contained in Form 1, dated 18th February 2020.
23. The Respondent denies that there is an office of the Human Resource Manager within its establishment; therefore, the allegations that the occupant of such an office received the assessment report from the Director of Occupational Safety and Health Services on behalf of the Respondent are untrue.
24. The Respondent argues that the decision of the Director of Occupational Safety and Health Services is not shielded from the interrogation of this Honourable Court, just like the other offices established under the [Labour Institutions Act](#). This Honourable Court has to satisfy itself that the said decision was arrived at in compliance with the statutory procedures as provided under the Work Injury Benefit Act, and the complaints raised by the aggrieved party must also be addressed.
25. Further, the applicant has moved this Honourable Court pursuant to Sections 87 and 90 of the [Employment Act](#) and Rule 17 of the Employment and Labour Relations Court (Procedure), Rules, 2016, which are not relevant to the application and correct provisions of the law.
26. Under Rule 17 of the Employment and Labour Relations Court (Procedure), Rules, 2016, no summary judgment can issue. Because there is no substantive Cause filed nor is there intended to be a Cause filed, this application must therefore fail.



27. The subject matter of this instant application does not arise from a contract of employment. As such, Sections 87 and 90 of the *Employment Act* are totally inapplicable. The Respondent argues further that this Honourable Court has no jurisdiction to entertain, hear and determine the instant application under those provisions.
28. The applicant initiated this application without fully disclosing material information within her knowledge. She failed to disclose that she had previously filed a similar application before this Honourable Court in Miscellaneous Application No. E 031 of 2023. This Honourable Court struck out the mentioned proceedings by the ruling delivered on 30th November, 2023, when it remitted the parties back to the Director in accordance with Sections 6 and 34 of WIBA.
29. It is contended that, by the Director's letter dated 13th December 2023, it is suggested that the applicant wrote a letter to the Director dated 11th December 2023, regarding the above-referenced ruling. While the court directed both parties to revert to the Director, the applicant proceeded without re-engaging the Respondent, as was directed in the said ruling.
30. It becomes clear that the Director and the applicant did not want to involve the Respondent in the conduct of inquiries and investigations related to the subject matter as required by law. Instead, they told the Respondent that the responsibility was theirs to make payments of any amount, regardless.
31. The Respondent asserts further that the Director declined to enforce and or act on the direction of the said ruling delivered by this Honourable Court.
32. The Director overstepped his mandate when, in his letter dated 13th December 2023, he directed dependents on how to proceed after determining the quantum of payments.
33. The applicant has not or did not appeal against the order issued in Miscellaneous Application No. E 031 of 2023 and the said ruling, and this Honourable court cannot be called upon to sit on the appeal from a court with concurrent jurisdiction.

The Rejoinder by the Applicant

34. Through her further affidavit sworn on 23rd April 2024, the Applicant states that the Respondent reported the matter to the Director and filed Dosh Form 1 on behalf of the deceased. It cannot be available to them to allege that they are strangers to the proceedings before the Director.

Through their letter dated 20th June 2022, the Respondent requested that the beneficiaries of the deceased be identified and a certificate of dependency issued. The Director, on 18th March 2022, wrote to the Deputy County Commissioner, Borabu Sub-County, where the deceased hailed from, asking the DCC to identify the dependents. The DCC complied by submitting a certificate of dependency to the Director. The details provided on the Dosh form by the Respondent indicate the deceased's position as that of an accountant. In any event, whether or not he was is not a matter that can be canvassed in the current application, which is solely for the adoption of the Director's award. She further argues that the Respondent reported the accident and the Director determined liability against them. The Respondent participated in the entire process, and in any case, a work injury is a strict liability claim that does not require an employee to prove liability against the employer. This Court has no jurisdiction to consider issues of liability, as the Director determined them. The Respondent is deliberately misleading the Court. On 16th November 2022, the Director wrote to the Respondent, and the Respondent received the same. In the letter, the Director urged him to settle the claim. On 20th June 2020, Simon. K. Sang wrote to the Director and stated;

“We are in receipt of compensation for the deceased's family members as indicated above.



As we arrange for payments, please let us know who the agreed bona fide beneficiaries are, because there is an issue we are told about in terms of the administration of the estate as required by the law whenever there are disputes of any nature.”

35. Having received the letter and responded to it, he cannot claim that he only learnt about the assessment's existence when he was served with submissions in Application No. E 131 of 2023. The Miscellaneous Application No. E 031 of 2023 was struck out because the Applicant had not submitted a certificate of dependency. The Court ruled that since the application was filed before obtaining the certificate of dependency, it was filed prematurely. The Court referred the matter back to the Director to verify the dependents.
36. She further states that after the Court's ruling, her Counsel wrote a letter to the Director and informed him of the Court's order.

After securing the certificate of dependency, her only option was to file a new application, namely the current one, rather than revert to the application that had been struck out. In the Application Number E131 of 2023, the Court only directed the Director to issue a certificate of dependency, not to conduct inquiries or investigations that he had already done as required by law.
37. I have carefully considered the Applicant's application, the grounds on which it is based, the supporting affidavit, the further affidavit, and the Respondent's affidavits, and the following issues arise for determination.
 - a. Whether this Court has the jurisdiction to entertain the Applicant's application.
 - b. What is the impact of the ruling in Miscellaneous Application No. 131 of 2023 on the Applicant's instant application?
 - c. Is the Applicant entitled to the orders sought?
38. There is no dispute that the [Work Injury Benefits Act](#) does not include a mechanism for enforcing the Director's awards or decisions. Usually, if such a mechanism is not specified within the substantive Act, as is the case with the [Work Injury Benefits Act](#), it is normally provided for in the Regulations to the Act. The unfortunate part is that nearly 17 years after the Act was enacted, no Regulations have been drafted or put into effect.
39. For a long time, there have been two schools of thought on whether this court has jurisdiction to entertain proceedings for orders enforcing the Director's awards and decisions. One school of thought held that the Employment and Labour Relations, in the context of the [Work Injury Benefits Act](#), is an appellate forum and does not have original jurisdiction. Allowing it to entertain such proceedings would be tantamount to granting it original jurisdiction, which is contrary to the stipulations of section 16 of the [Work Injury Benefits Act](#).
40. The other school of thought argued that, due to the gap in law, courts cannot simply remain passive and allow successful parties with favourable awards or decisions to suffer without a remedy. Judicial craft must intervene. Otherwise, the constitutional right to access to justice for such parties would remain an unfulfilled dream. Further, according to this school of thought, Section 12 of the Employment and [Labour Relations Act](#) grants the court broad jurisdiction to enable it to adopt the Director's awards or decisions.



41. To settle this unsettled state and resultant confusion, Rule 69 of this Court’s Procedure Rules, 2024, provided;
- “ 1. Where parties have entered into a conciliation, negotiation or mediation agreement, or are bound by an arbitral award or a lawful decision reached in Alternative Justice Systems, a party may file the award, decision or agreement for adoption and enforcement as an order of the Court.
2. An application under sub-rule [1] shall be by way of a miscellaneous application instituted through a notice of motion supported by an affidavit exhibiting the award, decision, or agreement together with all relevant documents.”
42. No doubt, any decision or award arising from the proceedings before the Director stems from an Alternative Justice System and should therefore be adopted under this Rule.
43. Affirming various decisions by judges of this court, and more specifically those aligned with the second school of thought, the Court of Appeal in the case of Charles v Cheto [2025] KECA 784 [KLR] has recently held;
- “As the learned Judge correctly observed, there is a lacuna in the law with regard to the procedure for the enforcement of the Director’s decision in that there is no express provision of the WIBA stipulating the procedure for the enforcement of the Director’s award. Be that as it may, Employment and Labour Relations Courts have aptly held that enforcement of the Director’s decisions lies with the ELRC as the court with the jurisdiction to deal with employment and labour relations claims and connected purposes as provided for under sections 86 and 89 [formerly 87 and 90] of the *Employment Act*.”
44. The Court notes that the Respondent alleges that it is a stranger to the proceedings conducted before the Director, the Director exceeded his mandate, and the Director deliberately ignored the ruling in Application No—E 131 of 2023. These matters cannot be addressed under the instant application. However, a judicial review application may be considered if they are convinced to challenge the Director’s actions and/or inactions on these grounds. Also see the Charles case [supra].
45. By reason of the foregoing premises, I am not convinced that this Court doesn’t have jurisdiction to entertain the instant application.
46. As counsel for the applicant correctly submitted, the Court in Application No. 131 of 2023 found that the application was filed prematurely and accordingly struck it out. The Court stated that the procedures outlined under sections 6 and 34 of the Act had not been followed. Consequently, the Court referred the parties back to the Director for compliance with the prescribed procedures. The Court did not set aside the Director’s decision, nor did it order the entire process to start again, commencing inquiries. Therefore, the ruling in the said application has no adverse effect on the current application.
47. Undoubtedly, the Respondent did not lodge an appeal against the Director’s award. This Court has no choice but to grant the Applicant’s application with costs.

READ SIGNED AND DELIVERED THIS 17TH DAY OF JULY 2025.

OCHARO KEBIRA

JUDGE.

