



**Lukano (Suing as the Legal Representative of the Estate of Evans Siema Lukano
(Deceased)) v Director of Occupational Health and Safety; Jamly Services
& another (Interested Parties) (Judicial Review Application E133 of 2021
[2022] KEHC 13092 (KLR) (Judicial Review) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13092 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E133 OF 2021
AK NDUNG’U, J
SEPTEMBER 22, 2022**

BETWEEN

**KIZITO LUKANO APPLICANT
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF EVANS SIEMA
LUKANO (DECEASED)**

AND

DIRECTOR OF OCCUPATIONAL HEALTH AND SAFETY RESPONDENT

AND

JAMLY SERVICES INTERESTED PARTY

GURDEV ENGINEERING INTERESTED PARTY

RULING

1. The applicant has moved this court *vide* a notice of motion dated October 27, 2021 seeking orders;
 1. That this honourable court be pleased to grant the applicant an order of *mandamus* compelling the respondent to fulfil his public duty as stipulated under the Work Injuries Benefits Act, 2007 and conduct the necessary enquiries as to the applicant’s claim on behalf of the estate of Evans Siema Lukano (deceased)
 2. That costs of this application be provided for
2. The applicant before this court is the legal representative to the estate of Siema Lukano who was his son who died on October 21, 2018 due to a fatal fall at Barclays plaza while in the course of his employment.



The applicant reported the particulars of the said accident to the director as is required by the law and so did the 2nd interested party.

3. It is the applicant's case that a demand was issued by the director to the 1st interested party to fill the DOSH1 form which form is yet to be filled three (3) years since the claim was lodged. The director is faulted for giving the applicant's counsel flimsy reasons as to why no further action has been taken since then.
4. Further that as provided under section 26 of the [Work Injuries Benefits Act 2007](#), in the event of a fatality, a claim for compensation ought to be lodged within 1 year after the same occurred and paid out within 90 days of the director deciding the quantum.
5. The *ex parte* applicant contends that since 2018, he has been following up with the director in regards to the said claim in which case the director erroneously misrepresented to the applicant's lawyers before the filing of this case that the DOSH 1 form had not been filled by either employer thus presenting a challenge. Further, that the procedural law requires that when the DOSH 1 form is properly filled out, the director must first determine the quantum before sending the form to his employer or insurance for settlement.
6. It was deponed that where the DOSH 1 form is filled appropriately, the procedural law dictates that the director determines quantum then sends the same to the employer or his insurance for settlement.
7. The *ex parte* applicant also contends that while both interested parties were covered by their respective accident insurance covers, none of them can forward the compensation claim duly filled by the director for settlement.
8. Given that the employer filed the claim three years ago (thereby fulfilling his statutory duty) and that the applicant has been following up on the claim as the dependent of the deceased, it can only be inferred that the applicant had a reasonable expectation that the respondent would fulfill his obligation and calculate the amount of the claim after the employer reported the accident and further follow-up by the applicant. Failure of the respondent to determine compensation according to the *ex parte* applicant flies on the face of the legitimate expectation of the applicant as was held in the case of [Communication Commission of Kenya & 5 Others vs Royal Media Services & 5 Others](#).
9. On the Order of *Mandamus*, the cases of [Republic v National Employment Authority & 3 others ex-parte Middle East Consultancy Services Limited](#) [2018] eKLR, [Republic vs Kenya National Examinations Council ex parte Gathenji and 9 Others](#), [1997] eKLR, and [Mureithi & 2 Others vs Attorney General & 4 Others](#) [2006] 1 KLR (E&L) 707.
10. The respondent filed a replying affidavit dated November 8, 2021 sworn by Justus Bosire Nyakego the deputy director of Occupational Safety & Health.
11. In the affidavit the respondent contends that pursuant to section 20 of the [Work Injury Benefits Acts, 2007](#) compensation in respect of fatal injuries of an employee does not form part of the deceased's employee's estate.
12. The respondent's case is that County Occupational Safety and Health Officer, Nairobi county received a notice by employer of an employee form DOSH1 duly completed and signed by the employer namely James Ochieng Osire containing details of a fatal accident on October 21, 2018 involving an employee by the name Evans Lukano at Barclays plaza along Loita street, Nairobi.
13. It is contended that the employer who had completed the DOSH1 was not registered with the registrar of companies which made it difficult to locate the permanent physical address. Subsequently, that in



an effort to obtain the details, the directorate made contact with Gurdev engineering and construction works limited through the company's safety and health officer, Mr Ben, and the company's advocate, Mr E Ochieng on November 25, 2020 and 14th January, where it emerged that the deceased employer's physical address was unknown and as such it was not possible to lodge documents for compensation in respect of the deceased.

14. The respondent contends that neither the applicant nor the 2nd interested party have reported particulars of the accident as per the statute as is alleged by the *ex parte* applicant. It is also contended that due process was not followed to warrant the director being a respondent in the suit as the 1st interested party did not send/lodge any notice of the accident involving the deceased at any given time as prescribed in section 21 of WIBA,2007.

Determination

15. I have considered the pleadings and the arguments advanced by the parties herein and one issue crystalizes for determination and this is whether the *ex parte* applicant has satisfied this court to grant the order sought in the application.
16. It is not in contention that the late Evans Siema Lukano died from a fatal fall while working for the 1st interested party herein, Jamly services a company that was sub-contracted by Gurdev engineering the 2nd interested party.
17. Further that pursuant to section 22 of the Work Injury Benefits Act (WIBA) a report of the accident was made by one James Ochieng on November 2, 2018 as seen in 'JBN1' produced by the respondent in its replying affidavit. It is also evident that despite claiming that the *ex parte* applicant had not complied with section 21 of the act, the respondent confirms that the County Occupational Safety and Health Officer, Nairobi county received a notice by employer of an occupational accident. Further, the *ex parte* applicant has also indicated that his efforts to lodge a notice were rendered futile when he was informed that one had already been lodged by the deceased's employer.
18. Upon lodging of the notice pursuant to section 23 of the Work Injury Benefits Act the director was required to make necessary enquiries to decide upon any claim or liability in accordance with this act. The section provides as follows;
 - “ 23. (1) After having received notice of an accident or having learned that an employee has been injured in an accident the director shall make such inquiries as are necessary to decide upon any claim or liability in accordance with this act.
 - (2) An inquiry made under subsection (1) may be conducted concurrently with any other investigation.
 - (3) An employer or employee shall, at the request of the director, furnish such further particulars regarding the accident as the director may require.
 - (4) A person who fails to comply with the provisions of subsection (3) commits an offence.”
19. I have had an opportunity to look at the document produced by the respondent herein and note that the same contains a WIBA registration No and I find that although the respondent's claims that the directorate does not have registration information about the deceased's employer, the said James Ochieng had indicated a WIBA registration No which is given upon one filling and returning to the directorate the application for registration form, DOSH 21, together with a self-assessment form that gives the general occupational safety and health standards of the workplace. A cursory look at the form



DOSH 21 shows that the said forms requires one to provide their physical location together with various contact details.

20. I also note that the respondent herein has not alluded to having tried to reach out to the employer through the telephone number provided on the notice neither has it alluded to having visited the premises indicated by the said employer during the WIBA registration with director of occupational health and safety services in the Ministry of labour and social protection.
21. I also find it implausible that the 2nd Interested party herein having been the party that sub-contracted the 1st interested party for its services would fail to have any contact with the 1st interested party yet they were working together.
22. The circumstances under which a judicial review order of *mandamus* can be issued was discussed in the case *Republic v Kenya National Examinations Council ex parte Gathenji & 8 Others* Civil Appeal No 234 of 1996, where the Court of Appeal cited with approval, *Halsbury's Law of England*, 4th Edition Vol 7 p 111 para 89 thus:

“The order of mandamus is of most extensive remedial nature and is in form, of a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right and it may issue in cases where although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.”

23. Respondent has failed to carry out a public duty and has failed to demonstrate that the office has exhausted all avenues available to it in undertaking its enquiry and I find and hold that the *ex parte* applicant's application is merited and I allow it in its entirety.
24. I make the following orders;
 - i. That an order of *mandamus* compelling the respondent to fulfill his public duty as stipulated under the *Work Injuries Benefits Act*, 2007 and conduct the necessary enquiries as to the applicant's claim on behalf of the Estate of Evans Siema Lukano (deceased) is hereby granted.
 - ii. That the *ex parte* applicant is granted costs of the application.

DATED, SIGNED AND DELIVERED AT THIS 22ND DAY OF SEPTEMBER, 2022

A. K. NDUNG'U

JUDGE

