



**Republic v Westbuild General Contractors Limited; Muhura (Exparte) (Application E023 of 2023) [2024] KEHC 1 (KLR) (Judicial Review) (2 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 1 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
APPLICATION E023 OF 2023  
J NGAAH, J  
JANUARY 2, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**WESTBUILD GENERAL CONTRACTORS LIMITED ..... RESPONDENT**

**AND**

**MARY NGINA MUHURA ..... EXPARTE**

**RULING**

1. The applicant’s application is a motion dated 3 March 2023 expressed to be brought under section 8. (2), (3) and (4) of the [Law Reform Act](#) cap. 26; [Work Injury Benefits Act](#), cap. 236 and the [Fair Administrative Action Act](#), 2015. The applicant has also invoked Order 53 Rule 1 of the [Civil Procedure Rules](#). The application seeks the order of *mandamus* against the respondent. The prayer for the order is couched in the following terms:

“ 1. That this Honourable Court be pleased to issue order of *mandamus* to compel the respondent to immediately and within 7 days of the order to furnish the correct information and/or fill and submit to the interested party DOSH form 1 (prescribed form) containing the correct amount of remuneration being Kshs 85,000 due to the *ex parte* applicant to enable the interested party to make an assessment for compensation under [WIBA](#), 2007 to the *ex parte* applicant.”

2. The application is based on a statutory statement dated 16 March 2023 and an affidavit sworn on even date by the applicant verifying the facts relied upon.



3. The applicant is the wife of Joseph Muhura Njuguna (deceased) who until his death was the respondent's employee. The late Njuguna died while in the course of his employment on 11 June 2017. The death arose out of a road traffic accident involving the respondent's motor vehicle registration No KBK 349X which the deceased was driving at the material time.
4. The applicant's case is that under the *Work Injury Benefits Act*, in the event of an accident involving an employee in the course of employment, the respondent is required to provide proper and accurate information to the interested party so that the latter can compute the remuneration due to the employee or his dependent.
5. As far as the late Njuguna's case is concerned, the respondent is alleged to have disregarded the provisions of *Work Injury Benefits Act* and furnished the interested party with what the applicant has described as "erroneous information regarding the deceased's earnings." To be precise, in a report filed by the interested party to the respondent, the total monthly salary or wage of the deceased was indicated as Kshs 20,000. This amount does not include allowances or overtime payments that were payable or paid to the deceased.
6. Despite the fact that the respondent did not include the allowances and overtime payments in the information given to the interested party, the latter proceeded to make an assessment for compensation based on the figure of Kshs 20,000/= and awarded the applicant a total sum of Kshs 1,920,000/= as compensation.
7. On 23 May 2022, the applicant filled a form of objection in the prescribed form and filed it with the interested party to dispute the assessment for compensation based on the amount of Kshs 20,000. In support of her objection, the applicant furnished the interested party with such documents as certified bank statements of the deceased demonstrating the amount he received as his monthly salary while in the employment of the respondent. According to this information, the deceased monthly salary was Kshs 85,000/= and not 20,000/=.
8. The respondent is alleged to have refused to furnish the interested party with the right information hence the instant application.
9. In response to the motion, the respondent filed a notice of preliminary objection contending that this Honourable Court does not have jurisdiction to dispose of this matter and, secondly, that the suit is res judicata, in any event. It is this preliminary objection that is the subject of this ruling.
10. On the question of jurisdiction, the learned counsel to the respondent has invoked section 52 of the *Work Injury Benefits Act* for the submission that the dispute ought to be determined by the Director of Occupational Safety and Health Services, apparently, in the Ministry of Labour and not by this Honourable Court. This section reads as follows:

52. Director's reply

- (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.

The "director" here is defined in section 2 of the *Work Injury Benefits Act* to mean "the Director of Occupational Safety and Health Services".



11. This provision is said to have been interpreted and applied in *Attorney General v Law Society of Kenya & another* (2017) eKLR where the Court of Appeal held that the provisions under the *Work Injury Benefits Act* require questions of injuries subject to the Act to be adjudicated upon by the Director of Occupational Safety and Health Services and that an aggrieved party is expressly barred from instituting court proceedings with respect to such injuries except as provided for under the Act. It was urged that the court further held that the right to approach court at first instance is curtailed and that the Employment and Labour Relations Court is designated as an appellate court from the decision of the Director under section 52(2) of the Act.
12. This court of Appeal decision was upheld by the Supreme Court in *Law Society of Kenya v Attorney-General & another* (2019) eKLR and has been followed by the Employment and Labour Relations Court in *Manuchar Kenya Limited v Dennis Odhiambo Olwete* (2020) eKLR and in *Saidi Mohamed v Diamond Industries Limited* (2018) eKLR.
13. On the question of *res judicata*, it is submitted that the applicant had sought to privately prosecute the respondent in Miscellaneous Criminal Application No E141 of 2022 where the issue of production of information by the respondent, which is the same issue in these proceedings, had been addressed.
14. I need not dwell on this second limb of the preliminary objection because, ordinarily, the existence of criminal proceedings would not be a bar to civil proceedings. Under section 193A of the *Criminal Procedure Code*, the two processes can run simultaneously. This section reads as follows:
  - 193A. Concurrent criminal and civil proceedings  
Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.
15. I am minded that judicial review proceedings are proceedings *sui generis* to the extent that they are neither civil nor criminal but there is no reason why the rationale behind section 193A should not be applicable to judicial review proceedings. The court in the latter proceedings will, of course, have to decide whether judicial review reliefs would be available to an applicant who has opted for an alternative means of addressing his grievances.
16. In any event, the criminal proceedings to which the respondent has made reference, have not been exhibited and neither has the court been informed of their fate.
17. But there is some merit on the question whether this Court's judicial review jurisdiction has been properly invoked to determine the applicant's dispute.
18. According to the applicant, section 52 of the *Work Injury Benefits Act* is not applicable to her case because she is not appealing against the decision of the interested party. To quote the learned counsel for the applicant on this question, he has submitted as follows:

“On whether the present application offends the said provision, we submit that Section 52 of the *WIBA* 2007 only applies to appeals on decisions of the interested party. Further, the present application neither contests any decision of the interested Party nor have any prayers been sought against the 1<sup>st</sup> interested party for section 52 of *WIBA* to apply. For the avoidance of doubt, the (sic) upon objection to the interested party initial assessment being



lodged, the interested party has never made any decision that can be subject to an appeal under section 52 of *WIBA*.”

19. One thing that comes out clearly out of this submission is that the applicant filed an objection to the Director of Occupational Safety and Health Services. For the avoidance of doubt, the applicant has also sworn in paragraph 10 of the affidavit verifying the facts relied upon that indeed she filed an objection to the Director’s assessment of her late husband’s dues. This deposition reads as follows:
  10. That on 23/5/2022 I therefore filled a form of objection in the prescribed form and filed it with the 1<sup>st</sup> interested party to dispute the assessment for compensation using the figure of Kshs 20,000. I further furnished the interested party with certified bank statements of the deceased, clearly indicating the amount of pay he received as monthly salary from his employer.
20. There is no doubt that in filing the objection as she did, the applicant must have been invoking section 51 of the Act which provides for filing of objections against decisions of the Director. The section reads as follows:
  51. Objections and appeals against decisions of the Director
    - (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 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.
21. Section 52 of the Act prescribes the timeline within which the Director ought to respond to the objection and, further, states expressly that only an appeal to the industrial court (or the Employment and Labour Relations Court) lie against the decision of the Director. It reads as follows:
  52. Director’s reply
    - (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.
22. So, when the applicant invoked section 51 of the Act in filing her objection against the decision of the Director, she was bound by the provisions of section 52 to appeal against the decision of the Director to the Employment and Labour Relations Court if she was aggrieved by the Director’s decision.
23. It is in the appeal to the Employment and Labour Relations Court that the applicant would argue, for instance, that the Director failed to exercise his powers properly under section 23 of the Act and make such inquiries as were necessary to decide upon the applicant’s claim in accordance with this Act or to enforce the obligation upon the respondent to furnish such further particulars regarding the accident in which the deceased died.
24. It is also in the appeal to the Employment and Labour Relations Court that the applicant could properly argue that in calculating the compensation, the interested party failed to take into account



the provisions of section 37 of the Act and consider the allowances and overtime payments due to the deceased. Section 37 reads as follows:

37.

- (1) In order to determine compensation, the earnings of an employee are deemed to be the monthly rate at which the employee was being remunerated by the employer at the time of the accident, including—
  - (a) the value of any rations, living quarters or both supplied by the employer to the employee to the date of the accident or report of disease;
  - (b) allowances paid regularly; and
  - (c) any overtime payment or other special remuneration of a regular nature or for work ordinarily performed, but excluding—
    - (i) payment for intermittent overtime;
    - (ii) payment for non-recurrent occasional services;
    - (iii) amounts paid by an employer to an employee to cover any special expenses; and (iv) ex gratia payments whether by the employer or any other person.
- (2) If an employee's remuneration is not consistent or is determined in accordance with a rate calculated on the basis of work performed, the employee's earnings shall be calculated on the basis of average remuneration for similar work on the same conditions of remuneration for the period of twelve months prior to the accident.
- (3) If by reason of the short duration of the service of an employee with his employer it is impracticable to calculate the employee's earnings in such service, the earnings shall, if possible, be calculated on the basis of the amount which—
  - (a) the employee with similar work at the same conditions of remuneration earned with another employer during the twelve months immediately prior to the accident; or (b) during the twelve months immediately prior to the accident was earned by other employees of the first-mentioned employer with similar work and on the same conditions of remuneration, or would have been earned by the employee during the previous twelve months had the employee been so employed.
- (4) If an employee has entered into contracts of service with two or more employers and has in terms of those contracts, worked at one time for one employer and at another time for another employer, the employee's earnings shall be calculated as if the earnings under all such contracts were earnings in the employment of the employer for whom the employee was working at the time of the accident.
- (5) If in the opinion of the Director it is not practicable to calculate the earnings of an employee in accordance with subsections (2), (3) and (4), the Director may calculate those earnings in such manner as the Director may deem equitable, but with due regard to the principles laid down in those provisions.
- (6) This section shall not be construed as prohibiting the calculation of earnings on a weekly basis, but where earnings are so calculated the monthly earnings shall be



calculated, as equal to four and one-third times the amount of such weekly earnings.  
(Emphasis added).

25. Having initiated proceedings before the Director in accordance with the section 51 of the Act, the applicant cannot be heard to say that this suit is all about the respondent. At the very least, the applicant cannot have filed an objection under section 51 of the Act and at the same time instituted parallel proceedings in this Honourable Court by way of judicial review seeking the same reliefs that the Director or the Employment and Labour Relations Court is entitled to grant.
26. In any event considering the appellate mechanism provided under the Act, judicial review reliefs would not be available to the applicant. This question of whether judicial review proceedings would be taken as an alternative to an appeal has been discussed by David Foulkes in his book *Foulkes Administrative Law*, 7<sup>th</sup> Edition. Citing the case of *Customs and Excise Commissioners v J.H. Corbitt (Numismatists) Ltd* (1981) AC 22, (1980) 2 ALL ER 72, the learned author noted as follows:
- “It is to be noted that an appeal lies from, whether to an appellate tribunal or to a court of law, only when and to the extent that statute so provides, and the powers of the appeal body to review, reconsider etc. the decision of the tribunal likewise depend on the statute.
- To be contrasted with appeal is judicial review. The decision of tribunals, as bodies exercising judicial functions, have always been subject to review by the courts (that is, to judicial review) by means of the order of certiorari. This enables the court to quash a decision on certain grounds. Whereas appeal lies only when and to the extent that statute provides, the court’s common law power of judicial review exists unless it is take away or limited by statute. Thus where no appeal to the court is provided by statute the only possible challenge in the courts is by way of judicial review...” (at p.150-151).
27. And no doubt this was the principle applied by Lord Wright in *General Medical Council v Spackman* (1943) AC627, at 640 where he stated as follows:
- “I have observed that Parliament has not provided for any appeal from the decisions of the council. The only control of the court to which the council is subject (apart from proceedings by way of *mandamus*) is the power which the court may exercise by way of certiorari. Certiorari is not an appellate power.”
28. It follows that an appeal will lie where a statute, as in the instant case says so. Where it is not provided, judicial review would set in. In any event, by its very nature, judicial review comes into play where there is no other alternative form of remedy that is as convenient, beneficial and effective. This principle was well articulated by Lord Widgery CJ in *R v Peterkin, ex Soni* (1972) Imm AR 253 where the learned judge noted as follows:
- “The prerogative orders form the general residual jurisdiction of this court whereby the court supervises the work of inferior tribunals and seeks to correct injustice where no other adequate remedy exists, but both authority and common sense seem to me to demand that the court should not allow its jurisdiction under the prerogative orders to be used merely as an alternative form of appeal when other and adequate jurisdiction exists elsewhere”.  
(Emphasis added).
29. The applicant cannot argue that no other adequate remedy exists when it is apparent from her own pleadings and affidavit that she has, as a matter of fact, embraced the alternative process to address



her grievances. She cannot invoke the judicial review jurisdiction of this Honourable Court as an alternative appeal process.

30. As I conclude, it is not clear to me why the applicant decided to avoid the Employment and Labour Relations Court and chose to file her suit in this court. I say so because the dispute arises out of labour and employment related issues. According to section 12. (1) (a) of the *Employment and Labour Relations Court Act* No 20 of 2011 the appropriate court for determination of such disputes is the Employment and Labour Relations Court. This section reads as follows:

On jurisdiction of the court

12.

- (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the *Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including —
- (a) disputes relating to or arising out of employment between an employer and an employee;

31. Be that as it may, I find the applicant's application to be misconceived and an abuse of the process of this Honourable Court. I uphold the respondent's preliminary objection and I hereby strike the suit out. Parties will bear their respective costs. It is so ordered.

**SIGNED, DATED AND POSTED ON CTS ON 2 JANUARY 2024**

**NGAAH JAIRUS**

**JUDGE**

