



**Kilonzo (Suing as the Administrator and Personal Representative of the Estate of Benjamin Kyalo Masila) ((Suing as the Administrator and Personal Representative of the Estate of Benjamin Kyalo Masila)) v Albeity Logistics Limited & another (Miscellaneous Application E004 of 2024) [2024] KEELRC 13629 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13629 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
MISCELLANEOUS APPLICATION E004 OF 2024**

**M MBARŪ, J**

**MAY 9, 2024**

**BETWEEN**

**MARY WAVINYA KILONZO [SUING AS THE ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF BENJAMIN KYALO MASILA] ..... APPLICANT**

**(SUING AS THE ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF BENJAMIN KYALO MASILA)**

**AND**

**ALBEITY LOGISTICS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**FEISAL ISLAM ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicant filed an application dated 17 January 2024 seeking orders that;
  1. This court be pleased to adopt the award of the Director of Occupational Safety and Health Services issued on 8 February 2023 as a judgment of the Court for purposes of execution.
  2. Consequently, a decree be issued under the award of the Director of Occupational Safety and Health Services against the respondents for the sum of Ksh.982,080;
  3. A declaration do issue that the respondents have committed an offence contrary to Section 26(6) of the *Work Injury Benefits Act* for failing to timely compensate the applicant.
  4. The court be pleased to fine the respondent Ksh.500,000 or commit the second respondent to imprisonment for a term of one year or both.



5. Costs of this application be borne by the respondents.
2. The application is supported by the affidavit of the applicant and on the grounds that she is the administrator of the Estate of the late Benjamin Kyalo Masila formerly employed by the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent is a director. The deceased sustained a fatal injury while at work and succumbed to the same on 22 July 2022. The applicant reported to the Director of Occupational Safety and Health Services (Director) and DOSH form 1 was issued. The respondents filled DOSH 1 and the director assessed compensation at Ksh.982, 080 but the 1<sup>st</sup> respondent refused to pay.
3. The applicant also aver that despite every effort being put in place to seek payment, the respondents have refused to pay. The 2<sup>nd</sup> respondent as the director of the 1<sup>st</sup> respondent should be committed to paying a fine or imprisonment or both. This is allowed under Section 26(6) of the [Work Injury Benefits Act, 2007 \(WIBA\)](#).
4. In the Further Affidavit, the applicant aver that this court has jurisdiction to hear and determine her application on the merits. In the case of *Joash Shisia Cheto v Theport Patrick Charles* [2022] eklr the court held there is jurisdiction to enforce the director's award.
5. In reply, the respondents filed a Notice of Preliminary Objections on the grounds that the application is incompetent and defective, the application cannot stand without substantive pleadings and the court has no power to enforce awards made by the director for work injury. The 2<sup>nd</sup> respondent cannot be legally answerable at a personal level for the injury committed by a company, if at all.
6. The respondent also filed the Replying Affidavit of the 2<sup>nd</sup> respondent who avers that the court has no jurisdiction to handle the application by the applicant dated 17 January 2024. This assumed jurisdiction has been adjudged by the Supreme Court in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 Others* [2012] eklr. The court cannot assume jurisdiction through craft or innovation unless given under the [constitution](#) or statute. Jurisdiction cannot be exercised to bridge a lacuna in the law.
7. The 2<sup>nd</sup> respondent aver that there is no provision of the law in WIBA, the [Employment and Labour Relations Court Act](#) or the [Employment Act](#) which allows the court to enforce the compensatory awards of the director. Section 52(2) of the WIBA only allows the court to deal with appeals arising out of the award of the director.
8. In the case of *Attorney General v Law Society of Kenya & Another* [2017] eKLR the Court of Appeal held that Sections 51 and 52 of WIBA provide for an appellate system. An objector is allowed to appeal the decision of the director to the court. The appellant court under WIBA cannot be the same court for enforcement. There is no enforcement mechanism under IWBA and such cannot be devised through craft to assist litigants as held in *Richard Akama Nyambane v Leg Maltuoro Spa Cause No.4 of 2020 (Nakuru)*.
9. The applicant has not filed a claim herein. There is no substantive application founded under Section 87 of the [Employment Act](#).
10. Section 26(6) of WIBA only provides for criminal sanctions as a remedy when an employer does not make good the award by the director. The action herein cannot be civil at the same time and this is not a criminal court. This court cannot convict the 2<sup>nd</sup> respondent for offences committed by the 1<sup>st</sup> respondent which is a limited liability company. The application should be dismissed with costs.
11. Both parties attended and filed written submissions and made oral submissions in court.



12. The applicant submitted that this court has inherent jurisdiction under Article 159 of the constitution to apply substantive justice. Upon the award of the director, there is no enforcement mechanism under WIBA but courts have applied justice and allowed parties to move the court through similar applications as herein done. In the case of *Elijah Kisyinga Ndende v Manager Zahkem International Construction Ltd [2022] eKLR*, the court held that the WIBA is silent on the procedure to be followed in enforcing the director's award. The law was never intended to deny an employee whose employer fails to pay the award as assessed to go without a remedy.
13. In the case of *Law Society of Kenya v Attorney General & another Petition 4 of 2019*, the Supreme Court held that the director has quasi-judicial powers but is subject to the overriding authority of the court. Through Practice Directions thereof through Gazette Notice No. 5476, the court was granted jurisdiction to address matters as herein.
14. The applicant submitted that there is the exhaustion of the preliminary procedures under WIBA with an award of compensation and what is pending is a court order and decree thereof. In the case of *Josiah Shisia Cheto v Theport Patrick Charles [2022] eKLR*, the court held that WIBA has no enforcement mechanism against reluctant employers and an applicant is allowed to move the court under its inherent jurisdiction under Article 162 of the constitution and Section 12 of the Employment and Labour Relations Court Act. the court cannot be restricted to matters under Section 52 of WIBA only.
15. In the case of *Jared Ingling Obuya v Handicap International [2021] eKLR*, the court held that without express provisions for enforcement under WIBA, applying a purposive interpretation of WIBA under Article 162(2) of the constitution is necessary. In this case, the court has the jurisdiction to allow the orders sought.
16. The applicant submitted that under Section 26(6) of WIBA, this court is allowed to punish an employer who does not make payment as per the director's award. The respondents are liable in law and have refused to make payment and a sanction should be issued.
17. The respondents submitted that this court lacks jurisdiction to enforce awards by the director under the WIBA. Without jurisdiction in the constitution or the law, it cannot be applied under any craft or innovation as held in the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR*.
18. Section 52(2) of WIBA only allows the court to deal with appeals arising from an award of the director. The court cannot enforce the award and also be the appellate court as held in the case of *Attorney General v Law Society of Kenya & Another [2017] eKLR* the respondents submitted that in the case of *Musembi v Great Yaduo Industry Limited Miscellaneous Case E080 of 2022*, the court in dealing with a similar application held that there is a lacuna in the WIBA with regard to enforcement of the director's award but this gap cannot be filled through craft and assumption of jurisdiction. The drafter of the law intended to have the director address work injury claims and the court address appeals. The application before the court denies the court the jurisdiction to grant as applied.
19. The respondent submitted that there is no criminal jurisdiction for the court to punish the respondents or commit the 2<sup>nd</sup> respondent to pay a fine, jail and take liability under Section 26(6) of WIBA. Such a mandate cannot apply since the principles and standards required to find criminal liability and sanction of fine or jail term are limited to a criminal court.
20. If the courts have any jurisdiction to enforce the director's award, then the magistrate's court should be the appropriate court to address the same under the doctrine of exhaustion or avoidance. In the case of *Edwin Songoroh & Another v Amony Koech Yatich & Another [2021] eKLR* the court held that



the director's award is enforceable by way of a miscellaneous application or a memorandum of claim before the magistrate's court. In the case of *Arafa Mohamed [suing as the legal representative to the Estate of Omar Khatib Abdulkadir – Deceased] v Dola Feeds (K) Limited [2022] eKLR* the court held that a prayer for criminal sanction as a way of enforcing award by the director for work injury should follow the criminal justice system.

## Determination

21. On the application dated 17 January 2024, the same seeking for the enforcement of the director's award following a work injury, from the pleadings, submissions and issues highlighted by the parties, the issues which emerge for determination are;
  1. Whether the court has jurisdiction to enforce the director's awards under WIBA;
  2. Whether the court has jurisdiction to sanction an employer who fails to make payment following the director's award under Section 26(6) of the WIBA;
  3. Whether the orders sought by the applicant should be issued.
22. As correctly noted by the respondents, jurisdiction is everything as held in the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR*. jurisdiction flows from the [constitution](#) or the law.
23. The jurisdiction of the court is outlined under Article 162(2) of the [constitution](#). Article 162(3) of the [constitution](#) mandates Parliament to enact legislation to address the jurisdiction of the court.
24. The Employment and Labour Relations Court, 2011 under Section 12 gives the court exclusive and original jurisdiction to address employment and labour relations disputes for connected purposes. The original jurisdiction cannot be removed under the connected purpose.
25. The Supreme Court has settled the matter in the case of [Kenya Tea Growers Association & 2 others v The National Social Security Fund Board of Trustees & 13 others \(Petition E004 & E002 of 2023 \(Consolidated\)\) \[2024\] KESC 3 \(KLR\) \(21 February 2024\) \(Judgment\)](#) that rights that accrue within the employment relationship and for connected purposes cannot be removed from the court. The drafters of the [constitution](#) intended that the court should have jurisdiction on all matters relating to employment and labour relations.
26. Indeed, the WIBA does not provide an enforcement mechanism. This fact is acknowledged in several decisions of the court. In the case of *Virginia Wangari Muita v Nyoro Construction Company Limited [2020] eKLR* the court held that;

... The Court considers that enforcement of the Director's decision made under the provisions of WIBA would not amount to a labour dispute under rule 5 of the Court's Rules or a dispute to be referred to the Court under rule 4 of the Court's rules. Thus it appears to the Court that the Director having made an assessment and there being no objection and then appeal per section 52 of WIBA it is not available for a party to file a statement of claim for enforcement of the Director's decision as though a dispute exists in that regard. While making that finding, in absence of a prescribed summary procedure to enforce the Director's decision, the memorandum of claim (but limiting itself to issue of enforcement of the Director's decision) would appear to be an available process as per *Radido J in Ruth Wambui Mwangi & Another Versus Alfarah Wholesalers (2017) eKLR*.



27. Enforcement of the director's award through a miscellaneous application to the court does not in any way negate the appellate jurisdiction of the court under Sections 51 and 52 of the WIBA. The inherent power of the court in access to justice is to secure a right. Enforcement of the director's award through a court order and decree thereof secures such right. Proceedings from enforcement through a miscellaneous application can be summary or through a Memorandum of Claim for a specific order, or enforcement of the director's award.
28. A party holding the director's award cannot be held at ransom and told that until WIBA has an enforcement mechanism, the award is a mere suggestion. Through the court, a miscellaneous application or a Memorandum of Claim, such matter can well be addressed under the inherent powers of the court.
29. Properly moved under this application, the court finds the applicant is justified in seeking for an order of the court for payment of the director's award at ksh.982,080.
30. On whether the court has jurisdiction to punish the respondents, upon the valid order and decree of the court from its decision, willful refusal to abide and comply with the orders of the court is punishable in contempt proceedings. being a superior court with the status of the High Court, the court has similar powers to those assigned by the High Court in all matters arising out of employment and labour relations. The term 'High Court' in Section 5(1) of the Judicature Act would therefore include the courts established under Article 162(2) of the constitution. That clears any doubts on the jurisdiction of this Court to punish for contempt of court. See Kenya Tea Growers Association v Francis Atwoli and 5 Others [2012] eKLR.
31. The court will punish for contempt to safeguard the rule of law which is fundamental in the administration of justice. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed. See Econet Wirelss Ltd Vs Minister for Information & Communication of Kenya & Another [2005] eKLR.
32. Therefore, a purposive application of WIBA, Article 162(2) of the constitution and Section 12 of the Employment and Labour Relations Court Act, 2011 gives the court jurisdiction to enforce the director's award under the WIBA as herein sought by the applicant. The court has jurisdiction to punish a party in contempt of its orders once issued.
33. Accordingly, the application dated 17 January 2024 is hereby allowed, in the following terms;
  - a. The respondents are to pay the applicant the sum of Ksh.982,080 being compensation assessed by the Director of Occupational Safety and Health Service;
  - b. The award (a) above is to be paid within 30 days after which to accrue costs and interests at court rates.

**DELIVERED IN OPEN COURT AT MOMBASA ON THIS 9 DAY OF MAY 2024.**

**M. MBARŪ**

**JUDGE**

**In the presence of:**

Court Assistant: Japhet

..... and .....

