Lukano (Suing as a Legal Representative of the Estate of Evans Lukano - Deceased) v Gurdev Engineering; Jamly Services (Interested Party) (Miscellaneous Application E010 of 2024) [2024] KEELRC 1134 (KLR) (17 May 2024) (Ruling)

Neutral citation: [2024] KEELRC 1134 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISCELLANEOUS APPLICATION E010 OF 2024

SC RUTTO, J

MAY 17, 2024

BETWEEN

KIZITO LUKANO (SUING AS A LEGAL REPRESENTATIVE OF THE ESTATE OF EVANS LUKANO - DECEASED) ..... APPLICANT

AND

GURDEV ENGINEERING ..... RESPONDENT

AND

JAMLY SERVICES ..... INTERESTED PARTY

RULING

1. This Ruling determines the Applicant's Notice of Motion Application filed on 29th January 2024 brought under Section 87 of the *Employment Act*.

2. The Application which is supported by the Affidavit of the Applicant seeks the following orders:

   a. That the Court adopts the assessment of the Director of Occupational Health and Safety dated 9th October 2023 as an order of the Court.

   b. That a decree be issued in accordance with the assessment of the Director of Occupational Health and Safety for the sum of Kenya shillings two million four hundred and ninety six thousand only (Ksh.2,496,000.00).

   c. That the Respondent to bear the costs of this suit.

3. The Applicant's case is that the deceased who was an employee of the Respondent, was injured on 21st October 2018. He later succumbed to the injuries on the same day while undergoing treatment.

4. The Applicant reported the accident to the Director of Occupational Safety and Health Services Nairobi and a DOSH/WIBA Form 1 was duly filled. It is averred that the Director made an assessment of Ksh.2,496,000.00.

5. The Applicant further avers that the Director and his Advocate sent a demand for payment, but the Respondent adamantly refused and/or neglected to pay the assessed sum.

6. He is advised by his Advocates which information he believes to be true that failure to pay an assessment by the Director of Occupational Safety and Health Services is an offence under Section 26 (6) of the *Work Injury Benefits Act*.

7. The Applicant has further averred that ninety days have lapsed since the demand was done and the Respondent has not preferred an appeal against the Director's assessment.

8. That in the circumstances, the Respondent has committed an offence by failing to pay the compensation due to him, which has necessitated the Application herein.

9. Opposing the Application, the Respondent through Mr. Ben Maurice Odhiambo, its Administration and Insurance Officer vide a Replying Affidavit dated 8th February 2024, contends that the Application is premature and an abuse of the court process in that the Director of Occupational Safety and Health has not done an assessment as required by the relevant Section of the *Work Injury Benefits Act* and there is no WIBA Form 4 prepared and duly served upon the Respondent.

10. He further avers that the only assessment done and served, is the assessment which was done on and was specifically served upon the Respondent on 23rd December 2022.

11. Mr. Odhiambo further contends that no demand in the prescribed form has been served upon the Respondent. He further states that when such demand is made, the Respondent shall file an appeal against it accordingly.

12. He is advised by his Advocate on record and verily believes the same to be true, that there are serious and contentious factual and legal issues raised by the circumstances of the subject matter herein which shall require determination through a full judicial hearing and it would be unjust and unfair to have summary proceedings leading to judgment against the Respondent.

13. The Interested Party filed a notice of appointment through the firm of J.L Onyango & Co. Advocates but did not file a response to the Application.

Submissions

14. The Application was canvased by way of written submissions following the Court's directions issued on 13th February 2024.

15. It is the Applicant's submission that he has literally exhausted all means available to compel the Director of Occupational Safety and Health (Director) to ensure that he gets the award of Kshs. 2,496,000.00.

16. The Applicant has further submitted that the Inquiry Report was served upon him on the same date with the Respondent and the Interested Party. It is the Applicant's position that there is no provision that requires the Director to serve the Respondent with a demand for them to proceed and file an appeal but rather the Respondent had a right of appeal from the moment the Director's decision is communicated to them. In support of this argument, the Applicant has placed reliance on the case of Elijah Kisyanga Ndende vs The Managers Zahkem International Construction Ltd (2022) eKLR.

17. It is the Applicant's further submission that the *Work Injury Benefits Act* (Act) does not provide for an enforcement mechanism in respect of awards of the Director and therefore the only recourse for him is premised under Section 87 of the *Employment Act*.

18. Further relying on the case of Samson Chweya Mwandabole vs Protective Custody Limited (20021) eKLR, the Applicant submits that the adoption of the Director's report/decision and award dated 9th October 2023 and issuance of a decree is the only remaining remedy available in furtherance to access of justice and protection of his rights under Article 47 of *the Constitution*.

19. The Respondent on the other hand posits that the Application is premature, frivolous, and an abuse of the court process, as the Director is yet to do an assessment against the Respondent and that the only award so far made is the assessment vide WIBA Form 4 dated 23rd December 2023 against the Interested Party.

20. The Respondent has further submitted that the assessment was presumably served upon the Interested Party as the employer of the deceased hence it (Interested Party) had the requisite statutory period to file any objection/appeals within the prescribed timelines. The Respondent is not aware whether any such appeal has ever been filed.

21. It is the Respondent's position that it is not contested that the deceased was the employee of the Interested Party. That in a strange twist of events, the Applicant chose not to enforce the assessment against the Interested Party.

22. The Respondent has further submitted that the Inquiry Report was prepared and submitted to the High Court and cannot be equated to the requisite assessment in the prescribed form. In this regard, it is submitted that no demand in the prescribed form was made to the Respondent.

23. The Interested Party did not file submissions.

Analysis and Determination

24. Fundamentally, the Application herein is purely for enforcement of an Award under the *Work Injury Benefits Act* by the Director. It is the Applicant's case that the Director made an assessment of Kshs. 2,496,000.00 and despite demand, the Respondent has blatantly refused to pay the assessed sum.

25. On its part, the Respondent has contended that the Application is premature as the Director has not made an assessment as required under the *Work Injury Benefits Act* and there is no WIBA Form 4 prepared and served upon it.

26. As stated herein, the Interested Party did not respond to the Application nor file submissions. Therefore, its position on the matter is not on record.

27. The record bears that the accident which is the subject of the proceedings herein, occurred on 21st October 2018, involving the deceased, Evans Lukano. According to LSSS/DOSH/FORM 1, attached to the Application herein, the Director was notified of the accident by one James Ochieng Osiro who identified himself as the employer of the deceased. This notification was in apparent compliance with the provisions of Section 21 of the *Work Injury Benefits Act*.

28. It is also apparent that upon the Director being notified of the accident, made an inquiry in accordance with Section 23 of the *Work Injury Benefits Act*. To this end, the Applicant attached a copy of the Inquiry Report although I note that the same is incomplete and is neither dated nor signed. Further, the narrative in the report lacks in flow hence it is not possible to comprehend its import.

29. Be that as it may, I gather from the Director's Inquiry that James Ochieng Osiro is the Interested Party herein t/a Jamly Services.

30. In further support of his case, the Applicant further annexed to the Application, a copy of ML/ DOSH/WIBA/ FORM 4 dated 23rd December 2022, addressed to the said James Ochieng Osire. The assessment as per the said Form 4 is in the sum of Kshs 2,496,000.00.

31. It is worth pointing out that the Applicant did not produce before this court a copy of the prescribed Form 4, addressed to the Respondent herein indicating the sum awarded.

32. As such, I am inclined to agree with the Respondent that the Director has not made an assessment against it and as such, the Application against it is premature.

33. It is also notable that the Applicant has sought to rely on the Inquiry Report in his quest against the Respondent. As stated herein, the said Report is incomplete and as presented, is incomprehensible. As such, it is not possible to make any definitive finding from it.

34. In any event, it is clear that the assessment made through ML/DOSH/WIBA/FORM 4 is against the Interested Party and not the Respondent herein.

35. That said, can the Court enforce the Award by the Director against the Interested Party? As it is, there is no provision under the law granting the Court jurisdiction to enforce an Award emanating from the Director. As such, there is a lacuna in law to that effect.

36. Further, pursuant to Section 52(2) of the *Work Injury Benefits Act*, this Court has appellate jurisdiction to hear and determine any appeals arising from an Award by the Director. Such was the determination by the Supreme Court in the case of Law Society of Kenya vs Attorney General & another [2019] eKLR.

37. Accordingly, it is this Court's position that an Application for adoption of an Award by the Director can only be brought before a Magistrate's Court.

38. In my respectful view, it will not be suitable to have this Court enforce an Award by the Director and thereafter sit on Appeal over the same issue. In any event, by enforcing an Award by the Director as this Court is being called to do through the instant Application will be tantamount to proceeding on a process not contemplated under the *Work Injury Benefits Act*. In which forum will the appeal be lodged in the event the Court proceeds to issue the orders sought? Needless to say, this is not the appropriate forum to hear and determine the Application as framed.

39. It is against this background that I dismiss the Application filed on 29th January 2024 with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MAY 2024.

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STELLA RUTTO

JUDGE

In the presence of:

Mr. Ayugi instructed by Mr. Ojienda for the Applicant

Mr. Ochieng for the Respondent

No appearance for the Interested Party

Millicent Kibet Court Assistant

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE