



**Ngigi v Afriwell Limited (Miscellaneous Case E018 of 2024)
[2024] KEELRC 1188 (KLR) (22 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1188 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS CASE E018 OF 2024**

JK GAKERI, J

MAY 22, 2024

BETWEEN

JOTHAM NDUNGU NGIGI APPLICANT

AND

AFRIWELL LIMITED RESPONDENT

RULING

1. This is the Applicant’s amended Notice of Motion dated 27th February, 2024 filed under Certificate of Urgency on even date seeking ORDERS THAT –
 1. Spent.
 2. This Honourable court be pleased to adopt the Award of the Director of Occupational Safety and Health Services made in Work Injury Benefits Act Claim Ref No. WIBA/NRB/01698/2022 made on 25th July, 2022 as judgment of this Court.
 3. Judgment be entered in favour of the Applicant against the Respondent of Kshs.860,676.92 being the sum assessed by the Director Occupational Safety and Health Services under the Work Injury Benefits Act on 25th July, 2022 in Claim Reference No. WIBA/NRB/01698/2022.
 4. The Honourable Court be pleased to award interest on the amount of court rates from the date of assessment until payment in full.
 5. The costs of this application be in the cause.
2. The Notice of Motion is expressed under Section 12 of the Employment and Labour Relations Court Act, Section 1A, 1B and 63(a) of the Civil Procedure Act, Order 2 Rules 51 of the Civil Procedure Rules, 2010 and Sections 16, 30, 32, 34, 37 and 51 of the Work Injury Benefits Act (WIBA 2007) and based on the grounds set out on its face and the Affidavit of Jotham Ndungu Ngigi sworn on 27th February, 2024.



3. It is the applicant's case that he was an employee of the Respondent and was injured on 16th October, 2021 and the same was reported by the employer to the Director of Occupational Safety and Health Services (herein after the DOSHS) by completing the DOSH FORM I and after investigation the DOSHS assessed the compensation due at Kshs.860,677/= which is yet to be paid.
4. The applicant deposes that the Respondent has no defence to the claim for compensation.

Response

5. In its grounds of opposition dated 26th February, 2024, the Respondent argues that the court has no jurisdiction to hear and determine the application as it is not an appeal as contemplated under Section 52(2) of the Work Injury Benefits Act, 2007 and the award of Kshs.860,677.00 has not been reviewed by the DOSHS and thus cannot award an amount in excess of what the DOSHS awarded.
6. That the court is bound the provisions of Sections 26 and 27 of the Civil Procedure Act with regard to interest and costs and should decline the invitation to award the same.
7. Reliance was made on the decisions in Musembi V Great Yaddo Industry Ltd (2022) KEELRC 13025 and Lameck Nyakundi Anyona V W. J. J Kenya Construction Co. Ltd (2022) eKLR where the court held that it had no jurisdiction to adopt awards made by the DOSHS.

Applicant's submissions

8. On jurisdiction of the court to adopt awards by the DOSHS, the counsel cited the decisions in Charles Gachebe Gicheru V SBI International Holdings AG (Kenya) (2018) eKLR, Omutili V Orpower 4 Inc (2023) KEELRC 1974 and Elijah Kisyanga Ndende V Manager Zahken International Construction Ltd (2022) eKLR where the court held that it had jurisdiction to adopt the awards.
9. Counsel urged that as the Respondent had not opposed the award, the same ought to be adopted as a judgment of this court.

Respondent's submissions

10. Counsel urged that this court's jurisdiction under the Work Injury Benefits Act (WIBA) is appellate under Part VIII of the Act entitled "Appeals" and adoption of the DOSH'S award is not an appeal.
11. Counsel submitted that WIBA has not given the court power to recognize, register and enforce the Director's award.
12. That the power to ensure that the DOSHS awards are honoured is on the DOSHS and not for the court to determine.
13. Reliance was made on the holding in Speaker of the National Assembly V Karume (1992) KECA 42 on compliance with the prescribed procedure.
14. The court was invited to find and hold that it had no jurisdiction to grant the prayers sought.
15. The issues for determination are:
 - i. Whether there is a valid assessment of the applicant's compensation by the DOSHS before the court.
 - ii. Depending on the answer to (i) above, whether the Notice of Motion dated 27th February, 2024 is merited.



16. As to whether there is a valid assessment of compensation by the DOSHS, the documents on record provide the answer.
17. The applicant's case is based on two documents exclusively, namely;
 - i. Copy of Dosh Form 1 and
 - ii. Copy of Dosh Form 4
18. While the former is a notification by the employer of an occupational accident or disease by an employee, the latter is a demand for payment of work injury benefits.
19. It is to all intents and purposes a demand letter by the Dosh to the employer.
20. First, the Dosh Form I cannot be relied on as it is neither completed nor authenticated by the Dosh under Part III of the Form. The form is thus incomplete to warrant consideration.
21. It is unclear to the court why Part III of the Dosh Form I was not completed and signed.
22. Similarly, the demand for payment Dosh Form 4 dated 25th July, 2022 signed by one Mr. James Mithanga lacks a postal or other address at all.
23. Equally, the document identifies the signatory as A. Director yet the title of Occupational Health and Safety Officer has not been deleted.
24. On the face of the document, it is unclear to the court which office issued the document and whether it was indeed served on the Respondent and perhaps what its response was.
25. Flowing from the foregoing, it is clear that the two documents relied upon by the applicant are incomplete and being the cornerstone of the applicant's Notice of Motion, it is clear that the same cannot proceed to the next stage of determination on merits.
26. The upshot of the foregoing is that the applicant has not demonstrated that he has a valid assessment or award by the DOSHS. Consequently, the Notice of Motion dated 27th February, 2024 is struck out with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 22ND DAY OF MAY 2024

DR. JACOB GAKERI

JUDGE

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 has 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.

