



**Valley Confectionary Ltd v Director Occupational Safety and Health Service & another
(Miscellaneous Application E016 of 2024) [2024] KEELRC 1516 (KLR) (11 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1516 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
MISCELLANEOUS APPLICATION E016 OF 2024**

**HS WASILWA, J
JUNE 11, 2024**

BETWEEN

VALLEY CONFECTIONARY LTD APPLICANT

AND

**DIRECTOR OCCUPATIONAL SAFETY AND HEALTH SERVICE 1ST
RESPONDENT**

**GESARE MOGIRE (SUING AS THE LEGAL ADMINISTRATOR OF THE
ESTATE OF VINCENT MOGIRE ASIAGI (DECEASED) 2ND RESPONDENT**

RULING

1. Before this Court for determination is the Applicant's Notice of Motion dated 22nd March, 2024 filed pursuant to section 3 of the *Employment and Labour Relations Court Act*, Section 1A, 1B and 3A of the *Civil Procedure Act*, Rule 17 and 52 of the Employment and Labour Relations Court (Procedure) Rules, 2016, Section 51 of the *Work Injury Benefits Act*, Rule 16 and 17 of the High Court (Organization and Administration) (General) Rules and all other enabling provisions of the law. Seeking for the following orders; -
 1. Spent.
 2. That this Honourable court be pleased to grant the Applicant leave to lodge an objection with the Director against the decision and award of the Director of Occupation Health and Safety Dated 7th July, 2023 out of time.
 3. That this Honourable court be pleased to grant an order of stay of execution of the Order and or award of the Director of Occupational Health and Safety Under the *work Injury Benefits Act*(WIBA) 2007, dated 7th July, 2023 pending the hearing and final determined of the Application herein.



4. That this Honourable court be pleased to stay proceedings in Nakuru Chief Magistrates Court Misc. Civil Application No. E336 of 2023 pending the hearing and final determination of this Application.
 5. That this Honourable court be pleased to stay proceedings in Nakuru Chief Magistrate Court Misc. Civil Application No. E336 of 2023 pending the hearing and final determination of the intended objection.
 6. That this Honourable Court be pleased to grant an Order of stay of execution of the Order and /or award of the Director of Occupational Health and safety under the *Work Injury Benefits Act* (WIBA) 2007, dated 7th July, 2023 pending the hearing and final determination of the intended objection.
 7. That the costs of this Application be provided for.
2. The Application is supported by the grounds on the face of the Application and the supporting affidavit of Evalyne Gathoni Maina, the Applicant's Human Resource manager, sworn on 22nd March, 2024.
 3. She stated that the 2nd Respondent was awarded Kshs 1,422,720 by the County Director of Occupational Safety but that the said award was not communicated to the Applicant as provided for under WIBA.
 4. She contends that the Applicant only learn of the said award when they were served with CMCELRC Misc. Application No. E336 of 2023. Therefore, that since they were not notified on time, they did not raise any objection against the award within the statutory timelines. Hence they are seeking leave of this Court to lodge objection to the said award out of time.
 5. The Affiant maintains that though the deceased passed on during cause of duty, his death was not cause by the Applicant's action and or inaction. Nonetheless, that the Applicant is facing imminent execution if the adoption of award proceedings is completed.
 6. That unless stay of execution order is granted by this court and the proceedings in Misc. Application No. E366 of 2023 stayed, the Applicant stands to suffer loss of a colossal amount of money.
 7. She stated that in arriving at its decision the Director of Occupational Safety and Health failed to consider the circumstances under which the employee passed on and affirm that the Employer had nothing to do with his death.
 8. She narrated the circumstances that lead to his death and stated that the deceased, arrived at work as usual at 6am on 21st May, 2023 and worked till 11 am when he complained of being unwell and requested to take the day off which was granted, while taking hos leave, he confirmed to his colleague that he was under medication.
 9. In the evening of the same day he reported back to work at around 8pm and took over duty, however that he was found dead the next morning on 22nd May, 2023, hence his death was not triggered by the Applicant work place but caused by natural causes to wit Cardiac tamponade due to raptured aortic dissection as evidence by the postmortem report dated 23rd May, 2023.
 10. She maintained that the cause of death was not associated at all with the nature of work the deceased was doing at the Applicant's employment as such it was not occupational to warrant the award given by the Director of Occupational Safety and Health.



11. The affiant reiterated that the applicant was not aware of the said award and as such did not lodge any objection on time, leading to the award that was granted without appreciation of the fact that the death was caused by natural causes and not an act of the Applicant as an employer.
12. She urged this Court to allow the Application and grant them leave to lodge an objection against the award of the Director out of time and also stay execution and the proceedings in Misc. Application No. E366 of 2023.
13. The Application is opposed by the 2nd Respondent who filed grounds of oppositions dated 17th April 2024 and based on the following grounds; -
 1. That the application is prima facie defective, grossly incompetent, vexatious and bad in law.
 2. That this court has no jurisdiction to hear contested facts arising from the decision of the Director of Occupational Health and safety office as these are preserve of the Director before making an award.
 3. That this court can only be moved to re-evaluate contested facts against the award made by the director by way of an appeal subject to section 52 of the Work Injury Benefits Act 2007.
 4. That the application is incompetent bad in law and a non-starter, and it does not meet the conditions set by law to contest against an award made by the Director.
14. In addition to the grounds of opposition, the 2nd Respondent filed a Replying affidavit sworn by the 2nd Respondent, Caroline Gesare Mogire, on 17th April, 2024 stating that the application is a mere shell as it lacks substance. Further that the Application has been filed with unreasonable delay given that the decision by the director was made on the 7th July 2023 and that the Application for enforcement of the said orders in Miscellaneous Application Number E336 of 2023 served upon the Applicant on the 30th November, 2023.
15. She states that on 7th July 2023, she obtained an award from the County Occupational Health and safety office of Kshs. 1,422,720 under the Work Injury Benefits Act (WIBA) 2007. Upon receiving the said award, the Director, made numerous reminders to the Applicant to honour the award assessed by the said Director but the Applicant refused to honour the said award.
16. She stated that since no objection was lodged as per section 51 of Work Injury Benefits Act and considering that the award had not been paid, the Respondent filed Miscellaneous Application Number E336 of 2023 for enforcement of the director's orders.
17. It is her position that the applicant's application is a tactical approach to delay her from prosecuting Miscellaneous Application No. E336 of 2023 to its finality and enjoy fruits of her award.
18. She stated that the application is incompetent, bad in law, an abuse of the court process and an afterthought made in bad faith and urged this Court to dismiss wit with costs.
19. The 1st Respondent did not file an response to the Application or submissions thereof.
20. The Application herein was canvassed by written submissions.

Applicant's Submissions

21. The Applicant submitted on four issues; whether the Applicant should be granted leave to lodge an objection against the award of Director of Occupational Health and safety, whether the stay of execution of the award or the orders of Director of Occupational Health and safety should be granted,



- whether proceedings in Nakuru Chief Magistrate Court Miscellaneous Civil Application No. E336 should be stayed pending the hearing and determination of this proceedings and the determination of the intended Objection and who should bear the costs of this application.
22. On the first issue, it was submitted that section 51 and section 52 of the *Work Injury Benefits Act* provides for an appellate authority and allows the Objector to lodge an objection with the Director against a decision that they are aggrieved of. On that basis, it was argued that the Applicant was neither involved in the proceedings before the Director of Occupation Health and Safety nor served with the award of the Director of Occupation health and safety made on 7th July 2023. That the Applicant learnt about the said award when it was served with the proceedings in Nakuru ELRC Misc. Application No. E336 of 2023 in the month of November 2023 long after the 60 days for lodging an objection had lapsed.
 23. It was argued that since the Applicant was made aware of the said award way after the 60 days had lapsed, it could not present its objection within the requisite time, hence it was condemned unheard before the Director Occupation health and Safety. In any event that the respondents have not controverted this averment that the Applicant never participated in the proceedings or was it notified of the award of the Director of Occupational Safety and Health. Save for CMELRC Misc. Application. No. E366 of 2023.
 24. It was submitted that the Director is mandated under section 23 of the Act to carry out inquiries of the alleged accident to ascertain liability of each party and further carry out investigation of any alleged accident once it receives a report of an accident in line with section 53 (2)(d) of the Act. The employer on the other hand is mandated to report any alleged accident. On that note, it was argued that the Director misdirected itself in failing to carry out any inquiries and merely relying on the report of the accident made by the 2nd Respondent and not putting to consideration the Postmortem report and other relevant materials that confirmed that the deceased' death was not caused by work related injury.
 25. Contrary to the averments by the 2nd Respondent, the Applicant submitted that upon receiving pleadings in CMELRC Misc. Application No. E336 of 2023, it filed its response and the matter has been mentioned before the trial court where the parties were given a chance to resolve the issue out of Court but the parties could not agree, causing the Applicant to move this court in order to have its grievances addressed. Therefore, the matter herein has been filed timely as to when it felt necessary to institute these proceedings, which they urged this Court to grant them leave to file objection out of time.
 26. On whether the stay of execution of the award by Director of Occupational Health and safety should be granted, it was submitted the said objection is meritorious as it raises pertinent issues including that the deceased' death was not caused by the actions of the Applicant but by other factors which the Applicant is not to be blamed. Further that if the intended execution of the said award is not stayed the substratum of the intended objection will be destroyed and that the Applicant will be condemned unfairly. In support of this, the Applicant relied on the case of RWW vs. EKW [2019] eKLR, where the court addressed its mind to the purpose of a stay of execution order pending appeal, and opined as follows:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award



of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

27. It was further submitted that the execution has not been commenced properly as required under Section 87 of the *Employment Act*. In support of this, they cited the holding in Nakuru ELRC Cause No. 4 of 2020, Richard Akama Nyambane v. Icg Malturo Spa.

28. On whether proceedings in Nakuru Chief Magistrate Court Miscellaneous Civil Application No. E336 of 2023 should be stayed pending the hearing and determination of this proceedings and the determination of the intended Objection, it was argued that the 2nd Respondent has sought for adoption of award by DOSH, which if not stayed, execution will ensure rendering the intended objection nugatory. In support of this, the Applicant relied on the case of Gichuhi Macharia & another v Kiai Mbaki & 2 others [2016] eKLR where the court held as follows:

“In reading the dictum in the case of Global Tours & Travel Ltd (supra), Ringera, J (as he then was) had held inter alia;

As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice...the sole question is whether it is in the interest of justice to order for stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And, in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

As was reiterated in the decision of Ringera, J in Global Tours & Travel Ltd (supra) the Court has to consider a number of issues before it may order for stay of proceedings; the Court should weigh the pros and cons of issuing such order and the ramifications that may arise subsequent to that orders. Further, it was for the Court to consider whether the issuing of such orders would be in the interest of justice, or for the expeditious disposition of matters as alluded to under the provisions of Section 1A of the *Civil Procedure Act*.”

29. Accordingly, it was submitted that this court has supervisory power over magistrate courts and as such in order to protect the subject matter of the intended objection to the Director of Occupation Health and Safety and the proceedings before this court, the proceedings in the lower court in Nakuru CMELRC Misc. Application No. E336 OF 2023 ought to be stayed pending the hearing and determination the intended objection to the Director of Occupation Health and Safety.

30. It was submitted further that if the said proceedings are not stayed the execution order will be granted as against the Applicant herein which will be prejudicial as it will be forced to pay a huge sum in relation to the impugned award which was arrived at unfairly and that these proceedings and the applicant's objection will be rendered nugatory.

31. On costs, it was submitted that the court has discretionary powers to award costs as it considers just as per section 12(4) of the Employment & Labour Relations Court Act and the guiding principles enumerated in the case of Jasbir Singh Rai & 3 Others –V- Tarlochan Sing Rai & 13 Others [2002] eKLR where the court stated that costs follow the event with the discretion of the court exercised judiciously.



32. Similarly, it was argued that the Applicant has presented a merited case which warrants the grant of the orders sought and urged this court to grant the Orders as prayed and costs of this application be awarded to the Applicant.

2nd Respondent's Submissions

33. The Respondent herein submitted on the merit of the Application and highlighted the process of compensation of an award made by the director of Occupational Health and safety office as provided for in the Work Injury Benefits 2007. He argued that the said process starts with a report of the occurrence of the accident of the employee by director as provided for under sections 21 and 22 of the said WIBA. The Director then conducts an inquiry pursuant to section 23 of the WIBA before determining the relief to award. Section 26(4) provides that once an award is made then the employer is obligated to settle the award within ninety days. However, in the event the employer is dissatisfied with the award made then he/she may within 60 days of the award lodge an objection with the director and the director will in turn determine the objection within fourteen days' subject to section 52 of the WIBA. If the objector/employer is not satisfied, he/she may approach the ELRC by way of an appeal within 30 days after the director's response. He argued that section 52 of the WIBA provides:
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".
34. It was submitted that from the above analysis, it is clear that the ELRC court can only by way of an appeal re-evaluate contested facts and not hear them at first instance. In support of this, the Respondent relied on the case of Austin Oduor Odira v Kenya Sweets Limited & another [2021] eKLR where the Court was of the opinion that once the Director makes an award, the parties cannot approach the court to re-open the matter except by way of an appeal to the ELRC.
35. The Respondent also relied on the case of Lameck Nyakundi Anyona v W.J. J Kenya Construction Company Limited [2022] eKLR, in which the court was of the view that the ELRC cannot be moved to enforce the Director's award as the law clothes it with jurisdiction to handle appeals from the Director only. Further, that the ELRC or indeed any other court is not the right forum, exercising its original jurisdiction, for investigating contested facts as these are the preserve of the Director before making an award.
36. On this basis, the Respondent submitted that this Court has no Jurisdiction to hear contested facts arising from the decision of the director of Occupational Health and Safety Office as these are special preserves of the director before making an award.
37. The Respondent also submitted that this application was filed on unreasonable delay given that the decision by the director was made on the 11th July 2023, the Application for enforcement of the Orders served on the Respondent on 30th November 2023. Moreover, that no plausible reason has been given for the delay in filing this application more than 7 months after the order was made and more than 3 months after the application for enforcement of the award was filed. He argued that such inordinate delay ought to be accompanied by plausible reasons for the same yet to be entertained, which none has been offered in this case.



38. The Respondent maintained that the Applicant was aware of the lodging of the claim to the director, the award and the filing of the application for the enforcement of the award but chose to be indolence. He added that the delay by the applicants in filing this application is inexcusable and there is no reason given for the delay as such, they prayed for the dismissal of the application with costs to the Respondents. In support of this, the Respondent cited the case of Rainbow Acres Limited v NIC Bank Limited [2015] Eklr, where the court cited the case of London Distillers (K) Ltd v Philip Kipchirchir & 2 Others [2007] Eklr which held that;

“In my view delay is affront to the administration of justice, delay is something to be deplored, delay is repugnant to justice, delay spoils the image of the judiciary, delay ferments public outcry against the judiciary, delay creates disharmony between the consumers of justice and the courts. Delay is a disguised disinterest in the disposal of the suit. Delay creates desolate and despair in the minds of the party affected by the delay. It is a despicable attempt to enslave a party to an endless contest. That contest must come to an end if the instigator is unwilling to end it. In this case the plaint of the plaintiff is like a despotic ruler hanging over the head of the defendants”.

39. In conclusion, the Respondent submitted that if the applicant was aggrieved by the decision of the director, it ought to have filed an objection within the stipulated time. That failure to file the objection within the stipulated time was a delay tactic aimed at delaying the prosecution of her Miscellaneous Application Number E336 of 2023 to finality to enable her enjoy her award. Therefore, that the Application herein is incompetent bad in law and an abuse of the court process and should thus be dismissed with costs to the Respondents herein.

40. I have examined all the averments and submissions of the parties herein. The applicant seek orders of this court to raise an objection to the award of the Director of the Occupational Safety and Health dated 7th July 2023.

41. In determining this application, I will set out the procedure to be employed in case of an injury at work as provided under the WIBA Act.

42. Section 21 of WIBA provides as follows:-

21. Notice of accident by employee to employer

Written or verbal notice of any accident provided for in section 22 which occurs during employment shall be given by or on behalf of the employee concerned to the employer and a copy of the written notice or a notice of the verbal notice shall be sent to the Director within twenty-four hours of its occurrence in the case of a fatal accident.

43. Section 22 on the other hand provides as follows:-

22. Notice of injury or accident by employer to Director

(1) Subject to the provisions of this section, an employer shall report an accident to the Director in the prescribed manner within seven days after having received notice of an accident or having learned that an employee has been injured in an accident.

2) For the purposes of this section, an accident includes any injury reported by an employee, to his employer, if the employee when reporting the injury, alleges that it arose out of and in the course of his employment and irrespective of the fact that the employer is of the opinion that the alleged accident did not so arise out of and in the course of employment.



- (3) An employer shall, at the request of an employee or the dependant of an employee, furnish the employee, or dependants with a copy of the notice of the accident furnished by the employer to the Director in respect of a claim for compensation by such employee or dependant.
 - (4) An employer who fails to comply with subsection (1) commits an offence.
 - (5) The provisions of this section do not prevent an employee from reporting an occupational accident or disease to the Director at any stage.
44. Once a report is made to the director, Section 23 envisages that the director shall make an inquiry as are necessary to decide upon any claim on liability in accordance with the act.
45. It is also provided under Section 26 (4) of WIBA that once the director makes an inquiry and makes computation on payment an employer or insurer against when a claim for compensation is made by the director shall settle the claim within 90 days of the lodging of the claim.
46. Section 51 of WIBA provides 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.
47. The director is also mandated under section 52 to consider any objection that should be lodged within 14 days.
48. Under section 52 (2) above an objector is free to file an appeal to this court against such an objection.
49. My reading of section 52 (2) herein is that this court's jurisdiction is lodged as an appeal on an award of the director and not on an objection itself.
50. The applicants have chosen to invoke this court's jurisdiction on this miscellaneous application to object to the award of the director and not an appeal; it is my finding that this court's jurisdiction can only be invoked on appeal and not otherwise. The application is therefore found unmerited and is dismissed accordingly.

RULING DELIVERED VIRTUALLY THIS 11TH DAY OF JUNE, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of: -

Mogire holding brief Konosi for Applicant – present

Kirui holding brief Mboga for 2nd Respondent – present

Court Assistant – Fred

