



**Benard v Shree Hari Plaza Limited (Hari Krishna Ampex) & another (Miscellaneous Application E018 of 2023) [2024] KEELRC 1936 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1936 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
MISCELLANEOUS APPLICATION E018 OF 2023**

**ON MAKAU, J  
JULY 26, 2024**

**BETWEEN**

**ONGERE KABA BENARD ..... APPLICANT**

**AND**

**SHREE HARI PLAZA LIMITED (HARI KRISHNA AMPEX) 1<sup>ST</sup> RESPONDENT  
DIRECTORATE OF OCCUPATIONAL HEALTH AND SAFETY  
SERVICES ..... 2<sup>ND</sup> RESPONDENT**

*(Before Hon. Justice Onesmus Makau on 26th July, 2024)*

**RULING**

1. On 3<sup>rd</sup> October 2023, I adopted the award of the Director Occupational Safety and Health (DOSHS) dated 23<sup>rd</sup> September 2022 as judgment of the court. The award was Kshs. 268,000 in favour of the claimant plus costs and interest from the date of filing the Notice of Motion dated 25<sup>th</sup> August 2023. Thereafter the claimant filed a bill of costs and the Taxing Officer of the court determined the costs as Kshs. 60,675.
2. By a Notice of Motion dated 14<sup>th</sup> November 2023, brought under Articles 25 (c) and 50 (1) of *the Constitution* and section 3 of the *Employment and Labour Relations Court Act*, No. 20 of 2011, the 1<sup>st</sup> Respondent/Applicant seeks for the following orders:
  - a. That this Honourable Court be pleased to set aside the ex parte proceedings and the consequential ex parte Ruling/Order delivered on 03/10/2023 and grant the 1<sup>st</sup> Respondent/Applicant leave to file its Response to the Application and the matter to be tried on merit.
  - b. That the cost of this Application be provided for.



3. The Application is supported by the affidavit sworn on 14<sup>th</sup> November 2023, by Cheryl Odipo, a Legal Officer of Old Mutual General Insurance Kenya Limited, the 1<sup>st</sup> Respondent's insurer. In brief, she deposed that the insurer was mandated to take up all claims against the 1<sup>st</sup> Respondent; that the claimant herein lodged an application dated 25/08/2023 seeking to enforce the award by the Director Occupational Safety and Health (DOSH) dated 23/09/2022; that the application was heard ex parte and the award adopted as judgement of the Court on 03/10/2023 for Kshs. 268,000; that the Applicant was notified of the proceedings and consequently, the insurer and the Applicant commenced negotiation with the Respondent with the aim of settling the claim; that the reason, the Applicant failed to enter appearance and defend the Application is because of the claimant's promise that the matter would be settled out of court; that jurisdiction to handle the matter lies with the Chief Magistrate Court and not this Court; that the award of Kshs. 268,000 was re-calculated at Kshs.86,400 by the 2<sup>nd</sup> Respondent after the permanent disability was reviewed downwards from 10% to 3%; that the said sum has since been fully settled; and that the Applicant will be prejudiced if the defunct award is enforced through court order. For these reasons, it sought stay of execution and setting aside of the said order.
4. The Respondent opposed the Application vide his Replying Affidavit sworn on 12<sup>th</sup> January 2024 on grounds that the same is fatally defective, bad in law and an abuse of court process; that the Applicant's intentions are to cause an injustice; that he was involved in an accident on 18<sup>th</sup> April 2022 in the course of employment and the 2<sup>nd</sup> Respondent assessed his compensation at Kshs. 268,000 on 23<sup>rd</sup> September 2022 based on 10% permanent disability; that the 2<sup>nd</sup> respondent issued notice and demand for payment dated 23<sup>rd</sup> September 2022 that the award was never challenged by the applicant and it promised him that he would be contacted to collect the cheque from the insurer but in vain; that the Applicant was served with the application dated 25<sup>th</sup> August 2023 as well as the hearing notice dated 19<sup>th</sup> September 2023 as evidenced by the affidavit of service but failed to enter appearance or defend the same; that there were no negotiations between him and the Applicant towards settlement of the award; that there was no review of the permanent disability from 10% to 3% since he was never invited to attend any clinic for that purposes; that an amount of Kshs. 86,400 was remitted to his advocates on 9<sup>th</sup> November 2023 in compliance with the court orders; and that the application does not meet the requirements of the law as it has been brought after an inordinate delay and it ought to be dismissed with costs.

### **Submissions**

5. It was submitted for the Applicant that the order adopting the award of 23<sup>rd</sup> September 2022 ought to be set aside because although service of the Application for adoption was not denied, the Applicant has a good defence to the application that raised triable issues; that the Applicant successfully moved the director to review the award downwards to 3% disability award of Kshs. 86,400 and the amount was fully settled; and that the court with jurisdiction to handle the matter was the Chief Magistrate's Court and not this Court.
6. The applicant urged the Court to exercise its discretion and set aside the impugned orders on account of there been triable issues raised and relied on the case of *AIA v SMH* [2019] eKLR. The Applicant offered to pay throw away costs of Kshs., 15,000/= to the Respondent as adequate costs for the prejudice suffered.
7. It was submitted for the claimant that the application lacks merit and thus ought to be dismissed. It was submitted that the WIBA provided for the reporting of injury by employer under section 21 and 22, the assessment of award by the director under section 23, and the obligation by the employer to settle



the award within 90 days under section 26(4). It was submitted that the Act also provided for an appeal process wherein a dissatisfied employer can appeal within 60 days of the decision and the director is mandated to determine the objection within 14 days in accordance with section 52 of the Act.

8. It was further submitted that Section 52(2) provided for further appeal to this Court under section 12 of this Court's Act and section 187 of the *Employment Act* within 30 days of the director's response to the objection. It was contended that the Applicant never challenged the award through the outlined procedures and timelines. Consequently, it was urged that the applicant is bound to settle the award as ordered by this court. For emphasis, reliance was placed on the case of *Samson Chweya Mwendabole v Protective Custody Limited* [2021] eKLR.
9. It was submitted further that the law is silent on the enforcement of the awards of the director under WIBA and as such the Court ought to assume jurisdiction by dint of vide section 12 of the Court's Act, Article 162 of *the Constitution* and section 87 of the *Employment Act*. For emphasis, reliance was placed on reliance on the case of *Richard Akama Nyambane v ICG Maltauro Spa* [2020] eKLR. However, it was argued that the Court lacked the jurisdiction to consider the merits of the award or embark on a fact-finding mission as that was the preserve of the director. Consequently, it was urged that the Application ought to be dismissed with costs.

### Analysis

10. Having considered the Application, the response and the parties' arguments therein, the issues that come up for determination are as follows:
  - a. Whether the Court has the jurisdiction.
  - b. Whether the Application has met the threshold to warrant setting aside orders of Court.

### Jurisdiction

11. The Applicant contested the jurisdiction of the Court on grounds that the value of the subject matter fell within the jurisdiction of the Magistrates Courts. The Respondent on the other hand argued that the law was silent on the enforcement of awards and thus the Court should assume jurisdiction based on section 12 of the Employment and Labour Relations Court (ELRC) Act, Article 162 of *the Constitution* and section 187 of the *Employment Act*.
12. In the case of *Jared Ingling Obuya v Handicap International* [2021] eKLR had this to say on the issue on jurisdiction of the Court in the enforcement of awards:

“

“24. The *Work Injury Benefits Act* is silent on the manner of enforcement of the decisions by Director DOSH. It is however this Court's finding that it could not have been the intention of the Legislator that beneficiaries of compensation by Director DOSH remain without a remedy in the event an employer does not implement the decision of the Director awarding an employee compensation. The court must bridge the lacuna and bring to effect the objects and purpose of the Act as captured in the preamble as follows:

“An Act of parliament to provide for compensation to employees for work related injuries and diseases contracted in the course of their employment and for connected purposes”



25. Having said that, it is however desirable that the Legislature enacts an express provision as to the manner of enforcement of compensation awards made by Director DOSH.
26. In the meantime applying purposive interpretation of *Work Injury Benefits Act*; Article 162(2) of *the Constitution* as read with Section 12(1) of Employment & Labour Relations Court Act, this Court finds that Employment & Labour Relations Court has jurisdiction to enforce awards of compensation by Director DOSH.”
13. Similarly, in *Samuel Wambua Mbituka v Metro Concepts East Africa Limited & another* [2021] eKLR while emphasizing the Court’s duty to uphold rights upheld the court’s jurisdiction as follows:
- “ 5. These decisions demonstrate this Court has authority to enforce a decision of the Director which has not been objected to nor appealed against and therefore the Applicant herein is entitled to the reliefs sought in the motion. If I were to find otherwise the import would drive the Applicant from the seat of justice and leave said Applicant with nowhere to turn given that the Latin maxim holds *Ubi jus ibi remedium* meaning ‘where there is a right, there is a remedy’. This is a principle that postulates where the law establishes a right there should be a corresponding remedy for its breach. Put another way the principle is simply that no wrong should be allowed to go without any remedy. The fact there is lacunae is the precision of the enforcement of the latter part of the assessment of the Director of Occupational Safety and Health sans (sic) the punitive sanctions which ideally should be visited on the 2 Respondents before the Court, there is some modicum of relief the Court can grant to the Applicant which is to allow the application in terms of prayers 1 and 2 of the notice of motion application dated 9<sup>th</sup> July 2021.”
14. In view of the matters highlighted above, it is apparent that the Court is rightly clothed to handle this matter by dint of section 12 of the *ELRC Act* which gives the Court unlimited original jurisdiction to determine all disputes related to employment and labour relations.

### **Merits of the motion**

15. The ELRC Act and the rules thereunder are silent on setting aside of *ex parte* judgment of the Court and as such I resort to the *Civil Procedure Act* and the rules thereunder. Order 10 Rule (11) of the Civil Procedure Rules stipulates that:
- “Where the Judgment has been entered under this order, the Court may set aside or vary such Judgment and any consequential decree or order upon such terms as are just.”
16. The Court is also guided by the principles laid down in the case of *Shah v Mbogo & Another* (1967) E.A 116 where it was held that: -
- “...the court’s discretion to set aside an *ex parte* judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise to obstruct or delay the cause of justice.”



17. The exercise of the discretion to set aside judgment is unfettered but the court is required as guided above, to act judiciously to ensure that the interest of justice is served. The Court must therefore examine the circumstances under which the order was delivered in order to ensure that the same was done fairly. The discretion should not be used to aid the indolent, negligent and reckless parties. In the case of *Mureithi Charles & another v Jacob Atina Nyagesuka* [2022] eKLR Where Odunga J (as he then was) held that:

“That the decision whether or not to set aside ex parte judgement is discretionary is not in doubt and that the discretion is intended so to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”

18. In this matter, the Applicant admitted that it was served with the motion that led to the impugned judgment and contended that it failed to enter appearance because it opted for an out of court negotiation with the claimant. It also alleged that the judgement is based on an obsolete award which had been reviewed downwards by the 2<sup>nd</sup> respondent. The claimant had denied being involved in any out of court negotiations with the applicant and further averred that he was never called for any medical examination for purposes of review of the assessment of the award by the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> respondent did not file any response to support or dispute the allegations above.

19. Having considered the material before me and especially the admission by the applicant that it was duly served with the motion but failed to enter appearance to defend the same, I find that the Applicant acted negligently. It should therefore quietly suffer the consequences of its negligence and indolence without crying foul.

20. The foregoing notwithstanding, I have considered the material before the Court and noted that after the award dated 23<sup>rd</sup> September 2022, a Work Injury Evaluation Clinic by three doctors was held on 11<sup>th</sup> May 2023 and evaluated the claimant’s health status and made an opinion that the claimant had suffered 3% permanent incapacity. That percentage was less than the 10% assessment recorded on 23<sup>rd</sup> September 2022.

21. However, it has not been stated whether the said Work Injury Evaluation Clinic was triggered by an objection under section 51 and 52 of the *WIBA*. What is clear is that the claimant was aware of the said clinical evaluation report. I say so because, he attached page 1 of the evaluation clinic report as exhibit OKB -2(b) in the Notice motion that gave rise to the impugned judgment. I would therefore hold that on a balance of probabilities that the claimant was subjected to medical clinic on 11<sup>th</sup> May 2023 that yielded to the said opinion. There is however, no documentary evidence to show that the Director re-assessed the earlier award down to Kshs. 86,400 based on the new opinion by dint of section 51 and 52 of *WIBA*.

22. Without any evidence that the Director reviewed his earlier award down to kshs. 86,400, there is no sufficient cause to warrant the setting aside of the judgment. Consequently, the notice of motion dated 14<sup>th</sup> November, 2023 lacks merits and is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 26<sup>TH</sup> DAY OF JULY, 2024.**

**ONESMUS N MAKAU**

**JUDGE**

\_Order



This ruling has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N MAKAU**

**JUDGE**

