



REPUBLIC OF KENYA



KENYA LAW
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**Peter v Gitau (Miscellaneous Application E021 of 2024)
[2025] KEELRC 55 (KLR) (23 January 2025) (Ruling)**

Neutral citation: [2025] KEELRC 55 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
MISCELLANEOUS APPLICATION E021 OF 2024
ON MAKAU, J
JANUARY 23, 2025**

BETWEEN

ANDREW MWENDA PETER APPLICANT

AND

PATRICK MAINA STANLEY GITAU RESPONDENT

RULING

1. The applicant was injured while at work on 6th November 2020. The accident was reported and on 19th July 2023 the Director of Occupational Safety and Health (DOSHS) assessed his compensation at Kshs.642,577. The respondent never complied with demand to pay by the DOSHS officer dated 19th July 2023 prompting the applicant to file a Notice of Motion dated 2nd August 2024 urging the court to adopt and enforce the Award by the DOSHS officer as a decree of the court.
2. The respondent filed a Notice of Preliminary Objection dated 9th October 2024 raising the following grounds: -
 - a. That the Applicant’s application to enforce the Director’s award of 19th July, 2023 is statutorily time barred in view of section 4 (2) of the [Limitation of Actions Act](#) as read with section 90 of the [Employment Act](#).
 - b. That the claim for compensation contravenes the mandatory provisions of section 26 as read with section 27 of the [Work Injury Benefits Act](#) as the claim for compensation was lodged out of time i.e. more than 12 months after the date of the accident.
3. As regards the issue of limitation period, it was submitted for the respondent that the application for adoption of the award was filed beyond the stipulated time since the accident occurred on 6th November 2020. Reliance was placed on section 90 of the [Employment Act](#) and section 4(2) of the [Limitation of Actions Act](#). Further reliance was placed on the case of Richard Akama Nyambane v ICG



Maltauro Spa (2020) eKLR where the court held that failure to file claim within the statutory period renders it void and precludes the claimant from compensation.

4. As regards the issue of violation of the mandatory provisions of the *Work Injury Benefits Act* (WIBA), it was submitted that the applicant's claim is inadmissible because it was lodged after the lapse of the 12 months period provided under section 26 and 27 of the WIBA. For emphasis, reliance was placed on the case of *Ng'ang'a v County Government of Nakuru (Miscellaneous Civil Application E007 of 2022) (2023) KEELRC 789 (KLR)* where the court underscored the need to lodge claims within the statutory timelines.
5. In the end, the court was urged to dismiss the application with costs for being time-barred and contravening mandatory provisions of WIBA.
6. On the other hand, it was submitted for the applicant that section 26 of WIBA places the duty to report an accident on the employer while section 27 provides that failure to report an accident is not a bar to compensation.
7. It was further submitted that the issue, whether or not the claim was reported out of time is a question of fact that requires adduction of evidence. Further that, the respondent never challenged the award as provided under WIBA.
8. As regards the limitation period, it was submitted that the time starts to run from the date of the assessment or communication of the assessment to the employer. For emphasis, reliance was placed on *Elijah Kisyanga Ndende v Manager Zahken International Construction Ltd (2022) eKLR* where the court held that time starts running from the date of the Directors decision.
9. Accordingly, the court was urged to follow the cited decisions that time starts to run from the date of the Directors decision or 90 days from the date the Director's decision is communicated.

Determination

10. The issues for determination are:
 - a. Whether the applicant's motion is time barred.
 - b. Whether the applicant's claim for compensation was lodged out of time.

Time barred motion

11. The Respondent alleges that the application herein is time barred by dint of section 90 of the *Employment Act* read with section 42(2) of the *Limitation of Actions Act*. Section 90 of the *Employment Act* provides that: -

“Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act* (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.”
12. There is no doubt that the claim herein is anchored on contract of employment and the cause of action relates to that contract. The question that arises is when does a cause of action arise in Work Injury claims.



13. A cause of action has been defined by Black's Law Dictionary 10th Edition as: -
- “ 1. . A group of operative facts giving rise to one or more basis for suing; a factual situation that entitles one person to obtain a remedy in court from another person;
 2. A legal theory of a law suit”
14. Applying the foregoing definition to this case, I find that the cause of action arose on the day the Director DOSH published the assessed compensation to the parties. This is the date referred to in section 51 of WIBA which allows any party aggrieved by the decision of the Director to challenge the same.
15. It follows that statutory period for enforcement of Directors award of damages cannot be three years from the date of the accident because the alternative procedure provided under section 16 of WIBA must first be exhausted before a party can have any right to sue. Section 16 provides that: -
- “No action shall lie by an employee or any dependent of an employee for recovery of damages in respect of any occupational accident or disease...save under this Act...”
16. I am persuaded by *Elijah Kisiyanga Ndende v Manager Zahken International Construction Ltd*, supra, where Nzei J held: -
- “For purpose of suits or applications for enforcement of decisions and/or assessment made by the director of Occupational Safety and Health Services under the *work injury benefits Act*, time in my view starts running from the date the director's decision is received by the employer.”
17. The court appreciates that there is no statutory provision on the application and enforcement of the Director's Awards. The said power is inherent in a court of law basically to give effect to the right to access to justice. All what the court should guard against is abuse of the process of the court by a party making such applications after an unreasonable delay.
18. In this case, the Director's award was made on 19th July 2023 and was communicated vide a letter dated even date. The application for enforcement herein was filed on 8th August 2024, about one year from the date of the award by the director. It follows that the delay in filing was not unreasonable and more so not beyond three years from the date it was communicated to the parties.

Violation of section 26 and 27 of WIBA

19. The respondent faulted the applicant's claim because it was not lodged within 12 months from the date of the accident. Whether or not, the applicant lodged his claim within 12 months from the date of the accident as required by section 26 of the Act or whether he reported the accident to the employer as required under section 21 of the Act are matters of facts which can only be proved by evidence. As such, objecting to the applicant's claim on the basis of failure to report an accident or lodging of a claim out of time is not a proper ground for objection. I gather support from the case of *Mukisa Biscuits Manufacturing Co.Ltd v West End Distributors Ltd (1969) EA 696* the court held:-
- “A preliminary objection consists of a point of law which has been pleaded or which arises by clear implications out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or plea of limitation



or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertain or if what is sought is the exercise of judicial discretion.”

Conclusion

20. Having found that the application before the court is not time barred, I dismiss the Notice of Preliminary Objection by the respondent and allow the Notice of Motion dated 2nd August 2024 in terms of prayer 2, 3 and 5. I further award the applicant interest at court rates from the date of filing the motion till payment in full. I say so because awarding interest from the date of the award would encourage parties to delay coming to court.

DATED, SIGNED AND DELIVERED AT NYERI THIS 23RD DAY OF JANUARY, 2025.

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.

