



REPUBLIC OF KENYA



KENYA LAW
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**Ogol & another v Badar Hardware Limited & another (Cause
116 of 2023) [2025] KEELRC 619 (KLR) (16 January 2025) (Ruling)**

Neutral citation: [2025] KEELRC 619 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 116 OF 2023
K OCHARO, J
JANUARY 16, 2025**

BETWEEN

SUSAN ADHIAMBO OGOL 1ST CLAIMANT

**MAUREEN KWAMBOKA ODHIAMBO (SUING AS THE
LEGAL REPRESENTATIVES OF THE ESTATE OF IBRAHIM
OKETCH) 2ND CLAIMANT**

AND

BADAR HARDWARE LIMITED 1ST RESPONDENT

TAKAFUL INSURANCE OF AFRICA 2ND RESPONDENT

RULING

1. Through their Notice of Motion application dated 3rd October 2023, the Applicants have sought:
 - I. Spent.
 - II. That this Court be pleased to compel the Respondents to pay KShs. 1,212,592.00 being the balance of the assessment amount awarded to the deceased's dependants by the Occupational Safety and Health Offices, Malindi County, on 25th May 2022.
 - III. That costs of the Application be borne by the Respondents.
2. The application is anchored on the grounds set forth on the face thereof and the supporting affidavit sworn by the 1st Claimant/Applicant on the 3rd October 2023.
3. The 1st Respondent resisted the application through the replying affidavit herein sworn by Omar Ahmed Yusuf, its Managing Director, on the 1st Respondent on 17th November 2023.



4. The 2nd Respondent opposed the application by way of the grounds of opposition dated 4th December 2023, and a replying affidavit sworn by Dolphine Moindi, its Legal Officer, on the same date. It further filed a notice of preliminary objection of the even date.
5. On 24th September 2024 the Court directed that the application be canvassed by way of written submissions. The parties obliged. In their respective submissions, the addressed both the preliminary objection raised by the 2nd Respondent, and the Notice of Motion application by the Claimants/Applicants.

The Application

6. The Applicants asserted that they have instituted the suit herein and instant application in their capacity as legal representatives of the estate the deceased who was an employee of the 1st Respondent.
7. On 12th July 2021, the deceased while in the course of his employment, got into a road accident and consequently suffered severe injuries which resulted to his untimely death.
8. The accident was reported to the Director of Occupational Safety and Health Services. Subsequently the Director assessed compensation payable to the estate of the deceased at KShs. 3,360,000 and directed the 1st Respondent to pay the amount within 90 days from the date of the award.
9. Following the assessment, the 2nd Respondent [as the 1st Respondent's Insurer] remitted KShs. 2, 147,408.00 to the Claimants/Applicants, leaving a balance of KShs. 1, 212, 592.00.
10. The Respondents have refused and or ignored to settle the stated amount despite numerous requests from the Applicants. The Respondents' decision to evade to settle the balance exposes the Applicants to unforeseen risks and losses.
11. The Respondents would not suffer any prejudice if the orders sought herein are granted. The justice of this matter demand that the instant application be granted.

The 1st Respondent's Response.

12. The 1st Respondent stated that the suit herein was commenced vide a Statement of Claim dated 3rd October 2023, and the substantive prayer under paragraph 19[a] is the payment of Kenya Shillings One Million, Two Hundred Twelve Thousand Five Hundred Ninety-Two [1,212,592.00] being compensation under the WIBA.
13. The instant application under prayer No. 2 seeks the order for payment of Kenya Shillings One Million, Two Hundred Twelve Thousand, Five Ninety-Two [1,212, 592.00] being compensation under WIBA.
14. The Claimants' claim has been denied through the Statement of Reply filed herein. The claim therefore cannot be determined summarily as the Claimants/Applicants want. The issues in dispute can only be determined after a full hearing of the suit.
15. The 1st Respondent further stated that following the assessment of the compensation payable to the estate of the deceased as hereinabove stated, it executed a memorandum of understanding dated 20th March 2023 whose main objective was to secure the interests of the Claimants by settling the claim to the extent of the funds that were expected from the 2nd Respondent.
16. On 27th March 2023, the Claimants and the 1st Respondent executed a deed of settlement of the claim for compensation. The execution was to allow to allow the payment of the sum of KShs. 2,247,408.00. This sum was subsequently fully remitted to the Claimants in instalments, by the 1st Respondent.



17. The 1st Respondent consequently received a refund of stated amount from the 2nd Respondent.
18. On 17th April 2023, the Claimants issued a discharge against the 1st Respondent. They undertook to hold harmless the latter in respect of any claim arising from the compensation of beneficiaries to the estate of the deceased.
19. The deed was a binding agreement which was dully executed and performed. The Claimants cannot rescind the same. However, as to whether or otherwise they can, is an issue that can only be determined after the hearing of the suit herein.
20. The 1st Respondent concluded that the instant application is a very good candidate for dismissal.

The 2nd Respondent's Response and preliminary objection.

21. The 2nd Respondent contended that this Court lacks jurisdiction to entertain the dispute herein as the law doesn't extend jurisdiction on this Court for Work Injury claims, except on an appeal from the decision of the Director. There isn't a provision of the law that donates jurisdiction to this Court to enforce an award by the Director.
22. The 2nd Respondent stated that once the Occupational Safety and Health Office made an assessment of KShs. 3,360,000, it paid the sum of KShs. 2,147,808 to the 1st Respondent for release to the Claimants. The sum was insured by the 1st Respondent based on the declared salary of a driver of KShs. 23,098 as opposed to what the Director relied on, KShs. 35000. The 1st Respondent under declared the salary of the deceased.
23. The 1st Respondent entered into an express agreement with the 2nd Respondent by way of a discharge voucher agreement that it would shoulder the difference of KShs. 1,142,592 since the latter had settled the maximum insured amount.
24. The 2nd Respondent argued that there is a misjoinder of parties and causes of action for the reason that the party with the primary obligation to pay the Claimant is the 1st Respondent. The primary dispute which this Court would have jurisdiction on [but only on appeal] is a dispute between the Claimant and the 1st Respondent based on a statutory obligation under the Work Injury Benefits Act. However, the cause of action between the 1st and 2nd Respondents is a secondary dispute based on an alleged breach of an insurance policy which is a commercial dispute. Hence this Court lacks jurisdiction to entertain a dispute between the 1st Respondent and 2nd Respondent. Its joinder in this suit is improper and misconceived.
25. The Claimants' cause of action can only be against the 1st Respondent with whom they have a direct link by way of a statutory duty to compensate under the Work Injury Benefits Act.
26. The instant application is superfluous as it is a duplication of the Statement of Claim.

The Claimants'/Applicants' submissions.

27. On their application herein, the Claimants identified on issue for determination, thus; whether the Respondents should be compelled to remit the balance of the assessed award being KShs. 1,212,592.00.
28. They argued that the instant application is all intended to secure aid of this Court in enforcing the Occupational Safety and Health Services Offices Malindi County's award of KShs. 3,360,000 as compensation for the deceased's death resulted from an accident that occurred while he was in the course of his employment.



29. An award issued by the Director under the Work Injury Benefits Act, is essentially a resolution of an employment or labour dispute or issue that arises between an employer and an employee which falls within the jurisdiction of this Court.
30. In making the award, the Occupational Safety and Health Offices, Malindi County, performed a quasi-judicial function that the Respondents neither objected to nor appealed against. As such, they created a legitimate expectation that they would comply with the said directions emanating from the exercise of the function. The Respondents cemented this expectation when they settled part of the award.
31. To support their submission that where an employer hasn't challenged the award of the Director by way of an objection of appeal, or settled the awarded sum within 90 days, the person in whose favour the award was made, has the right to pursue payment of the sum either through an application or a cause, they placed reliance on the decision in the case of *Nganga v County Government of Nakuru* [2023] KEELRC 789 [KLR].
32. The allegation by the 1st Respondent that it entered into an agreement with the Claimants is unsupported as the agreement hasn't been placed before the Court. In any event, no agreement can override the award by the Director. The alleged agreement should not be allowed to be used as a means of aiding the Respondents to run away from effecting the award, and denying the Claimants their right to full compensation.
33. By their actions, the Respondents created a legitimate expectation that they could settle the balance, the subject matter of the application. The 2nd Respondent cannot therefore, rely on privity of contract to run away from the created legitimate expectation.
34. The instant application isn't mis-anchored as alleged by the Respondents. It was rightfully filed contemporaneously with the Statement of Claim herein.
35. On the preliminary objection raised by the 2nd Respondent, the Claimants submitted that the objection is not properly raised. The same isn't on pure points of law. As such, the preliminary objection should be declined. To support this point, reliance was placed on the case of *Mukisa Biscuit Manufacturing Co. Limited vs West End Distributors Limited*.
36. A keen look at the provisions of Article 162[2] of the Constitution and the provisions of Section 12 of the Employment and Labour Relations Court Act, will reveal that this Court has the jurisdiction to handle the matter such as the instant one. The court is urged to in so holding take into account the fact that the Work Injury Benefits Act, hasn't provided a mechanism for the enforcement of the awards by the Director. However, judicial precedents have it that the Court has jurisdiction to enforce the awards or decisions of the Director.

The 1st Respondent's Submissions.

37. The first Respondent identified three issues for determination, thus, whether the proceedings herein are an abuse of the Court process, whether the orders sought can issue, and who should bear the costs herein.
38. Submitting on the 1st issue, the 1st Respondent stated that through the uncontroverted affidavit of its Managing Director, it has shown that the Claimants received the sum of Kshs. 2,247,408 and signed a letter of discharge in its favour. Subsequently, the parties signed a deed of settlement. They are bound by the deed. The 1st Respondent performed its part of the contract and the Claimants discharged it. In light of this, the Claimant's application herein is an abuse of the Court process. To fortify this submission that the action of filing the instant suit and application can be characterised as an abuse of



the Court process, reliance was placed on the elaboration in *Satya Bhama Gandhi v Director of public Prosecutions & 3 others* [2018] eKLR.

39. The Claimants seek payment of KShs. 1,212,592 in the instant application as well as in the main claim. The Claimants haven't demonstrated why the amount should be paid before the suit is heard and determined. To grant the application shall be tantamount to prejudging the main suit. To support this point, reliance has been placed on the case of *Sophia Wanjiru Muchiri v Laikipia University* [2022] eKLR.

The 2nd Respondent's submissions.

40. It was submitted that the 2nd Respondent as an Insurer cannot be enjoined in a claim of this nature as the Claimants have no direct link with it. The direct link with the Insurer exists only with the employer [the 1st Respondent], since the two have a commercial arrangement in the form of an insurance policy.
41. It is only the employer who can sue alleging that the Insurer hasn't honoured the terms of the insurance policy, in separate commercial proceedings in the civil Court. The defence the Insurer may raise as against a claim by the employer such as violation of the insurance policy by the employer, exceeding of the policy limit among others are defences that can only be well considered on merit in substantive proceedings in the civil Court.
42. It was further submitted that the 2nd Respondent isn't a necessary party in this suit as a decree can be made against the employer without the presence of the Insurer. In case the employer wishes to seek indemnity from the Insurer, then it has to file a substantive case in a court with jurisdiction that gives the Insurer an opportunity to defend itself. To buttress this submission reliance was placed on the case of *Peter Mutua Kaloki v China State Construction & Engineering Corp [Kenya] & Another* [2022] eKLR.

Analysis and Determination.

43. I have carefully considered the Notice of Motion application, the grounds on which it is premised, the affidavit in support of the application, and the replying affidavits by the Respondents, and distil the following issues for determination: -
- I. Whether this Court has the requisite jurisdiction to entertain and render itself on matters enforcement of the Directors of Occupational Safety and Health Services awards or decisions.
 - II. Whether the 2nd Respondent is properly enjoined in the instant suit.
 - III. Whether the orders sought in the application can be availed to the Claimants.
- Jurisdiction of the Court on matters enforcement of the Directors award or decision.
44. Undoubtedly, though the Work Injury Benefits Act sets out processes regarding, initiation and processing of work, injury, death, and diseases, claims, and appeals against the decisions of the Director, it is deficient on the process for enforcement of the decisions or awards. Further, in light of this, there has been a furious debate as to whether the Employment and Labour Relations Court has the jurisdiction to entertain causes or applications concerning the enforcement of the decisions or awards. As correctly pointed out by Justice Rika in the case of *Peter Mutua Kaloki vs China State Construction & Engineering Corp [Kenya] and Another* [2022] eKLR, there have been two schools of thought on this aspect.
45. I am urged to be persuaded by the above-mentioned decision. Respectfully, I decline. Time and again this Court has held that considering, the provisions of section 12 of the Employment and Labour



Relations Act liberally, that Article 10 of the Constitution enjoins the Court in interpreting the law to be mindful of inter alia the national values of human dignity, social justice and human rights, and the maxim, equity will not suffer a wrong without a remedy, persons who have sustained workplace injuries, or suffered workplace diseases, or estates of persons who have died as a result of workplace injuries or diseases, and have successfully undertaken and concluded the processes contemplated under the Work Injury Benefits Act, cannot wait till end comes, to enforce their success against employers who are unwilling to adhere to what the law requires of them under the stated Act, simply because the Legislature in its wisdom hasn't almost 17 years after the enactment of the Act, failed or cared little, to make good the gap and provide for the enforcement mechanism.

46. Such will, embolden defiant employers to continue with their non-adherence to what the law requires of them, and thus with impunity breach the rule of law, stifle the affected persons' right to access to justice, and right to equal protection under the law.
47. It is in situations like as obtains regarding the deficiency in the Work Injury Benefits Act, that Judge made law, or put it in another way, Judge craft, becomes imperative for the sake of the wider interest of justice.
48. It is not lost of me that rule 69 of this court's Rules that came into effect on 17th August 2024, gives the Court power to adopt awards like those by the Director.
49. By reason of the premises, I return that this Court has Jurisdiction to entertain matters enforcement of the awards under the WIBA, but not on contentious matters that will require the Court to assume original jurisdiction that will involve taking of evidence from the parties and rendering itself on the same.

Enjoinment of the 2nd Respondent

50. I have considered that the 2nd Respondent has raised a preliminary objection that it is improperly enjoined in this matter. In my view, this point as raised is not a pure point of law, as for the Court to render itself on it, it must interrogate facts. The matters raised as regards this point can be good stuff for an application by way of a notice of motion, to have the name of the 2nd Respondent struck off the proceedings herein.
51. As such, I decline to strike out the name as invited, on the basis of the preliminary objection.

Whether the Claimants/ Applicants are entitled to the orders sought.

52. Inarguably, the instant application seeks for a relief that is the same as the principal relief sought in the Statement of Claim, yet the application before this Court isn't one for summary judgment. To grant the orders sought in the application shall be tantamount to conclusively determining the suit herein at an interlocutory stage on the basis of affidavits. That will be a foreign procedure engaged. I am not willing to engage and sanction a procedure unknown to our procedure rules or the law.
53. In the upshot, I hereby decline the Claimants'/ Applicants' application. It is hereby dismissed. Each party to bear its own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MOMBASA THIS 16TH DAY OF JANUARY 2025.

OCHARO KEBIRA

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 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.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

