



Gatimu v Africa Star Railway Operation Company Limited (Miscellaneous Civil Application E131 of 2023) [2025] KEELRC 513 (KLR) (24 February 2025) (Ruling)

Neutral citation: [2025] KEELRC 513 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS CIVIL APPLICATION E131 OF 2023**

**NJ ABUODHA, J
FEBRUARY 24, 2025**

BETWEEN

SAMUEL NGATIA GATIMU APPLICANT

AND

AFRICA STAR RAILWAY OPERATION COMPANY LIMITED .. RESPONDENT

RULING

1. The Applicant filed application dated 27th April, 2023 brought under Order 51 Rule 1 of the Civil Procedure Rules 2010: section 3A, 1A and 1B of the *Civil Procedure Act* and pursuant to section 30, 36, 37 and 40 of the *Work Injury Benefits Act* 2007 and Gazette Notice No. 9243 of 5th August 2011 seeking for Orders to adopt award of Directorate of Occupational Health and Safety Services, Nairobi City County under WIBA made in favour of the Applicant of Kshs 1,577,950/= as Judgment of the court. That the award made be paid within 30 days in default execution to issue and to award interest on the amount from the date of assessment until payment in full.
2. The application was supported by the Affidavit of Samuel Ngatia Gatimu who averred that he was employed as a crane operator by the Respondent. That on 5th November, 2018 he was injured at his left hipbone when the offloading goods which were not properly locked, got loose and fell on him causing the injury.
3. That he was rushed to Mariakani Cottage Hospital by his colleagues at the company and received treatment. That he was given painkillers and bandaged his thigh and referred to Nairobi South Hospital for further treatment where a surgery had to be performed on his hipbone.
4. That he was discharged upon treatment from the hospital and he had to use crutches for 2 months and upon resuming work on 2nd January, 2019 he was terminated hence out of employment.
5. That the Applicant was injured while on duty and has never been compensated by the Respondent for injuries suffered.



6. That the Director of Occupational Safety and Health awarded the applicant the sum of Kshs 1,577,950 which the Respondent has refused, failed and or neglected to pay the Applicant.
7. The Respondents in reply filed a Preliminary Objection dated 18th March,2024 stating that the application and cause of action was time barred as per section 90 of the *Employment Act* and amounted to abuse of court process. The Respondent also filed their replying affidavit by Linda Kaniaru sworn on 20th March 2024 who averred that the application lacked merit, was frivolous and an abuse of court process and the court does not have jurisdiction for enforcement of awards of the Director of Occupational safety and Health Services.
8. That the application was time barred pursuant to section 90 of the *Employment Act*.
9. That the Cause of action arose on or about 5/11/2018 when the Applicant was executing his official duties at his place of work when he sustained injuries and was treated at Nairobi South Hospital on the same date.
10. That on 29/7/2019 the Applicant and the Respondent entered into an understanding whereby they mutually agreed that the Applicant be paid a total of 172,820/= as compensation for the temporary total disablement and medical expenses as per policy limit for injuries sustained on 15/11/2018 which amount was paid to the Applicant on 6/8/2019.
11. That as part of follow up the Applicant was referred to Dr. Wambugu P.W to assess the degree of permanent total disability which he assessed at 2% and on 21/7/2020 the Applicant was referred to Dr. Joab Bodo for further medical re-examination where it was confirmed that there was no permanent total disability as the fracture had united well with no shortening of the left leg.
12. That a further discharge voucher for Kshs 99,609/= was issued on 21/04/2020 for permanent total injuries sustained as per the report prepared by Dr Wambugu awarding him 2% for 0.5cm shortening of the limb but the discharge voucher was never Responded to by the Applicant.
13. That the Respondent was shocked to have been served by the application with an annexure of a medical certificate dated 31/1/2019 by Dr Agunda Moses assessing permanent total disability at 30% which was never availed to the Respondent.
14. That the Applicant further attached the medical report by Dr. Welling K. Kiamba dated 28.8.2020 which was availed to the Respondent. That the said medical certificate and medical report were exaggerated, the injuries sustained by the Applicant and assessed the permanent disability at 30% and 35% a percentage applicable in cases of total loss of the leg below the knee with stump exceeding 10cm, which was not the case with the Applicant.
15. That the demand for payment of Work Injury Benefit by the Director of Occupational and Safety Health Services dated 14.3.2019 was exaggerated, exorbitant and without any basis. That the same was based on exaggerated injuries and the per cent suffered of 30% was without any basis.
16. That the Applicant could not rely on medical report done on 28.8.2020 way long after the Director had already made the assessment. That the Director's assessment was exorbitant in comparison with the injuries sustained. That the same was made to frustrate the Respondent after the employment contract came to an end. That the Applicant's claim was an afterthought.
17. That the Applicant's application was time barred having been filed six years after the occurrence of the incident and five years after the alleged assessment by the Director. That the same should be dismissed with costs as it would unjustly enrich the Applicant to the detriment of the Respondent.



18. The Application was dispensed of by written submissions.

Determination

19. This court has considered the application, the preliminary objection and Replying Affidavit by the Respondent and submissions filed by the parties herein and observes that it was not in dispute that the Applicant was employed by the Respondent and that he got injured while at work working as a crane operator and as a result he suffered serious injuries at his left hipbone. The Respondent reported the accident to the Director of DOSH who assessed the Applicant's compensation payable at Kshs.1,577,950/= after the Applicant's permanent incapacity was assessed at 30% on 14th March,2019.
20. The Respondent on the other hand alleged that the Application was time barred as per section 90 of the *Employment Act*, the Court did not have jurisdiction and that the Applicant sought to unjustly enrich himself as he was already paid among other allegations of exorbitant injuries and assessment.
21. On the issue of the Application being time barred this court notes that section 90 of the *Employment Act* concerns claims arising from employment relationship. This application is governed by WIBA which does not seem to give timelines on when the assessment by DOSH may be enforced provided the accident was reported within one year as provided for under section 27 of the Act. The Application is therefore not time barred when the primary law does not give any timelines.
22. On the issue of jurisdiction, this court has power to order enforcement of WIBA assessments as judgment of Court even though the WIBA Act is silent on the matter. This is premised on the presumption that this is a Court of law clothed with inherent power to do justice in any given situation provided it is within its power and on the principle that there can be no right without a remedy. In the case of Joash Shisia Cheto v Thepot Patrick Charles [2022] eKLR the court held as follows;
- The general position established by a majority of these decisions is as follows: -
- a. The law does not provide for mechanisms of enforcing the Director's award against a reluctant employer.
 - b. In the face of this lacuna, the holder of the award can move the court to seek for enforcement of the award. A majority of the decisions favour the view that the ELRC can be moved for this purpose pursuant to its jurisdiction under article 162 of *the Constitution* as read with section 12 of the ELRC Act. Only one decision holds the view that the ELRC cannot be moved for this purpose. A few share the view that the Magistrate's court may be moved where pecuniary jurisdiction allows.
 - c. The proceedings for enforcement may be in summary form by way of miscellaneous causes or in the form of ordinary causes but confined to matters of enforcement only.
 - d. Unless by way of appeal under section 52 of the WIBA, it is not open to the court to consider the merits of the Director's award or indeed go on a fact finding mission. This jurisdiction is the preserve of the Director.
23. The Applicant has therefore rightly approached this court through a Miscellaneous Application and since the Respondent has not raised any objection or appeal to the assessment by DOSH.
24. The issues raised by the Respondent in their Replying Affidavit of mutual agreement and the exaggerated injuries and medical reports could not be entertained at the application for enforcement



stage. The same ought to have been entertained by the Director during the assessment period where the employer was required to participate by providing such documents, they deemed necessary to assist the director in assessing the award. It is to be noted that it was the Respondent who reported the accident to the Director as per requirements of section 21 and 22 of the Act and they ought to have participated in the process where they ought to have raised an objection to the assessment as provided under section 51 of the Act and appealed to the Court as provided under section 52(2) if the if not satisfied by the Director's assessment.

25. This court notes that no appeal or objection was filed as per the WIBA Act since 2019 when the assessment was made. The Respondent did not seek to set aside the award or stay the same.
26. In conclusion the Applicant's application dated 27th April, 2023 is found merited and the court adopts the Director's award of Kshs 1,577,950/= made on 14th March, 2019 as a decree of the Court with interest thereon at court rates from the date of this ruling until payment in full.
27. Costs are awarded to the Applicant.
28. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2025

DELIVERED VIRTUALLY THIS 24TH DAY OF FEBRUARY, 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

