



**Ogola v Bob Morgan Services Ltd (Miscellaneous Case E124 of 2024)
[2025] KEELRC 435 (KLR) (19 February 2025) (Ruling)**

Neutral citation: [2025] KEELRC 435 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
MISCELLANEOUS CASE E124 OF 2024
JK GAKERI, J
FEBRUARY 19, 2025**

BETWEEN

DAVID OCHIENG OGOLA APPLICANT

AND

BOB MORGAN SERVICES LTD RESPONDENT

RULING

1. The Applicant filed the instant Application on 25th November, 2024 under Certificate of Urgency seeking various Orders, principally adoption of the assessment of the Director of Occupational Safety and Health Services, Kisumu dated 7th July, 2021 as a judgment of this court, the sum of Kshs.1,206,297.60 and the respondent be fined Kshs.500,000.00 for failing to compensate the Applicant and costs of the application.
2. The respondent, on the other hand raised a Preliminary Objection (PO) contending that the court has no jurisdiction to enforce awards emanating from the Director of Occupational Safety and Health (DOSHS) as there was no legal provision conferring that power to the Employment and Labour Relations Court.
3. In its response, the respondent deposes that the applicant had filed Milimani Commercial Courts Magistrate's Civil Case No. E 198 of 2023 David Ochieng Ogola V Bob Morgan Services Ltd and Madison General Insurance Kenya Ltd but withdrew it when a ruling by the court was pending.
The respondent equally gave notice of the Preliminary Objection.

Respondent's submissions

4. According to the respondent, the Preliminary Objection runs to the root of the suit and can be raised at any stage even viva voce as held in Mohamed Sheikh Abubakar V Zakarius M. Mbaya [2019] eKLR.



5. That the alleged assessment by the DOSH is dated 7th July, 2021 and this suit was filed on 15th October, 2024 outside the 3 year limitation period and is thus statute barred by virtue of Section 89 of the *Employment Act*.
6. Reliance was made on the decisions in Ng'ang'a V County Government of Nakuru [2023] KEELRC 789 (KLR) and Richard Akama Nyambane V ICG Maltauro Spa [2020] KEELRC 847(KLR) on the applicability of Section 90 of the *Employment Act* to urge that the action is time barred.
7. On enforcement of the award by DOSH, counsel cited the sentiments of the court in Samuel Kamau Macharia & Another V Kenya Commercial Bank Ltd & 2 Others [2012] eKLR, on the source of jurisdiction, and the decisions in Akhaya (suing as the Administrator of the Estate of Brian Mutabi Amakobe (Deceased) V Uhuru Heights Ltd Misc. App. No. E148 of 2023 [2024] KEELRC 244 (KLR), Lameck Nyakundi Anyona V W. J. J. Kenya Construction Co. Ltd and Peter Mutua Koloki V China state Construction & Engineering Corporation (Kenya) & Another [2022] eKLR, to urge that the court had no jurisdiction to enforce the awards by the DOSH as there is no provision of law to that effect.
8. The court's sentiments in Obango V Platinum Outsourcing and Logistics (EA) Ltd [2022] KEELRC 13026 (KLR) were also cited to embellish the submission.
9. Finally, counsel submits that the Insurance Company, in this case Madison Insurance failed to settle the claim despite the subsistence of the policy when the accident occurred and it was duly informed.

Applicants submissions

10. On jurisdiction, the applicant submitted that Article 162(2) of *the Constitution* and Section 12 of the Employment and Labour Relations Court confer upon the court jurisdiction to adopt DOSH awards as held in Jared Inging Obuya V Handicap International [2021] eKLR and Luvizu V Timsales Ltd Misc. Civil App. E069 of 2023 where the court held that it had jurisdiction to adopt the awards to persuade the court that it had jurisdiction to adopt DOSH Awards.
11. As to whether the objection is merited the applicant urges that Article 159(2)(d) of *the Constitution* and 52(2) of the *Work Injury Benefits Act* (WIBA) accord the court jurisdiction by implication and cites the sentiments of Samson Schweya Mwendabule V Protective Custody Ltd where the court held that Article 162(2)(a) of *the Constitution* and Section 12 of the Employment and Labour Relations court bridge the lacuna as regards enforcement of awards by DOSH.
12. In his Supplementary Submissions, the applicant addressed the issue of jurisdiction as previously done, whether the application is time barred and whether the respondent's amended Preliminary Objection on Limitation of time should be allowed. The applicant urges that the *Employment Act* has no application as this is a WIBA matter and cites sections 16, 26(4) and 51(1) of the Act to urge that time starts running 150 days after the award by DOSH.

Analysis and determination

13. As to whether the respondents Notice of Preliminary Objection raises a competent Preliminary Objection, the applicant did not contest the same and the court is satisfied it meets the threshold in Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd [1969] EA 696 as exquisitely captured by Law JA and Sir Charles Newbold P.



14. The respondent's Notice of Preliminary Objection is grounded on the foundational issue of jurisdiction of the court and as correctly submitted, the issue can be raised at any point in the course of proceedings including through submissions and by word of mouth.
15. This is because as underscored by Nyarangi JA in Owners of the Motor Vessel "Lilian S" V Caltex Oil (Kenya) Ltd [1989] KLR, "Jurisdiction is everything" and without it the court cannot make one more step and must down its tools.
16. As held in Samuel Kamau Macharia & Another V Kenya Commercial Bank and 2 Others (Supra)

"A court's jurisdiction flows from either *the constitution* or legislation or both, thus, a court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law".
17. The court is alive to the reality that there are two schools of thought concerning enforcement of awards of DOSH by the Employment and Labour Relations Court.
18. While one school postulates that the provisions of Article 162(2)(a) of *the Constitution* of Kenya and Section 12 of the *Employment and Labour Relations Court Act* confer upon the Court inherent jurisdiction to deal with all matters germane to employment and labour relations, the other school posits that since WIBA is silent as to how DOSH awards ought to be enforced and by whom, there is a lacuna in the law and the Act confers appellate jurisdiction on the Employment and Labour Relations Court to hear appeals against decisions of the DOSH.
19. Both Schools of thought are in agreement that there is a Lacuna in WIBA.
20. In Lameck Nyakundi Anyona V W. J. J. Kenya Construction Co. Ltd (Supra) the court stated:

"There is no provision of the law, in the *Work Injury Benefits Act*, the *Employment and Labour Relations Court Act* or the *Employment Act* which allows the Court to enforce the compensation awards of the Director of Work Injury".
21. Similar sentiments were expressed in Peter Mutua Kaloki V China State Construction & Engineering Corporation (K) & Another (Supra).
22. Similarly, in Jared Ingling Obuya V Handicap International (Supra), the court appreciated the Lacuna but enforced the award on the ground that the legislature could not have intended that beneficiaries of DOSH awards would be without a remedy if the employer fails to implement the decision.
23. In John Munene V Kenya Wildlife Services & Another (Supra) this court was persuaded that the provisions of WIBA do not confer upon the Employment and Labour Relations Court primary or original jurisdiction to entertain disputes under WIBA and declined to hear and determine the case among others.
24. In that case, the court expressed itself as follows on the issue of jurisdiction:

"As apparent from the provisions of WIBA, the only jurisdiction this court has under the Act is to hear appeals against decisions of the Director as ordained by the provisions of Section 52(2) of the *Work Injury Benefits Act*, 2007.

Having entertained and determined appeals from the DOSHS, in exercise of appellate jurisdiction conferred by Section 52(2) of the Work Injury Act Benefits, this court is



reluctant to arrogate unto itself additional jurisdiction of adopting decisions of DOSHs as its own, a position that the court finds unpalatable.

Having found that this is an appellate court for purposes of the decisions of the Director of Occupational Safety and Health Services, the Preliminary Objection herein is merited and the Application herein is dismissed”

25. The foregoing sentiments expressed in 2022 apply on all fours to the instant application.
26. Concise Oxford English Dictionary 12th Edition, 2011 defines the term adopt as;
“formally approve or accept”.
27. Clearly, by adopting the assessment by the Director of Occupational Safety and Health Service, the assessment becomes an order or judgment of the court as it assumes responsibility.
28. Can the court thereafter assume appellate jurisdiction over the same matter or similar matter whether it has adopted the assessment or award or not?
29. In the courts view, the status quo is untidy and require immediate resolution.
30. From the foregoing, it is discernible that this court is not persuaded that it has jurisdiction to adopt the assessment or awards by the Director of Occupational Safety and Health Services as its Orders and as jurisdiction is everything as exquisitely captured by Nyarangi JA in the Owners of the Motor Vessel “Lilian S” V Caltex Oil (Kenya) Ltd [1989] KLR, the court has no choice but to down its tools.
31. Before concluding this judgment, I will comment on the quality of documents relied upon by the applicant, specifically the DOSH forms.
32. The document is barely readable and cannot pass the test of legibility.
33. Neither the copy in the CTS nor the printed copy is legible. This observation is necessitated by the fact that this court has previously declined applications on the ground of illegibility of essential documents, and in particular the DOSH Forms which are an indispensable pillar of an application of this nature.
34. It cannot be over-emphasized that documents filed in court by parties for purposes of litigation must be legible for ease of use by the court. An illegible document does not serve the intended purpose.
35. In *Abdiaziz Abdullahi Ibrahim V Abdirizak Ali Ahmed and Another* [2024] KEHC 108400 (KLR), B. K. Njoroge J. observed:
“The trial court ought to have declined to admit into evidence a document that is illegible. Production of documents before the court is for purposes of assisting the court arrive at the truth. Once the court notices that the copy being produced is illegible, it should decline the request”.
- See also *Sanaiko N. Kibiwott Tanui & 4 Others* [2021] eKLR.
36. The upshot of the foregoing is that the applicant’s Notice of Motion dated 25th November, 2024 is struck out with no Orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 19TH DAY OF FEBRUARY, 2025.

DR. JACOB GAKERI



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 *Civil 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.

