



Intercontinental Consultant and Technocrats v Matheka & another (Employment and Labour Relations Judicial Review E039 of 2024) [2025] KEELRC 876 (KLR) (13 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 876 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS JUDICIAL REVIEW E039 OF 2024
MN NDUMA, J
MARCH 13, 2025**

**BETWEEN
INTERCONTINENTAL CONSULTANT AND TECHNOCRATS ... APPLICANT
AND
MARGARET MUMBUA MATHEKA 1ST RESPONDENT
THE DIRECTORATE OF OCCUPATIONAL SAFETY AND HEALTH
SERVICES 2ND RESPONDENT**

JUDGMENT

1. The ex-parte Applicant filed a Judicial Review application dated 23rd July 2024 seeking an order in the following terms:-
 1. Spent
 2. Spent
 3. That a declaration be issued that there was no employer – employee relationship between the Applicant and the 1st Respondent
 4. That this honourable court be pleased to set aside the award of the sum of Kshs. 2,500,615.00 issued on 22nd November 2021 by the Director of Occupational Safety and Health Services and the proceedings thereto.
 5. That the costs of this application be provided for.
2. The application is premised on grounds (i) to (vi) on the face of the Notice of Motion and buttressed in the supporting affidavit of Geoffrey Kamau, the General Manager of the Applicant. The nub of the application is that the 1st Respondent obtained an award of Kshs. 2,500,615.00 issued on 22/11/2021



- by the Director of Occupational Safety and Health Services. That the proceedings before the 2nd Respondent went ahead without participation of the Applicant.
3. That the 1st Respondent sought to enforce the said award in suit, Nairobi ELRC claim No. E123 of 2023 but withdrew the suit on 7/5/2024 with costs of Kshs. 60,000.00 to the Applicant.
 4. That the 1st Respondent filed application dated 7/6/2024 in Nairobi Misc. Application No. 173 of 2024 seeking to enforce the said award of Kshs. 2,500,615.00 against the Applicant.
 5. The Applicant disputes the jurisdiction of the 2nd Respondent in making the award as there was no employer – employee relationship between the Applicant and the 1st Respondent. That the application be granted.
 6. The application is opposed by Replying Affidavit of 1st Respondent in which she deposes that she reported to work as an employee, was paid as employee, was issued with sick days and upon lapse of her sick days used her leave for recovery. That it is too late in the day for the Applicant to raise these issues as the same ought to have been raised sixty days from the date of the award being 22nd November 2021.
 7. The application is further opposed by the objection by 1st Respondent dated 12/9/2024 to the effect that the Judicial Review proceedings are statutory time barred. The Notice of Motion is therefore fatally defective and same be struck out with costs.
 8. The 2nd Respondent filed an objection to the Notice of Motion on grounds set out as 1 to 11 in the notice dated 7/10/2024 as follows:-
 1. That, the Applicant sent notice to the 2nd Respondent, in the prescribed form ML/DOSH FORM 1, of an accident involving a worker, Margaret Mumbua Matheka – Mbiti that occurred on the 2nd June 2021 at 11:27 a.m. in compliance with section 22 of the Work Injury Benefit Act, 2007.
 2. That, the notice of accident by the Applicant in the prescribed form ML/DOSH FORM 1 was duly signed and stamped by the Applicant.
 3. That, the Applicant did not and has neither demonstrated that he is not the one who completed the stamped prescribed form ML/DOSH FORM 1 nor the person/agent who completed, signed and stamped the form on his behalf was not authorized to do so.
 4. That, the Applicant did not lodge a dispute/objection/appeal in the prescribed form within sixty (60) days following the decision of the 2nd Respondent as required under section 51 of the Work Injury Benefits Act 2007, and has not been turned away in attempting to do so.
 5. That, the Applicant lodged a dispute/objection well after lapse of a whole year when it dawned on him that the 1st Respondent had sustained injuries which are compensable; which dispute/objection he has lodged in ELRC without first exhausting the dispute process with the 2nd Respondent.
 6. That, the Applicant did not and has not even attempted to seek leave from any court of law for orders to lodge a dispute/objection out of time prescribed in the law.
 7. That, the Applicant in his supporting affidavit referred the 1st Respondent to as an ‘Independent Consultant Sociologist’ yet in the agreement contract duly signed by the Applicant and 1st Respondent did not state so. The Professional Service Agreement dated 4/6/2017 between the Applicant and 1st Respondent in his termination clause invokes



provisions characteristic of an employer-employee relationship where an employee has to give or be given a 30-day notice or salary prior to termination.

8. That, due process as provided at the Directorate was not followed by the Applicant to warrant this Directorate being a 2nd Respondent in this suit in light of alleged grounds stated by the Applicant in his Notice of Motion and Supporting Affidavit.
 9. That, misrepresentation of facts by the Applicant as to lodgment of alleged proceedings by the 1st Respondent, as to when the disputes/objection/appeal ought to have been lodged with the 1st Respondent does not warrant this matter to be placed before the honourable court where the Directorate is a Respondent. A notice in the prescribed form ML/DOSH FORM 1, of an accident involving a worker was sent to the 2nd Respondent and from the medical report in Part II of the form, the 2nd Respondent computed the amount compensable in accordance with sections 28 and 30 of the Work Injury Benefits Act, 2007 and this did not in any way entail proceedings as alleged.
 10. That the Respondent denies having tainted any legal procedure, denies having violated the provisions of the fair administrative action Act and/or provisions of the Constitution of Kenya 2010 and denies having acted unreasonably towards the Applicant who failed to obey the provisions of the law providing for lodgment of disputes/objections in the first place.
 11. That, mix up of procedure for document lodgement coupled with failure to observe legal requirements relating to dispute/objection lodgement, by the Applicant does not warrant this matter to not only be placed before the honourable court where this Directorate is Respondent but also being subjected to a situation where court orders are sought.
9. The 2nd Respondent further filed a replying affidavit dated 7/10/2024 which is sworn by Justus Bosire Nyakego who is the Director of the 2nd Respondent. He deposes that the Applicant has neither demonstrated that the 2nd Respondent did not complete and stamp the prescribed form ML/DOSH FORM 1 nor that the person/agent who filled, signed and stamped the form on his behalf was not authorized to do so. That the applicant did not lodge a dispute/objection/Appeal in the prescribed form following the decision of the 2nd Respondent as required under section 51 of the Work Injury Benefits Act, 2007 and has not been turned away in attempting to do so.

Determination

10. The parties filed written submissions which the court has considered and following the Court of Appeal decision in Owners of the Motor Vessel „Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1 where the Court held that;

I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

11. The court will determine the preliminary objection first before getting into the merits of the case.
12. The most crucial preliminary objection is that this matter is res judicata having been decided by Ndolo J. in a Ruling dated 14/11/2024 in which the court considered a Notice of Motion dated 7/6/2024 in which the Applicant sought orders directing the Respondent to pay to her the sum of Kshs.



- 2,500,615.00 awarded by the Director of Occupational Safety and Health Services on 22/11/2021 and Kshs. 58,050.00 or treatment plus costs and interests. This is the same matter in this suit and against the same parties except that the Applicant in that matter is the 1st Respondent in this matter.
13. The court relying on the decision in *Musimbi versus Great Yaduo Industry Limited* (Miscellaneous case E080 of 2022 [2022] KEELRC L302 (KLR)), (1 November 2022) (Ruling) found that the Employment and Labour Relations Court exercises appellate jurisdiction under the provisions of the Work Injury Benefit Act and no more.
 14. The court also considered the decision in *Seme versus Sino Hydro Corporate Engineering Bureau 15 Company Ltd (K)* (Miscellaneous case E009 of 2023 [2024] KEE LRC JIP (KLR))(7 March 2024 (Ruling) where the court stated as follows:

Purposeful interpretation of the execution of the award of the Director would point to the fact that this court cannot adopt the Director’s award by confirming it as the order of ELRC and thereafter change act and sit as an appeal court where appeals are raised against the award adopted.”
 15. The court per Ndolo J. concluded that:

“in the light of the foregoing jurisprudence, I find and hold that this court lacks jurisdiction to grant the orders sought by the Applicant.”

This court is not bound by the aforesaid decision made by a different Judge.
 16. It follows, however, that the present application by the employer who was the Respondent in the matter before Ndolo J. which was filed by the 1st Respondent in this matter has been conclusively pre-empted by that decision by Ndolo J. in her Ruling dated 14/11/2024 and the court lacks jurisdiction to entertain the same, it being *res judicata*.
 17. Furthermore, the decision sought to be set aside in the present judicial review proceedings was made on 22nd November 2021 and this application was filed on 25th June 2024, more than seven (7) months after.
 18. The further objection raised by the 1st Respondent is that an objection ought to have been filed with the Director within sixty days from the date of the award that being 22nd November 2021 in terms of section 51 of WIBA and it is only thereafter through an Appeal that an aggrieved party may challenge the decision of the Director. Section 51(1) of WIBA provides:

Any person aggrieved by a decision of the Director on any matter under this Act, may within sixty days of such decision, lodge an objection with the Director against such decision.”

And Section 52 (2) of WIBA provides:

“An objector may, within thirty days of the Director’s reply being received by him, appeal to the Industrial Court against such decision.”

This preliminary objection is good and is also upheld.
 19. Accordingly, the application before court is struck off firstly for the matter being *res judicata* and secondly, for lack of jurisdiction, the Applicant having failed to follow the provisions of section 51 of WIBA by lodging an objection within sixty days from the date of the award and an Appeal to Court within 30 days as decreed by section 52 (2) of WIBA.
- Applicant to meet the costs of the application.



DATED AT NAIROBI THIS 13TH DAY OF MARCH 2025

MATHEWS NDUMA

JUDGE

Appearance:

Mr. Njomo for Applicant

Mr. Kihara for Respondent

Mr. Kemboi – Court Assistant

