



**Kassim v Kenya Ports Authority (Miscellaneous Application
E117 of 2024) [2025] KEELRC 752 (KLR) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEELRC 752 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E117 OF 2024**

**M MBARŪ, J
MARCH 6, 2025**

BETWEEN

ALI CHIDAGAYA KASSIM APPLICANT

AND

KENYA PORTS AUTHORITY RESPONDENT

RULING

1. The applicant filed an application dated 11 November 2024 under the provisions of Article 162 of *the Constitution*, Section 12 of the *Employment and Labour Relations Court Act*, Section 19(2) of the *Work Injury Benefits Act*, Rule 62 of the Employment and Labour Relations Court (Procedure) Rules, Order 40 rule 51 and article 159 of *the constitution*. The applicant is seeking orders;
 1. The court be pleased to adopt as a judgment of the court the assessment/award of the Director of Occupational Safety and Health Services, Mombasa made on 13 June 2023;
 2. A decree do issue for;
 - a. The sum of Ksh.1,216,309.50 being the Director’s award/assessment made on 13 June 2024;
 - b. Interests thereon compounded annually at court rates from the date of the award until payment in full.
 3. Costs of the application.
2. The applicant supported his case through an affidavit and averred that he had been an employee of the respondent as a Docker, where he sustained an injury on 20 September 2022. The incident was reported to the Director, who established that he suffered 10% incapacity. On 13 June 2023, the director awarded the applicant Ksh.1, 216,309.50 and notified the respondent to make payment within 90 days. Upon service, the respondent did not make any objections or file an appeal, and hence, the



- payment is due with sanctions under Section 26(6) of the Work Injury Benefits Act (WIBA). The orders sought should be issued with costs.
3. In reply, the respondent filed the Replying Affidavit of George O. Ochieng, the principal insurance officer, who avers that the applicant lodged a claim with the Director, who assessed damages on 13 June 2023. The assessment was based on an incapacity of 10%. Through M/S Jubilee Allianz Insurance Company Limited, the respondent referred the applicant to Dr. Jamlick Micheni Muriithi, who returned an assessment of permanent incapacity at 3%. The award was mutually reviewed to incorporate the difference in the incapacity decree, and a discharge voucher was issued between the respondent and the insurer.
 4. Ochieng avers that the court is divested of jurisdiction to handle the matter in the first instance and is limited to appeal, either from the Director's assessment or the subordinate court on matters of enforcement.
 5. The claim herein is statute-barred under Section 90 of the Employment Act.
 6. The applicant filed Mombasa ELRC Misc Application No.E110 of 2024 to enforce an award subject herein. The instant application is untenable and an abuse of the court process, and it should be dismissed with costs.
 7. The applicant filed his Supplementary Affidavit and averred that despite being served with the assessment and award of 13 June 2023, the respondent has not made payment. The discharge voucher that satisfied the Director's award is without evidence of payment to the applicant. Upon the award, the respondent was referred to a second assessment, and incapacity was revised from 10% to 3%. However, the second assessment was 6 months after the Director's award, outside the timelines provided by law of 60 days.
 8. The alleged mutual review of the Director's award is unlawful and contrary to Sections 23, 28, 30, 36, and 37 of WIBA. No employer can review the Director's award and purport to settle a claim.
 9. The applicant admitted that he filed Mombasa ELRC Misc. E110 of 2024, which, upon identifying a fundamental flaw, he withdrew. The Notice of Withdrawal dated 4 November 2024 was adopted by the court.
 10. Parties addressed the application by written submissions.
 11. The applicant submitted that upon the applicant's work injury, the Director assessed and made an award dated 13 June 2023. There was no payment within 90 days required under the WIBA. On 20 December 2023, the respondent referred the applicant to a second medical assessment outside the law, and the degree of incapacity was reduced from 10% to 3%.
 12. The second medical assessment was not presented to the Director for adoption. There were no objections to the Director's award or an appeal. In Chobogo v Kenya Ports Authority Misc. Appl. No.E036 of 2024, the court held that under WIBA, a second opinion obtained by the employer must be within the Director's directions; otherwise, that would negate Section 23 of the WIBA. In this case, the respondent has yet to pay the award as assessed by the Director, and the orders sought should be issued.
 13. The respondent submitted that the applicant has moved the court to adopt the Director's award of 13 June 2023 for Ksh.1, 216,309.50. The applicant was subjected to a second examination, and the award was reduced to Ksh.436, 443, which was paid, and a discharge voucher was executed.
 14. The court is not divested of its original jurisdiction to hear the matter. Legal Notice No.6024 removed all claims from the court where the monthly wage was below Ksh.80 000 and the applicant was earning



Ksh.75, 164, as held in *Nyandege v Ekaterra Tea Kenya Plc Cause No.E009 of 2023*. The court declined jurisdiction.

15. The respondent submitted that the claim herein is time-barred under section 90 of the *Employment Act*. A claim should be filed within 12 months when the cause of action arose in a continuing injury. The subject award was on 25 May 2023, and the claim was filed outside the limitation period as held in *Elijah Kisyanga Ndende v Manager Zakhem International Construction Ltd Misc. Appl. No.E040 of 2021*.

Determination

16. It is common cause that the applicant suffered a work injury on 20 September 2022.
17. The matter was reported to the Director, who made an assessment and award for Ksh.1, 216,309.50.
18. The applicant filed Mombasa ELRC Misc. No.E110 of 2024, which was later withdrawn. This closed the matter, and the applicant could lodge a new application.
19. The applicant filed the instant application on 11 November 2024.
20. On 20 December 2023, a second doctor assessed the applicant, who established a 3% incapacity from the previous assessment of 10%. This reduced the award to Ksh.436, 433, and through a Discharge Voucher dated 24 January 2024, Jubilee Allianz paid the applicant through the employer, the respondent.
21. The second assessment was not conducted with the director. The Director's office is the statutory repository of all work injury matters. The office is given the power to investigate, assess and make an award from a work injury. Upon the award of the Director, the employer is required to make payment within 90 days or file objections, including seeking to have a second assessment and review. Where the review is undertaken outside the Director's office and mandate, despite payment to the injured subject employee, the Director must complete the process with a confirmation of the payment. Otherwise, the purpose of WIBA would be lost through employers circumventing the due process.

Does the court have jurisdiction to determine the matter?

Is the claim statute barred?

22. The court is given original and primary duty over employment and labour relations in Kenya under Article 162(2) (a) of *the Constitution*. The provisions of Legal Notice No.6024 of 10 June 2018 did not take away the court's original jurisdiction. The magistrates' court was divested with jurisdiction for access to justice for persons earning below Ksh.80, 000 about *employment disputes*. Such jurisdiction cannot be applied to remove the constitutional mandate of the court.
23. In the case of *Maisha Mabati Mills Ltd v Ondari & another [2022] KEELRC 12932 (KLR)*, the court held that the court has original jurisdiction to hear work injury claims and not the lower courts. This position is affirmed in several other cases in *Wandera v Endmor Steel Millers Limited [2025] KEELRC 265 (KLR)*; *Marcus Curvey Ojango v Kenya Revenue Authority [2024] eKLR*; and *Peter v Gitau [2025] KEELRC 55 (KLR)*
24. In this case, the court has the inherent jurisdiction to hear and address the application herein.
25. On the time limitations under Section 89 of the *Employment Act*, a continuing injury is now defined by the Court and the Court of Appeal to be that which accrues from daily, weekly or monthly intervals and continues to accrue each subsequent day, week or month. For such a continuing injury, any damage or loss must be secured within 12 months from the date of cessation.



26. Section 98 also addresses claims that accrue with employment as a benefit or action that breaches the employment contract, right, or benefit. A work injury arises from a single act of injury. It does not accrue each day, week or month. From the date of injury, the employer must make a report to the Director under WIBA, upon which there will be an assessment and an award of compensation. The date of the award and the benefit thereof give rise to a right which must be secured within the provisions of Section 89 of the *Employment Act*.
27. In this case, the award of 13 June 2023 was not settled upon service to the respondent, who opted to engage the applicant for a second assessment and payment with a discharge voucher executed on 24 January 2024. Save to urge the court that there is no evidence of payment submitted in court; the applicant does not deny that he has since received the payment of Ksh.436, 433.
28. Having settled the claim on 24 January 2024, the respondent cannot assert that the claim herein was filed out of time. The settlement in itself is an admission of liability save for the lack of concurrence with the Director to close the circuit and the payment to be in tandem with WIBA provisions.
29. The applicant, too, should shoulder part of the blame in settling the matter. He failed to advise his advocates on the execution of the discharge voucher and payment of Ksh. 436, 433 in settlement of his work injury claim.
30. For these reasons, to complete the process, the respondent shall submit the second assessment to the Director for review, adoption, and confirmation of the payment made to the applicant in settlement. Where any matters arise based on the Director's review, the applicant is at liberty to move the court.
31. In the circumstances, the application dated 11 November 2024 is thus addressed. Each party bears its costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 6TH DAY OF MARCH 2025.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

