Bakari v Spanish Coach Express Limited & another (Miscellaneous Application E109 of 2024) [2025] KEELRC 2351 (KLR) (31 July 2025) (Ruling)

Neutral citation: [2025] KEELRC 2351 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

MISCELLANEOUS APPLICATION E109 OF 2024

K OCHARO, J

JULY 31, 2025

BETWEEN

OMAR SINEYI BAKARI ..... APPLICANT

AND

SPANISH COACH EXPRESS LIMITED ..... 1ST RESPONDENT

BRITAM GENERAL INSURANCE COMPANY [KENYA] LIMITED .... 2ND RESPONDENT

RULING

1. By a Chamber Summons application dated 21st January 2025, the Applicants sought the following orders;
    a. The Application is certified urgent, and service is dispensed with in the first instance.
    b. The Applicants be granted leave to file an Application against the Respondents, towards enforcement of the award/assessment of the Director of Occupational Safety and Health Services, Mombasa, made on 24th August, 2017, outside the limitation period under statute.
    c. The Draft Application annexed herein be deemed duly filed within the statutory timelines and that the same be admitted for purposes of the intended Suit.
    d. Costs of this Application abide by the outcome of the intended Suit.
2. The application is expressed to be under the provisions of section 4, 21, 22, & 27 of the *Limitation of Actions Act*, Article 162 of *the Constitution*, Section 12 of the Employment and *Labour Relations Act*, Rule 69 of the Employment and Labour Relations Court [Procedure] Rules, 2024, Sections 19[2] and 51 of the Works Injuries Benefits Act, Orders 40 and 51 of the Civil Procedure Rules, 2010, and Article 159[2][d] of *the Constitution*.

3. The application is anchored on the following grounds;

a. Whereas Section 89 of the *Employment Act* clarifies that an employment claim must be brought within three (3) years from the date the cause of action arose. The suit was not instituted within the three years due to circumstances beyond the Applicant's control that prevented the Applicant from lodging this claim within the prescribed time.

b. At all material times, the Applicant was employed by the Respondent as a driver. On 1st March 2015, he sustained injuries related to his work.

c. The incident was reported to the Directorate of Occupational Safety and Health Services, Mombasa, via DOSH/FORM 1. After assessment, the Applicant was found to have suffered 70% permanent incapacity. Consequently, on 24th August 2017, DOSH/WIBA 4 was issued, requiring the Respondent to compensate the Applicant with KShs. 2,376,000.

d. Despite the above timelines, the Respondent through Ms Britam Insurance referred the Applicant for secondary medical examination on 6th April, 2018 (which was way after the lapse of sixty days) and on 7th April, 2018 a Report was issued wherein Dr. J.M. Muthuuri reviewed the extent of the Applicant's injuries from 70% to 5%. Following the review report, the Respondent's insurer, via a letter dated May 16, 2018, prepared a tabulation of the sums payable and issued a discharge voucher on May 23, 2018, for the sum of KShs. 317,885/- which was never remitted.

e. Subsequently and in an interesting twist of events, vide a letter dated 3rd November, 2022, the Respondent wrote a letter to the Director, requesting that the Applicant proceed for re-examination for purposes of compensation.

f. In Response to the said letter, the Director noted that:-

i. The Respondent's insurer had done a review on 7th April, 2018,

ii. No formal Objection had been submitted since the review of 7th April, 2018,

iii. A request for re-examination was made on 3rd November, 2022, which was beyond the 60 days stipulated under the provisions of Section 51 of the WIBA, and

iv. The Respondent should pay as per the WIBA 4 done on 24th August, 20217.

g. Noting the long delays, vide a letter dated 1st March, 2023, the Director wrote to the Respondent requesting settlement of the assessed amount.

h. That upon such assessment, the Respondent was required to effect the said payment within ninety (90) days, after which the Director would remit the sum so paid to the Applicant within thirty (30) days.

i. If the Respondent was aggrieved with the Director's decision, they had up to sixty (60) days to object to the Director and, in any case, appeal to this Court.

j. Despite the above timelines, the Respondent herein and the notification regarding the assessment on 24th August, 2017, they never lodged an Objection nor filed an Appeal as by law required to date.

k. The Director was constrained to write a letter dated 26th May, 2023, clarifying to them what the law required of them, which unfortunately they hadn't done within the requisite period,

and that the assessment by the Insurer and the consequential discharge voucher didn't have any legal basis.

l. Throughout this period, the Applicant was maintained in a state of wait-and-see, and was not informed of various correspondences and developments, which significantly delayed the resolution of the claim.

m. Further, and without prejudice to the foregoing, the various requests for additional medical examinations, although provided for by law, materially delayed the litigation and led the Applicant to believe that his claim was still under consideration by the Director and not yet ready for enforcement. It is noted that the timing of the secondary medical examination is beyond the control of the Applicant.

n. The Claimant's cause of action arose on 16th may, 2023 when the Director, in response to the Respondent's letter dated 3rd November, confirmed that for failure to raise any objection nor an appeal, the claim was payable as per the DOSH/FORM 4 of 24th August 2017, acting out of abundance of caution, however, the Applicant has moved the court for enlargement of time.

4. The 2nd Respondent opposed the Application through a replying affidavit sworn by its Senior Legal Officer, Edinah Masanya, on 13th December 2024.

5. The Respondent argued that after the secondary medical examination carried out on 7th April 2018 by Dr. J.M. Muthuuri, the Applicant's level of permanent incapacity was reduced from 70% to 5%.

6. Based on the revised assessment, the Respondent prepared a tabulation of compensation amounting to Kshs. 317,885/-, which was communicated to the Applicant as per the Discharge voucher annexed by the Applicant.

7. The payment of Kshs. 317,885/- was processed and disbursed to the Applicant under the payment requisition voucher dated 9th June, 2018.

8. Consequently, the Applicant's claim that he was not compensated as per the assessment by the Directorate is misleading and an attempt to reopen a matter that has already been conclusively settled.

9. Any subsequent correspondence or decisions by the Directorate of Occupational Safety and Health Services contradicting the secondary medical assessment or the discharge voucher are irregular and legally untenable, as the Applicant had already settled the matter with the Respondent.

10. It is further stated that the Applicant's allegations of delay and lack of information are unsubstantiated, as he actively participated in the secondary medical examination and the subsequent compensation process.

11. The application for an extension of time is considered an abuse of the judicial process, as the Applicant is estopped from reopening the claim after having accepted payment in full and final settlement.

The Applicant's Submissions.

12. The Applicant submitted that he has filed this case with the Court out of an abundance of caution. While it is appreciated that Section 89 [formerly section 90] of the *Employment Act* states that claims arising from employment contracts should be brought within three [3] years from the date of the incident, Section 4 [4] of the *Limitation of Actions Act*, on the other hand, states that judgments or orders for payment of money are actionable within twelve years. The Applicant finds himself facing a legal dilemma.

13. A claim for enforcement of the Director's award is the pursuit of a statutory right within the realms of employment law. The statutory rights are realised within the provisions of Section 16 of WIBA. Section 16 of the Act expressly states that such claims shall only lie as per the provisions therein. In support of this position, Counsel cited the case of Naftali [Suing as the Legal Administrator and/or Representative of the Estate of the Late Monica Nafula-deceased] v County Government of Kakamega [2024] KEELRC 1781[KLR], where Keli. J, held;

> " The Limitation period under Section 89 of the *Employment Act* [Rev. 2024] of three years doesn't apply in the present application, as the award sought to be enforced was under WIBA. There is no issue under the contract of service of the deceased employee to be adjudicated by this court under the *Employment Act* for Section 89 to apply."

14. Holding that Section 4[4] of the *Limitation of Actions Act* was instead applicable, Keli J stated;

> " The award of Dosh directed the Respondent to pay KShs. 3, 926,880, which is an order contemplated under which is an order contemplated under Section 4[4] of the *Limitation of Actions Act*, Cap 22....."

15. The Director's award was granted on 24th August 2017 and remains payable to this day. Twelve years will lapse in August 2029.

The Respondent's submissions

16. The Respondent's Counsel identified two issues for determination, namely, whether the Applicant's Application for enlargement of time is meritorious or constitutes an abuse of the court process, and whether the 2nd Respondent duly compensated the Applicant.

17. Counsel argued that the Applicant's reliance on Section 4(4) of the *Limitation of Actions Act* (Cap. 22) to contend that the Director's award is enforceable within 12 years is fundamentally flawed. A purposive interpretation of Section 4(4) reveals that the Legislature intended the provision to apply to judicial judgments, rather than to administrative decisions, such as the Director's award under the *Work Injury Benefits Act* (WIBA).

18. The purpose of Section 4(4) is to establish a limitation period for enforcing judicial judgments, which are final and binding decisions issued by courts after a full adjudicative process. The Legislature, in creating this provision, aimed to balance the need for finality in litigation with the rights of judgment creditors to enforce their claims within a reasonable time frame. However, this provision was never intended to apply to administrative decisions, such as those made by the Directorate of Occupational Safety and Health Services (DOSH), which are subject to review, revision, and appeal under specific statutory frameworks.

19. To fortify the foregoing submissions, Counsel placed reliance on the Supreme Court decision in Munya v The Independent Electoral and Boundaries Commission & 2 others (Petition 2B of 2014) [2014] KESC 38 (KLR), which cited the decision in Pepper v. Hart (1992. 3 WLR, where Lord Griffiths observed that the "purposive approach to legislative interpretation" has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the Court is not to be held captive to such phraseology. Where the Court is not sure of what the legislature meant, it is free to look beyond the words themselves and consider the historical context underpinning the legislation.

20. The Respondent's Counsel further argued that the Applicant's attempt to invoke Section 4(4) constitutes a misguided effort to circumvent the statutory limitation period applicable to his claim. The relevant limitation period for employment-related claims is three years, in accordance with Section 89 of the *Employment Act*, which has long since expired.

21. It was further argued that under WIBA, the Director's duty is to assess and compute compensation based on objective criteria, e.g medical reports (Sections 22, 23, 24, 25 and 26 of WIBA). This is no different from a tax officer computing liability under the *Income Tax Act*-a function the Courts have repeatedly deemed administrative and not judgments/judicial decisions as held in Ndirangu t/a Ndirangu Hardware v Commissioner of Domestic Taxes (Tax Appeal E070 of 2021) [2023] KEHC 19357 (KLR).

22. Furthermore, Section 25 of the *Civil Procedure Act*, Cap 21, defines a judgment as a pronouncement by a court upon adjudicating a dispute. In contrast, Sections 22-26 of the WIBA demonstrate that the Director merely assesses and computes compensation, functions that are administrative in nature.

23. Section 2 of the Fair Administrative Actions Act CAP. 7L defines an "administrative action" to include the exercise of powers, functions, and duties by authorities or quasi-judicial bodies, as well as any act, omission, or decision by any individual, body, or authority that impacts the legal rights or interests of any affected party.

24. Further Section 2 of the *Commission on Administrative Justice Act* CAP. States that an "administrative action" includes any action related to administration, such as decisions or acts in public service, failures to fulfil public duties, recommendations to a Cabinet Secretary, or actions taken following such recommendations. Still, nowhere in these two Acts is judgment mentioned regarding administrative acts.

25. Counsel further submitted that some broad factors have to be considered when determining whether an action is "administrative" or "judicial". These factors include the nature of the power, its source, its subject matter, whether it involves the performance of public duty, and whether it most closely involves the implementation of legislation, a characteristic of administrative action, or the making of policy in the broad sense, which is not.

26. On the second issue, Counsel submitted that Section 89 of the Employment. 226, cap 226 imposes a three-year limitation on employment-related claims. The Applicant's injury arose from employment; thus, her claim is tethered to this provision. Her attempt to vault into Section 4(4)'s 12-year window is a Trojan horse, smuggling a time-barred claim into enforceability.

27. The Court of Appeal in Paul Wanjohi Mathenge v. Duncan Gichane Mathenge [2013] eKLR held that discretion to extend time must be exercised judicially, not on "whim, sympathy, or caprice." The Court stated:

> "The discretion under Rule 4 (extension of time) is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance."

The Applicant has not met this threshold.

28. The Applicant slumbered for over three years, awakening only when nostalgia for a larger payout struck. Furthermore, a "change of heart" is not a valid reason for delay-it's an admission of buyer's remorse. In Mutuku v. Multichoice Kenya Limited [2024] KEELRC 1028 (KLR), the Court rebuked such indolence. “Limitation is not in the books for show. It is meant to protect a party... when witnesses are gone, memories faded, and documents misplaced."

29. Counsel submitted further that the Applicant's claim is purely personal and does not involve any broader legal or policy considerations that would warrant the Court's intervention. The principles of justice and fairness dictate that the Court should not permit its processes to be exploited for the sake of satisfying an individual's private and unjustified demands.

30. This Honourable Court should not allow its processes to be abused in this manner. The instant Application for enlargement of time should be dismissed, and the Applicant should be left to rest content with the compensation he has already received.

31. Counsel cited Salat v Independent Electoral and Boundaries Commission & 7 others (Application 16 of 2014) [2014] KESC 12 (KLR), submitting that extension of time is an equitable remedy, not a right.

32. The Applicant bears the burden to prove merit. Yet, she offers no valid reason for her delay, only regret. Equity does not reward regret. In Muthui v. Kitui Flour Mills Limited [2024] KEELRC 2808 (KLR), the Court aptly stated:

> “ Under Section 89... a party is allowed 3 years to file a claim seeking employment injury." We respectfully submit that this Honourable Court ought not to shred this statutory safeguard because the Applicant belatedly regrets her settlement.

33. It was finally argued that the Applicant accepted the revised compensation of Kshs. 317,885/- in full and final settlement, without objection, signed a discharge voucher, and took the funds. Having enjoyed the benefits of settlement, he cannot now reject the consequences.

Analysis and Determination

34. I have carefully considered the Application, the grounds upon which it is premised, the affidavit in support thereof, the replying affidavit, and the submissions by Counsel for the parties, and the following issues emerge for determination:

    a. Whether the stipulations of section 89 of the *Employment Act*, 2007, apply to Claims under the *Work Injury Benefits Act*.

    b. Whether the Applicant’s application herein has merit.

35. Section 89 of the *Employment Act* provides,

> “ Notwithstanding the provisions of section 4[1] of the *Limitation of Actions Act* [Cap. 22], no civil action or proceedings based on or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained of, or in the case of continuing injury or damage, within twelve months next after the cessation thereof.”

36. Undoubtedly, after 2007, the legal landscape regarding employment and labour relations changed. Five statutes, including the *Employment Act* 2007 and the *Work Injury Benefits Act* 2007, came into force. Furthermore, considering their preambles, it is clear they were enacted to address various specific aspects within the field.

37. It is evident that the statutes, due to the nature of the issues they address, have carefully specified timelines for the relevant events they pertain to within those particular areas. To the extent that no timelines that are established in one of the statutes would apply to situations covered by another, unless there is an explicit provision permitting that, or clear circumstances that would allow an inference supporting the applicability. This is the interpretation that a purpose interpretation of the statutes yields, in my view.

38. The preamble to the *Work Injury Benefits Act* provides that;

> " An Act of Parliament to provide for compensation to employees for work-related injuries and diseases contracted in the course of their employment and connected purposes"

39. The preamble to the *Employment Act*, 2007, states;

> " An Act of Parliament to repeal the *Employment Act*, declare and define the fundamental rights of employees, to provide basic conditions of employment of employees, to regulate employment of children, and to provide for matters connected with the foregoing."

40. The instant application doesn't relate to the matters contemplated under the preamble to the *Employment Act*, or the provisions of the Act themselves. Addressing this point, Justice Keli, in the Naftali Case [Supra], stated;

> " 25. The present application does not relate to an employer-employee relationship under the *Employment Act* but rather falls within the application of WIBA, whose preamble provides ... for compensation to employees for work-related injuries and contracted in the course of their employment.
>
> 26. The limitation period under Section 89 of the *Employment Act* of three years does not apply in the present application as the award sought to be enforced was under WIBA. There is no issue under the contract of service of the deceased to be adjudicated under the *Employment Act*."

41. Addressing the applicability of Section 90 [now Section 89] of the *Employment Act*, this Court in David Mwangi Karanja v Rift Valley Machinery Services Limited [2024] KEELRC 1617 [KLR] stated;

> " I have carefully considered the provisions of section 90 of the *Employment Act*, which provides;
>
> > 'Notwithstanding the provisions of Section 4[1] of the *Limitation of Actions Act* [Cap22], no civil action or proceedings based or arising out of this Act or a contract of service, in general, shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof."
>
> And conclude that this provision, looked at from whatever angle, does not contemplate initiated proceedings for enforcement of an award, or verdict, as a result of proceedings under WIBA."

42. There can be no dispute that the *Work Injury Benefits Act* contains several lacunae, some of which have been explicitly identified by courts through jurisprudence, while others remain unidentified as such.

In my view, an aspect that has yet to be spotted is that, despite prescribing timelines for various actions and events, the Act does not specify deadlines for submitting applications to the court for the adoption of an award by the Director of Occupational Safety and Health. This lacuna, in my view, stems from one of the already identified gaps: the lack of a provision for enforcing the awards and/or decisions.

43. Having upheld the applicability of the provisions of section 89 of the *Employment Act*, 2007, on work injury matters, as I have hereinabove, I will hold that Section [4][4] Cap 22, is applicable. This is because, under the provisions of the *Work Injury Benefits Act*, once the Director's decision isn't objected to or appealed, it fully determines the rights of the parties, thereby assuming the character of a judgment.

44. Assuming I am wrong on this position, then I could still look at the matter from another angle, and take a clear view that the applicability of Section 4[1] of the *Limitation of Actions Act*, on those matters, has not been explicitly or implicitly ousted. As such, this Court holds that pursuing an unpaid assessed sum under the *Work Injury Benefits Act* would constitute an action to recover a sum recoverable by virtue of written law, as contemplated under Section 4 [1] [d], or an action, including actions claiming equitable relief, for which no other period of limitation is prescribed by the Act or any other written law under Section [4][1][e] whose limitation period is statutorily fixed at six [6] years.

45. I have not lost sight of the fact that, as late as March 2023, the 1st Respondent acknowledged their obligations under the WIBA, when they wrote to the Director requesting that the Applicant be re-examined for purposes of compensation.

46. In light of the foregoing premises, I find that the Applicant's application was unnecessary and premature, and the opposition to it was based on inapplicable provisions of the law. It is hereby dismissed with costs.

47. Before I conclude, I feel compelled to note that the Respondent has raised some valid points, such as the alleged unreasonableness or ultra vires actions of the Director. Moreover, the Applicant was fully paid and acknowledged receipt of the payment without protest; therefore, the doctrine of estoppel prevents her from pursuing further payment, which can be fairly challenged in other forums, for example, through judicial review proceedings.

48. Orders accordingly.

READ, SIGNED, AND DELIVERED THIS 31ST DAY OF JULY 2025.

OCHARO KEBIRA

JUDGE