Jefwa & 3 others v Rea Vipingo Plantations Limited (Miscellaneous Application E008, E009, E010 & E011 of 2023 (Consolidated)) [2024] KEELRC 435 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KEELRC 435 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI

MISCELLANEOUS APPLICATION E008, E009, E010 & E011 OF 2023 (CONSOLIDATED)

M MBARŨ, J

FEBRUARY 29, 2024

BETWEEN

NYEVU KITSAO JEFWA ..... 1ST APPLICANT

SIDI CHANGWA KITSAO ..... 2ND APPLICANT

ZAWADI KAHINDI PONDA ..... 3RD APPLICANT

SIDI SULUBU CHARO ..... 4TH APPLICANT

AND

REA VIPINGO PLANTATIONS LIMITED ..... RESPONDENT

RULING

1. The applications herein were consolidated for hearing and determination as they all arise from the same cause of action and relates to the same respondent. The lead file is Misc. Application No. E008 of 2023 bringing together Misc. Applications No. E009 of 2023, E010 of 2023 and E011 of 2023. The findings in the lead file shall apply in all the consolidated files.

2. The applicants, filed applications dated 13 September 2023 under the provisions of Section 22, 26(4), 28 and 30 of the *Work Injury Benefits Act*, Section 12 of the *Employment and Labour Relations Act* and Rule 6 and 17 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 seeking for orders that;

> The court be pleased to order that the respondent be obligated to pay the claimant [applicant] sum of Kshs. 267,439 as assessed by the Director of Occupational Safety and Health Services.
>
> 4. This court be pleased to order that prayer (1) above is to attract interest as 16% from the date of assessment by the Director of Occupational Safety and Health Services.
>
> Costs be in the cause.

3. The application is supported by the affidavit of the applicant and on the grounds that he was employed by the respondent in the capacity of sisal cutter and on the 1st November 2019 sustained injuries in the line of duty. The applicant approached the Director Occupational Safety and health Services (Director), Kilifi County for assistance and who conducted assessment of the injuries and made an award of Kshs. 267,439. This assessment and award were communicated to the respondent as the employer and instead of paying the full amount opted to pay Kshs. 15,282 only.

4. The applicant avers in the affidavit that following work injury on 1st November 2019 there was treatment at Kilifi County Hospital and on 20 October 2021 DOSH forms were filled and submitted to the director. The director assessed the injuries and awarded compensation at Kshs. 267,439 and through letter dated 5 July 2023 addressed to the respondent to pay but they declined. A further demand issued on 17 November 2022 without response. on 17 august 2023 the applicant was called by the respondent and issued with a cheque for Kshs. 15,282 paid through a Certificate of Payment dated the same day.

5. The applicant aver that the respondent has failed to pay the amounts assessed by the Director and the orders sought should issue with costs.

6. In reply, the respondent filed the Replying Affidavit of Janet Omulindi the human resources manager and aver that the instant application is in abuse of court process and should be dismissed. The applicant was employed as a sisal cutter on the respondent's sisal plantation and on 1st November 2019 got injured while on duty and which matter was reported to the respondent. The applicant attended Kilifi District Hospital for treatment and the respondent reported the matter to the Director and DOSH Form 1 issued.

7. Omulindi also aver that the applicant was also assessed by DOSH medical practitioner Dr. Valentine Eruli who assessed the applicant at degree of permanent incapacity at 17.5%. The doctor recorded findings under DOSH Form 1 and presented the same to the Director at Malindi for purposes of assessing the compensation due. The Director assessed the amount payable at Kshs. 267,439 and through letter dated 28 June 20121 issued demand against the respondent.

8. The respondent was dissatisfied with the award and assessment of the Director and hence lodged an objection and called for the applicant to undergo a second medical examination by a doctor of the respondent's choice. Dr. Jamlick Muthuuri assessed the applicant's degree of incapacitation at 01% and this report was presented to the Director though letter dated 2 February 2023.

9. Based on the findings by Dr. Muthuuri, the Director re-assessed the award payable to the applicant based on the second medical examination and the compensation due is Kshs. 15,282 paid through DOSH Form 4 dated 21st February 2023. The applicant has since been issued with Certificate of Payment under DOSH Form 7 and acknowledged payment.

10. Under Section 51 of *WIBA*, a party who is dissatisfied with the assessment by the Director should file objections within 60 days which the applicant failed to address. Upon any objections, the Director is required to respond within 14 days and hence, the applicant having failed to file any objections and instead acknowledged full payment, to file these proceedings is an abuse of court process. The application should be dismissed with costs.

11. Both parties attended court on 1st February 2024 and agreed to attend on 14 February 2024 for oral submissions. Only the applicant attended.

12. The applicant submitted that while in employment as a sisal cuter, there was injury on 1st November 2019 which was reported to the respondent and the matter reported to the Director for assessment

on 29 September 2020. Treatment was at Kilifi County Hospital and subsequently, a *WIBA* claim was done and assessment awarded at Kshs. 267,439. The respondent has refused to pay within 90 days resulting in these proceedings.

13. The applicant submitted that on 17 August 2023 the respondent issued cheque for Kshs. 15,282 as final settlements but a balance remains unpaid. There was no appeal by the respondent to justify the reduced compensation from 17.5% incapacity to 01% incapacity. There are medical reports confirmed by the Director which guided in the assessment of what compensation was due.

Determination

14. It is common cause that the applicant got injured while at work on 1st November 2019. The matter was reported to the respondent and DOSH Form I issued with a report to the Director at Malindi. On record is the medical assessment of the applicant by Dr. Valentine Eruli who assessed degree of permanent degree of incapacity at 17.5% as allowed under Section 24(2) read together with Section 25(1) of the *Work Injury Benefits Act*, 2007 (*WIBA*);

    (2) An employer shall, within seven days after having received a claim, medical report or other document or information concerning such claim, submit the claim, report, document or information to the Director.

    And;

    (1) An employee who claims compensation or to whom compensation has been paid or is payable, shall when required by the Director or the employer as the case may be, after reasonable notice, submit himself at the time and place mentioned in the notice to an examination by the medical practitioner designated by the Director or the employer with the approval of the Director

15. The applicant attended and was assessed and the Director awarded compensation at Kshs. 267,439. The applicant's case is that the respondent has refused to pay the award.

16. *WIBA* has elaborate procedures with regard to an employee who is injured at work on how to get compensation thereof. As outlined above, under Section 24 and 25 of *WIBA*, an employee is to be assessed by the primary doctor as required by the Director and based on the assessment, the Director should allocate the compensation payable. However, an employer who is required to pay has the right to object to the assessed compensation and further allowed to subject the employee to a second medical assessment in accordance with Section 51 of *WIBA*;

    51. Objections and appeals against decisions of the Director

        (1) 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.

        (2) The objection shall be in writing in the prescribed form accompanied by particulars containing a concise statement of the circumstances in which the objection is made and the relief or order which the objector claims, or the question which he desires to have determined.

17. The respondent filed annexure "JO-4" to the Replying affidavit of Janet Omulindi dated 1st February 2024. This record is a Medical ReporT of Doctor Jamlick Muthuuri dated 2 February 2023. It gives a history of the applicant and that there was attendance on 1st February 2023 for assessment and the medical opinion was that there was full recovery from the injuries suffered and permanent incapacity is assessed at one per cent (01%).

18. In terms of Section 28 and 30 of *WIBA*, the respondent submitted DOSH Form 4 to the Director based on the second medical report and the compensation awarded was Kshs. 15,282.

19. The applicant has since executed DOSH Form 5A and Certificate of Payment dated 17 August 2023. A payment of Kshs. 15,282 has issued in accordance with DOSH Form 7.

20. As outlined above, upon the applicant undergoing medical assessment, Section 51 of the *WIBA* allow for objections within 60 days and based on which, the Director is required to within 14 days vary, review or confirm the assessment ad given reasons in accordance with Section 52 of WIBA;

    52. Director's reply

        (1) The Director shall within fourteen days after the receipt of an objection in the prescribed form, give a written answer to the objection, varying or upholding his decision and giving reasons for the decision objected to, and shall within the same period send a copy of the statement to any other person affected by the decision.

        (2) An objector may, within thirty days of the Director's reply being received by him, appeal to the Industrial Court against such decision

21. Even though the *WIBA* does not address the modalities to be followed after an employee undergoes a second medical assessment, Section 52 of *WIBA* contemplates a scenario where an aggrieved party may lodge an objection to the Director. The Director should give written reasons within 14 days and upon which, such party is allowed to lodge an appeal to the court.

22. These procedures are imperative to address before an applicant can seek to enforce a decision on compensation awarded by the Director and which has been subsequently reviewed. This is acknowledged in Petition No. 33 of 2018, *Sammy Ndungu Waity Vs I.E.B.C. and 3 others* [2019] eKLR where the court addressed the importance of addressing grievances through the available mechanisms before invoking the judicial process;

23. Where *the Constitution* or any other law establishes an organ, with a clear mandate for the resolution of a given genre of disputes, no other body can lawfully usurp such power, nor can it append such organ from the pedestal of execution of its mandate. To hold otherwise, would be to render the constitutional provision inoperable, a territory into which no judicial tribunal, however daring, would dare to fly.

24. The applicant was assessed by Dr. Valentine Eruli and degree of permanent incapacitation at 17.5%. this was reviewed by Dr. Jamlick Muthuuri to 01%. This last assessment was addressed by the Director and the due compensation processed and paid. there are no objections on the last assessment and award of compensation. The applicant cannot be justified in asserting that the initial assessment stands upon completion of the process and acknowledgment of payment and issuance of Certificate of Payment.

25. On the employer's assessment and review by the Director, where the applicant was aggrieved, objections ought to have issued to the Director and based on the given reasons, an appeal ought to have been filed in this court. the circuit of procedures under *WIBA* can only be complete where parties take on its motions to the fullest possible limits as held in *Ahmed Abdullahi Musa v Director of Occupational Safety and Health Services & another* [2021] eKLR. To urge a case such as herein done is lapse to apply the provisions of Section 52 of *WIBA* which allows aggrieved parties to seek redress in a court process. In the circumstances, access to justice cannot be said to have been denied. See *Law Society of Kenya v Attorney General & another* [2019] eKLR upheld the decision of the Court of Appeal and stated that;

> ...But what if one is still aggrieved by the decision of the Director? The answer to that question lies in Section 52 of the *Act* which allows aggrieved parties to seek redress in a court process.

26. Recourse is not to go back to the initial award but to apply the provisions of Section 51 and 52 of *WIBA*.

ACCORDINGLY, APPLICATION DATED 13 SEPTEMBER 2023 IS WITHOUT MERIT AND IS HEREBY DISMISSED. EACH PARTY TO BEAR OWN COSTS.

DELIVERED IN OPEN COURT AT MOMBASA THIS 29 DAY OF FEBRUARY 2024.

M. MBARŨ

JUDGE

orders apply in the following files;

Misc. Applications No. E009 of 2023,

Misc. Applications No. E010 of 2023 and

Misc. Applications No. E011 of 2023.

In the presence of:

Court Assistant: Japhet Muthaine

..... and .....