



**Muiruri v China Gansu International Corporation for Economic and Technical Cooperation (K) Ltd (Miscellaneous Application E080 of 2023) [2024] KEELRC 380 (KLR) (23 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 380 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
MISCELLANEOUS APPLICATION E080 OF 2023  
K OCHARO, J  
FEBRUARY 23, 2024**

**BETWEEN**

**ERASTUS NDUNG’U MUIRURI ..... APPLICANT**

**AND**

**CHINA GANSU INTERNATIONAL CORPORATION FOR ECONOMIC AND TECHNICAL COOPERATION (K) LTD ..... RESPONDENT**

**RULING**

1. Through his Notice of Motion Application dated 5<sup>th</sup> April 2023, the Applicant seeks the following orders: -
  - a. Spent.
  - b. That the Honourable Court be pleased to adopt as its judgment the award made by the Directorate of Occupational Safety and Health in Wiba/KBO/657/019/020.
  - c. That Judgment be entered for the Applicant against the Respondent in the sum of Kshs. 883,800/- being the sum assessed by the Directorate of Occupational Safety and Health.
  - d. That the Court be pleased to award interest from the date of the award i.e. 26/06/2020 until paid in full.
  - e. That costs of this suit be borne by the Respondent.
2. The Notice of Motion dated 5<sup>th</sup> April 2023 is premised on the Grounds set out on its face and the Supporting Affidavit of the Applicant, Erastus Ndung’u Muiruri sworn on 5<sup>th</sup> March 2023.
3. The Respondent resisted the application through a Replying Affidavit sworn on 15<sup>th</sup> May 2023 by one Wang Qian, its Director.



4. The Applicant's application is expressed to be brought under Article 162 of the Constitution of Kenya 2010; Section 12 and 20(1) of the Employment and Labour Relations Court Act; Section 10 of the Work Injury Benefits Act; and all other enabling provisions of law.

### **The Application.**

5. The Applicant states that at all material times, he was an employee of the Respondent. Further, on the 28<sup>th</sup> of August 2019, he was assigned the duty of cutting steel plates using a gas-cutting machine. While trying to regulate the gas cylinder valve, there was an explosion which caused a huge fire. As a result, he suffered bodily burns. The burns that the Applicant suffered caused him a 20% permanent disability.
6. The accident was reported to the Directorate of Occupational Safety and Health in line with the provisions of the Work Injury Benefits Act. Resultantly, the Applicant claimed compensation under the above-stated Act, through claim number Wiba/KBO/657/019/020.
7. The Applicant states that subsequently, the Director assessed compensation awardable to him for the injuries suffered as Kshs. 883,800. Despite being aware of the award, the Respondent neither filed an objection nor an appeal assailing the same.
8. It is further stated that despite demands that the Respondent settle the awarded sum, it has failed, refused and or ignored.

### **The Response**

9. The Respondent contends that the award of Kshs. 883,800/- is highly exaggerated and manifestly excessive considering the injuries suffered by the Applicant. Further, the Director's award ignored the principles established by precedents that comparable injuries ought to attract comparable damages. The failure resulted in an inordinately high and arbitrary award.
10. The Respondent further argues that the Officer who did the assessment failed to keenly consider the medical documents that were placed before him to ascertain the true extent of the injuries suffered by the Applicant. As a result, he arrived at an erroneous award, consequently, the intervention of this Court is warranted.
11. The Respondent further states that the amount awarded is not medically supported. The independent medical report prepared by Dr P.M Wambugu, dated 12<sup>th</sup> April 2021, has cast doubt over the injuries that the Applicant asserts to have suffered.
12. On 13<sup>th</sup> July 2023 when the matter came up for directions before this Court, I directed that the Notice of Motion application be canvassed by way of written submissions. The parties' submissions are on record. This ruling is with the benefit of the submissions, therefore.

### **Analysis and Determination**

13. I have carefully considered the Notice of Motion application; the Grounds thereof and Affidavit in Support; the Replying Affidavit; and the submissions of both parties and authorities relied on, and distil a single issue for determination, thus; Whether this Court should grant the orders sought by the Applicant
14. Before I delve further into considering the issue, I find it imperative to state that the Work Injury Benefits Act hasn't provided for a procedure for enforcement of the Director's award. Equity will not suffer a wrong without a remedy. This court hasn't left those who deserve the enjoyment of the sums assessed by the Director as compensation for injuries suffered to be without recourse due to the lacuna



in the provisions of the Act, and more specifically where the person under a duty to settle the award is deliberately and without justification refusing to settle.

15. In finding a solution to the stated deficit, in provision, the court has had to read the provisions of the WIBA Act, not in isolation from other statutes and constitutional provisions that are relevant to the jurisdiction of this court, but together.
16. The deficit has attracted the attention of the court in various cases, and the position hereinabove expressed affirmed. *Elijah Kisyanga Ndende –Vs- The Manager Zahkem Internation Construction Ltd* [2022] eKLR, the Court held: -

“The *Work Injury Benefits Act* is silent on the procedure to be followed in enforcing the Director’s decision made on assessment of compensation payable to an employee for work injuries. In this Court’s view, however, the legislature never intended that an employee whose employer fails and/or refuses to pay the amount of compensation assessed by the Director of Occupational Safety and Health Services under WIBA would be without civil remedy, and particularly so where the employer never objected to the Director’s decision on assessment of compensation payable.”

17. Similarly, in *Samson Chweya Mwandabole –Vs- Protective Custody Limited* [2021] eKLR the Court held as follows: -

“...However, this Court being endowed with unlimited original and appellate jurisdiction in disputes related to employment and labour relations pursuant to Article 162(2) of the *Constitution* and Section 12 of the *Employment and Labour Relations Court Act*, the Court has inherent jurisdiction to adopt as a judgment the Director’s award for purposes of execution. This jurisdiction should not be confused with appellate jurisdiction which is expressly donated under Section 52(2) of the WIBA in respect of the director’s reply to an objection made under Section 51(1) of WIBA. It would appear that the former jurisdiction, which I now invoke, can be exercised by the Court where there is no challenge mounted against the Director’s award by any party by way of objection or appeal under Sections 51(1) and 52(2) of the WIBA respectively.”

18. In *Joash Shisia Cheto v Thepot Patrick Charles* [2022] eKLR, after analyzing various decisions on the issue of enforcement of DOSH awards, the Court stated: -

- “51. The general position established by a majority of these decisions is as follows: -
  - a. The law does not provide for mechanisms of enforcing the Director’s award against a reluctant employer.
  - b. In the face of this lacuna, the holder of the award can move the court to seek for enforcement of the award. A majority of the decisions favour the view that the ELRC can be moved for this purpose pursuant to its jurisdiction under article 162 of the *Constitution* as read with section 12 of the ELRC Act. Only one decision holds the view that the ELRC cannot be moved for this purpose. A few share the view that the Magistrate’s court may be moved where pecuniary jurisdiction allows.
  - c. The proceedings for enforcement may be in summary form by way of miscellaneous causes or in the form of ordinary causes but confined to matters of enforcement only.



- d. Unless by way of appeal under section 52 of the WIBA, it is not open to the court to consider the merits of the Director's award or indeed go on a fact-finding mission. This jurisdiction is the preserve of the Director.

52. I agree with these general principles.”

19. Sight should not be lost on the fact that among the national values and principles of governance stipulated under Article 10 of the *Constitution* of Kenya, 2010, that bind this Court whenever it applies or interprets the law, are social justice, the rule of law, and human rights. If this Court were to fold its hands and say “Behold WIBA does not provide for an enforcement mechanism, there is nothing I can do”, the citizens' right of access to justice under Article 48 shall suffer, employers will deliberately refuse to settle the awards by the Director, as a result, the rule of law and social justice will suffer. The Court must issue facilitative orders for enforcement of the award in deserving cases, therefore.

20. While the Respondent possessed the right to file an objection against the award under Section 51 of the *Work Injury Benefits Act* and a right of appeal to this Court under Section 52 thereof, it failed to avail itself of these procedures within the statutory period. Section 51 and 52 provide that: -

“(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.

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. Absent an objection and/or appeal by the Respondent against the award dated 26<sup>th</sup> June 2020, this Court's jurisdiction to enforce the said award in the face of the Respondent's non-settlement of the same, has matured.

22. I have carefully considered the matters raised by the Respondent in response to the Applicant's application. Largely, they are in the attack on the merits of the award. In my view, the grounds and material presented by the Respondent could be proper material and or grounds in a process that involves merit consideration, like the appeal process contemplated under section 52 of the Act. The grounds and or material as presented by the respondent are irrelevant in the proceedings like the instant one, where the Court's authority is limited and does not extend to the examination of merits.



23. The above-stated position by this Court draws inspiration from the decision in *Joash Shisia Cheto v Thepot Patrick Charles* [2022] eKLR, where the Court aptly stated;
- “.....[d]. Unless by way of appeal under section 52 of the WIBA, it is not open to the court to consider the merits of the Director’s award or indeed go on a fact finding mission. This jurisdiction is the preserve of the Director.”
24. The Respondent passionately argues that the Applicant’s claim is time-barred. I am not persuaded by this position taken by the Respondent. The reasons for this shall emerge shortly hereinafter. Section 90 of the *Employment Act* 2007, provides that: -
- “Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), 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.”
25. Judicial attention has been given by this court to the applicability of the statutory limitation of action under section 90 of the *Employment Act*, 2007 to matters enforcement of the Director’s award. There is consensus that the limitation of actions provision applies. See, *Richard Akama Nyambane vs ICG Maltauro Spa* [2020] eKLR.
26. The question that this Court has to answer, therefore, is when did the cause of action arise? or when did the neglect or default complained of occur? In the case of *Elijah Kisyanza Ndende v Manager Zabkem International Construction Ltd* [2022] eKLR.
27. With utmost respect, I see it differently. Section 26(4) of the *Work Injury Benefits Act* grants an employer who has been notified of the Director’s award 90 days within which to settle it. Enforcement thereof can therefore only be pursued once the 90 days envisioned in Section 26 (4) lapse, if the award is not subjected to an objection. In my considered view therefore, the date of the occurrence of the neglect/default or the date when the cause of action arises on the 91<sup>st</sup> day of the date of the receipt of the award by the employer.
28. In the instant case, the award was made on 26<sup>th</sup> June 2020. It is unclear when it was received by the Respondent, as neither party has addressed this issue. I presume that the Respondent was made aware of the same immediately after the Director issued it. This means that 90 days lapsed on 26<sup>th</sup> September 2020 or thereabouts. In light of the foregoing, 3 years lapsed on 26<sup>th</sup> September 2023, way after the Applicant herein had lodged his claim for enforcement on 5<sup>th</sup> April 2023. The Claim was therefore filed within 3 years not outside.
29. The Applicant having sufficiently demonstrated; the existence of the award by the Director made on 26<sup>th</sup> June 2020 in his favour; that the award has not been assailed in any of the ways provided for under the law and; that the Respondent has not settled the same to date, I return that he is entitled to the Orders sought.
30. In the upshot, I allow the Notice of Motion application dated 5<sup>th</sup> April 2023, with costs.
31. It is so ordered.

**READ, DELIVERED AND SIGNED THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2024.**

**OCHARO, KEBIRA**



**JUDGE**

**In the presence of:**

Mr. Mugo for Applicant.

Mr. Jaoko for Respondent.

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 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.

A signed copy will be availed to each party upon payment of Court fees.

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**OCHARO KEBIRA**

**JUDGE**

