



**Adika v Supra Textiles Limited (Miscellaneous Application
E096 of 2022) [2024] KEELRC 255 (KLR) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 255 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E096 OF 2022**

L NDOLO, J

FEBRUARY 15, 2024

BETWEEN

JUSTUS AGO ADIKA APPLICANT

AND

SUPRA TEXTILES LIMITED RESPONDENT

RULING

1. This ruling flows from two applications; one by the Applicant dated 23rd June 2022 and the other by the Respondent dated 29th May 2023.
2. By his application dated 23rd June 2022, the Applicant seeks adoption of the award by the County Occupational Safety and Health Officer, as an order of the Court and issuance of a decree in accordance with the assessment.
3. The application is supported by the Applicant's own affidavit and is based on the following grounds:
 - a. That the Applicant was an employee of the Respondent;
 - b. That the Applicant was in the lawful course of employment with the Respondent, when he was ordered to load a bale of fabric into a baling machine. Unknown to him, the machine was in bad condition due to lack of proper service and it consequently malfunctioned, grabbed the Appellant's arm and de-gloved it, leaving his right hand permanently incapacitated;
 - c. That the accident was reported to the Director of Occupational Safety and Health Services, who assessed compensation in favour of the Applicant, in the sum of Kshs. 1,070,208;
 - d. That on 2nd August 2021, the Applicant served the Respondent with the assessment but no payment has been made to date;
 - e. That the Respondent has refused and/or neglected to pay the compensation;



- f. That efforts by the Applicant to negotiate with the Respondent have proved unfruitful;
 - g. That the *Work Injury Benefits Act* does not provide for a civil remedy for the enforcement of the decision of the Director of Occupational Safety and Health Services, in the event that the employer declines to pay compensation;
 - h. That failure to pay the claim as assessed has necessitated the instant application;
 - i. That it is an equitable legal maxim that no person will suffer a wrong without a remedy;
 - j. That Article 159(2) of the *Constitution* of Kenya provides that justice shall be administered without undue regard to technicalities;
 - k. That Article 162(2) of the *Constitution* establishes this Court whose mandate is to hear and determine employment and labour disputes;
 - l. That it is in the interest of justice that the application be allowed as prayed.
4. The Respondent's response is contained in a replying affidavit sworn by James Kamere Kahia on 14th November 2022.
 5. Kahia depones that in the process of verifying the Applicant's claim, the Respondent's Insurer noted that the DOSH form had an assessment of 60% degree of permanent incapacity. He questions the authenticity of the DOSH form submitted by the Applicant and adds that the Applicant was referred for a 2nd assessment which returned a 3% degree of permanent incapacity.
 6. Kahia accuses the Director of Occupational Safety and Health Services of failure to issue a revised award based on the 2nd assessment.
 7. In response to the Respondent's replying affidavit, the Applicant filed a Notice of Preliminary Objection dated 23rd November 2022, stating that the Respondent is barred from challenging the merits of the award by the Director through a response to an application for enforcement.
 8. The Applicant states that an application for enforcement of an award by the Director is a procedural one and the Court has no jurisdiction to entertain arguments on the merits of the award.
 9. The Applicant also filed a further affidavit sworn by Professor Stanley Khainga on 24th January 2023. Professor Khainga confirms having treated the Applicant both as an in-patient and out-patient at the Nairobi West Hospital. He confirms the degree of the Applicant's permanent incapacity as 60%.
 10. James Kamere Kihia swore a supplementary affidavit on 22nd March 2023, reiterating the contents of his replying affidavit sworn on 14th November 2022. He asks the Court to refer the matter back to the Director for review.
 11. The Respondent's application dated 29th May 2023 seeks stay of these proceedings pending determination of the issues in controversy, by the Director of Occupational Safety and Health Services.
 12. The Respondent also seeks an order for enlargement of time for lodging of an objection before the Director.
 13. The application is supported by an affidavit sworn by the Respondent's Counsel, Eddah Simiyu Ngichave and is premised on the following grounds:
 - a. That the instant suit was filed for the enforcement of the Director's award issued on 23rd July 2023;



- b. That the cause of action in this claim being work injury in nature, meant that parties were to ventilate any issues arising with the Director of Occupational Safety and Health Services;
 - c. That the award by the Director was communicated to the Respondent on 2nd August 2021 and to the Insurer on 9th August 2021;
 - d. That the Respondent shared the award with the Insurer, who sought to verify the claim made;
 - e. That on 13th September 2023, the Respondent and its Insurer received communication from the Hospital said to have completed the DOSH form, distancing itself from the award on permanent incapacity;
 - f. That this issue has not been clarified and only the Director can make an accurate determination on allegations of fraud;
 - g. That it will be just that the orders sought be granted.
14. The twin applications before me present a dispute between the parties regarding authenticity of an award by the Director of Occupational Safety and Health Services. On the one hand, the Applicant asks the Court to adopt the award as a judgment and decree of the Court while on the other, the Respondent asks the Court to stay these proceedings and remit the matter back to the Director for re-assessment.
15. Looking at the *Work Injury Benefits Act*, the only jurisdiction granted to this Court is to sit on appeal over decisions of the Director. There is no provision for enforcement of an award by the Director or any interlocutory interventions by the Court. This was the finding in *Lameck Nyakundi Anyona v W.I.J Kenya Construction Company Limited* [2022] eKLR where it was held that:
- “There is no provision of the law, in the *Work Injury Benefits Act*, the *Employment and Labour Relations Court Act*, or the *Employment Act*, which allows the Court to enforce the compensatory awards of the Director of Work Injury.”
16. This was also the holding in *Peter Mutua Kaloki v China State Construction & Engineering Corp (Kenya) and another* [2022] eKLR where it was stated:
- “There is no provision for E&LRC to adopt an award of the Director as its Judgment. Such adoption ultimately leads to a Judgment and Decree issued by the E&LRC, which Court does not have primary jurisdiction in work injury compensation.”
17. Several decisions emanating from this Court (variously constituted) have identified a lacuna in enforcement of awards by the Director. This cannot however be a justification for the Court to arrogate to itself jurisdiction that is not donated by either the Constitution or statute.
18. For the foregoing reasons, I decline to assume jurisdiction in this matter and direct that any emerging issues regarding the processing of the claim be canvassed before the Director of Occupational Safety and Health Services.
19. Each party will bear their own costs.
20. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF FEBRUARY 2024

LINNET NDOLO



JUDGE

Appearance:

Ms. Obiri for the Applicant

Ms. Hani for the Respondent

