



REPUBLIC OF KENYA



**Ouya v Avenue Health Care Ltd (Miscellaneous Application  
E213 of 2023) [2024] KEELRC 182 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 182 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
MISCELLANEOUS APPLICATION E213 OF 2023  
K OCHARO, J  
FEBRUARY 9, 2024**

**BETWEEN**

**TERESA NYAMOITA OUYA ..... APPLICANT**

**AND**

**AVENUE HEALTH CARE LTD ..... RESPONDENT**

**RULING**

1. By her application dated 17<sup>th</sup> October 2023, the Applicant seeks;
  - a. That this Court does adopt the assessment made by the Director of Occupational Health and Safety for the Applicant as an order of this court.
  - b. That a decree be issued in accordance with the assessment of the Director of Occupational Health and Safety for the sum of Kenya shillings eight hundred thirty-six thousand four hundred forty-one [ KShs. 836, 441.00]
  - c. That the costs of the Application be borne by the Respondent;
  - d. That interest be paid on the Director's award.
2. The application is premised on the grounds set out on the face of it and in the supporting affidavit sworn on the 17<sup>th</sup> of October 2023.
3. The Applicant states that he is an employee of the Respondent, and was injured on the 15<sup>th</sup> of December 2021, while in the course of his duty. Subsequently, she was treated and examined. A medical report was prepared for her by a doctor, confirming the injuries.
4. The Applicant stated further that the workplace accident was reported to the Director of Occupational Safety and Health in accordance with the law. The relevant form, Dosh/WIBA Form 4 was duly filled.



5. The Director later on made inquiries into the accident as well as the injuries that she sustained as a result of the accident. Further, with the knowledge of the Respondent, she submitted to various medical examinations that were required by the Director.
6. The Applicant stated that upon a series of medical examinations and assessments, the Director assessed her permanent disablement at 7% and awarded a compensatory amount of KShs. 447,303.36, and for temporary incapacity, KShs. 389,137.54, therefore, totalling to KShs. 836,441.00.
7. The Applicant contends that the Respondent was issued with a demand for payment of the assessed sum. Ninety days have elapsed without the Respondent either appealing against the Director's award or settling the awarded sum.
8. She asserts that she has a right to recover the compensatory award and or enforce the same. A grant of the orders sought herein shall enable the enforcement of the award.
9. The Respondent resists the application upon the grounds set out on the Notice of Preliminary Objection dated 3<sup>rd</sup> November 2023. The grounds are;
  - a. That the application is incompetent, incurably defective and bad in law for; it seeks substantive orders in a miscellaneous Application which is not found upon any substantive pleading, whether a claim, petition, or an application for judicial review hence denying the Respondent an opportunity to be heard on the substance of the suit; and the application seeks a final resolution of the issues in controversy and as such cannot be granted by way of a miscellaneous application.
  - b. This Court lacks jurisdiction as regards the enforcement of awards made by the Director of Occupational Safety and Health services as no mechanism has been provided under the governing laws.

### **Analysis and Determination**

10. The Respondent has raised a jurisdictional issue. It is trite that once a party raises an issue concerning the jurisdiction of a court over a matter in its hands, the court is obligated to render itself on the issue right away before moving further into the proceedings. In the case of RC V KKR [2021] the Court held;
  - “26. That, jurisdiction is so central in judicial proceedings, is a well settled principle in law. A Court acting without jurisdiction is acting in vain. All it engages in is nullity. Nyarangi, JA, in Owners of Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Limited [1989] KLR 1 expressed himself as follows on the issue of jurisdiction: -  
  
Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...”
11. The Respondent contends that this Court lacks jurisdiction to entertain proceedings and give orders as regards to enforcement of the awards of the Director of Occupational Health and Safety. The Respondent anchors this position on the fact that the law does provide for an enforcement mechanism for the enforcement of the awards. I agree with the Respondent that the [Work Injury Benefits Act](#) doesn't specifically or in any manner provide a mechanism for enforcement of the awards by the Director. The question that then springs up is, owing to the lacuna do litigants go without a



remedy? In my view, to agree with the Respondent's position, with great respect shall be agreeing with a constrained approach. An approach that has restricted itself to the *Work Injury Benefits Act* in ignorance of the provisions of the Act that establishes this Court, the Employment and *Labour Relations Act*, and the stipulations of *the Constitution* of Kenya, 2010.

12. Article 48 of *the Constitution* of Kenya, 2010 provides every person with the right of access justice. The full realization of this right, more specifically as regards WIBA matters cannot be possible if the statutory lacuna mentioned above is to be allowed to negate a party's enjoyment of the fruits earned out of a successful process under the Act. This Court is enjoined to apply its mind in a manner that promotes and protects the right. This I do by hereby holding that the fact that there exists the lacuna does not leave those in whose favour the Director has made an award, remediless.
13. My view above is reinforced by the recent jurisprudence of this court on this very issue. To quote a few decisions, in the case of *Elijah Kisiyanga Ndende –Vs- The Manager Zabkem Internation Construction Ltd [2022]* Eklr, the Court held that: -

“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.”

14. In *Samson Chweya Mwandabole –Vs- Protective Custody Limited [2021]* eKLR where 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.”

15. In *Joash Shisia Cheto v Thepot Patrick Charles [2022]* eKLR, after analyzing various decisions on the issue of enforcement of DOSH awards, Manani J. concluded as follows:-

“ 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.”

16. In *Ng'ang'a v County Government of Nakuru (Miscellaneous Civil Application E007 of 2022) [2023] KEELRC 789 (KLR) (29 March 2023)* (Ruling), the Nderitu J, considering the same issue, held as follows: -

- “27. While it is correct that WIBA does not provide for the procedure and or mechanism for enforcement of an award of the director, it is illogical and unjust to argue that an employee whose award has been neglected or denied by an employer, who has not appealed against the award, has no remedy in law. Some courts have argued that the award by the director should be enforced in a lower court (magistracy) so that a dissatisfied party may appeal to this court (ELRC). As noted above, some courts and this court takes this school of thought, have held that this court has jurisdiction to enforce such an award.
- 28. There is no obscurity in this issue. An employer or an employee who is dissatisfied with the award of the director and who elects to pursue the issue beyond the director shall follow the procedure as provided for in Sections 51 and 52 of WIBA culminating in an appeal against the award in this court. Logically, such an appeal shall be attacking the legality of the award in as many ways as one can fathom including such aspects as whether the Claimant was an employee, the nature and extent of injury, the quantum of the award, etc.
- 29. On appeal this court may either uphold the award or set it aside or give such orders as it may deem lawful in the circumstances. The crux of the matter then becomes, if the court upholds the award or varies it in whatever way or manner but nonetheless there is an award subsisting, is the court not clothed with the jurisdiction to enforce that decision? Would it make any legal or logical sense to return the award to the director and submit that the court has no jurisdiction in enforcing the award of the director that it has upheld or only varied or modified? The answer to these rhetorical questions, in my considered view, is that the court would have jurisdiction to enforce the award.
- 30. Where the award is not appealed, as it happened in this matter, and the employer fails, refuses, and or neglects to settle the same, the employee has a right to approach this court for enforcement of the award by way of an application or a cause. The award, if not challenged and or appealed against as provided for by the law, becomes a debt due and payable arising from an employment relationship. I entertain no doubts in my mind that this court



(ELRC) has jurisdiction to hear and determine such a cause based on Section 12 of the Employment and Labour Relations Court Act and Section 87 of the Employment Act.

31. The jurisdiction of this court to hear and determine an appeal challenging an award by the director should not be confused or married with the jurisdiction of this court to hear and determine matters and issues of employment and labour relations as provided for in the sections of the law cited and alluded to in the preceding paragraph. For avoidance of doubt, a decision made by ELRC in its original and exclusive jurisdiction is appealable to the Court of Appeal and no prejudice would be suffered by a party who is dissatisfied with the judgment of the court in the enforcement of an award which award has not been appealed against.
  33. For all the foregoing reasons, this court agrees with the holding by Nduma J in *Bornface Indolo Luciva v Prime Quantifiers Construction Company Limited* [2021] eKLR and Kitiku J in *Elijah Kisyanga Ndende v Manager Zakhem International Construction Ltd* [2022] eKLR among many other decisions. ELRC has jurisdiction to enforce the awards by the director where the award is not challenged by way of an appeal and the employer fails, refuses, and or neglects to settle the award after the expiry of the time allowed for lodging such an appeal.”
17. Time and again, this Court has expressed that it belongs to the school of thought that the court has the requisite jurisdiction in enabling the enforcement of the Director’s award. The position hasn’t changed. I am inspired and I agree with the decisions hereinabove quoted. Consequently, I am not persuaded by the Respondent’s argument that this Court lacks jurisdiction.
  18. With great respect, the second ground of objection lacks merit. In the instant application, this Court is not invited to interrogate the merits or demerits of the Director’s award. It is all about the enforcement of an award that has not been appealed against. Typically, the application is not a contentious one. I am not persuaded that it could require a hearing where oral evidence is taken from the parties and or their witnesses and cross-examination undertaken on the evidence. At this point, I say that I agree with the decision in *Joash Shisia Cheto v Thepot Patrick Charles* [2022] eKLR, that an application like the instant one may be in a summary form by way of a miscellaneous cause but confined to matters of enforcement.
  19. In the upshot I find the Respondent’s preliminary objection lacking in merit. It is hereby dismissed with costs.
  20. Having dismissed the objection, I see no reason why the Applicant’s application should not be allowed. Consequently, the application is allowed in the following terms;
    - I. The assessment of the Director’s award is hereby adopted as a judgment of the Court.
    - II. A decree shall be issued in the sum of KShs.836,441.00. assessed by the Director of Occupational Health and Safety, Services.
    - III. The above stated sum is to attract interest at Court rates from the date of the award till full payment.
    - IV. Costs of this application shall be for the Applicant.



**READ, SIGNED, AND DELIVERED THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2024.**

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**OCHARO KEBIRA**

**JUDGE**

In the Presence of;

Ms. Bonyo for the Applicant

Mr. Ochola for the 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**

