



**Wandu v Central Bank of Kenya (Miscellaneous Application
E154 of 2023) [2024] KEELRC 183 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 183 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E154 OF 2023**

K OCHARO, J

FEBRUARY 9, 2024

BETWEEN

MICHAEL LANZEY WANDU APPLICANT

AND

CENTRAL BANK OF KENYA RESPONDENT

RULING

Background

1. By his Notice of Motion application dated 24th July 2023, the Applicant seeks: -
 - a. Spent.
 - b. That the Court does adopt the assessment and award made by the Director Occupational Safety and Health Services in favour of the Applicant on 29th June 2023 in the sum of Kenya Shillings Nine Million Forty Five Thousand Five Hundred and Forty Two and Ninety Six Cents only (Kshs. 9,045,542.96) as an order of the Court.
 - c. That Judgment be entered and a Decree issued in favour of the Applicant and against the Respondent in the sum of Kenya Shillings Nine Million Forty Five Thousand Five Hundred and Forty Two and Ninety Six Cents only (Kshs. 9,045,542.96) as an order of the Court.
 - d. Costs of the Application be provided for.
2. The application is premised on the grounds set out on the face of the application and the supporting affidavit sworn by the Applicant on 24th July 2023.
3. In response to the Notice of Motion, the Respondent filed a Notice of Preliminary Objection dated 26th September 2023, and a Replying Affidavit sworn by one Mary Imende on 5th October 2023.



4. The application is expressed to be under Articles 159 and 162 of the Constitution of Kenya 2010; Section 12 of the Employment and Labour Relations Court Act; Sections 1A, 1B and 3A of the Civil Procedure Act 2010; and Order 51 Rules 1, 3 & 4 of the Civil Procedure Rules 2010; and all other enabling provisions of law.
5. The application is premised on the following grounds:
 - i. The Applicant was an employee of the Respondent on permanent and pensionable terms who suffered a head injury on 13th November 2023 whilst training in the Respondent's gym due to a malfunction of a Pectoral Flyes Machine.
 - ii. That the Applicant duly reported the accident to the Respondent, and filled the necessary forms. Further, he underwent medical treatment both at the Respondent's staff clinic and other specialized hospitals. Eventually, his injury was assessed both by the Respondent's Head of Staff Clinic and external doctor, and it was confirmed that he had suffered a permanent disability of 40%.
 - iii. That upon reporting the accident to the Respondent he expected it to lodge a compensation claim with its Insurer under the Group Personal Accident cover, in conformity with the stipulations of the Work Injury Benefits Act. The Respondent failed to pursue compensation for him from the Insurer and report the accident to the Director of Occupational Safety and Health to enable compensation under the above stated Act.
 - iv. That in light of the inaction on the part of the Respondent, the Applicant was forced to report the accident to the Director of Occupational Safety and Health Services through his Advocate. Upon assessment of the claim, the Director made an award of Kenya Shillings Nine Million Forty Five Thousand Five Hundred and Forty Two and Ninety Six Cents only (Kshs. 9,045,542.96) in his favour.
 - v. The Director demanded payment of the assessed compensation from the Respondent but the demand didn't elicit any action from the Respondent. They have not mounted any challenge against the Director's award or appealed against the award under Sections 51 (1) and 52 (2) of the Work Injury Benefits Act, 2007, respectively.
 - vi. That under Section 26 (4) of the Work Injury Benefits Act, it is an offence for an employer to fail to settle a claim upon receiving the Director's assessment, hence the Respondent is guilty of an offence.
 - vii. There is no enforcement mechanism provided under the Work Injuries Benefits Act 2007, for enforcement of the Director's award. Only this Court exercising its original jurisdiction under Section 12 of the Employment and Labour Relations Act 2011 can enforce the said award.
 - viii. Lastly, the Claimant is in urgent need of finances to meet his medical needs as a result of the injury, having exhausted his retirement benefits on the same, and as the matter has dragged on for many years due to deliberate inaction on the part of the Respondent.

The Respondent's objection and Response

6. The Respondent's Preliminary Objection dated 26th September 2023 is based on the following grounds:



- i. That the application is premature, misconceived, frivolous, vexatious and an abuse of the Court process and should be struck out in limine as the same is filed before the exhaustion of the statutory mechanism under Sections 51 and 52 of the Work Injury Benefits Act 2007;
 - ii. That this Honourable Court lacks jurisdiction to hear and determine an application seeking to enforce awards of compensation by the Director of Occupational Safety and Health Services.
7. In their Replying Affidavit sworn by one Mary Imende on 5th October 2023, the Respondent admits that the Applicant was indeed their employee in the position of Senior Bank Officer (then) and did indeed suffer an injury to the left side of his forehead while exercising in the Respondent's gym.
8. The Respondent argues that the injury sustained by the Applicant was not a work injury. It was not sustained while in the course of his duties which entailed processing cheques and verifying documents, work that could not be carried out in the Bank's gym. At the time of his accident, the Applicant was using the Respondent's gym for his own benefit.
9. It was further stated that on 2nd January 2014, a Medical Certificate was issued following a medical assessment that was carried out on the Applicant. As per the assessment, the Applicant had suffered no permanent disability as a result of the accident, a fact which he has not disclosed to this Court.
10. It was the Respondent's position that the Group Accident Policy taken out with Jubilee Insurance Company only covers accidental deaths and injuries which result in a degree of permanent disability. In light of the certificate to the effect that the Applicant had suffered no permanent disability, the insurer rejected his claim.
11. The Respondent further stated that the Applicant's eye issues developed sometime in December 2014, more than a year after the accident. He suffered cataracts of the left eye, right eye retinal detachment, among others. The Respondent supported him when he sought treatment for the eye issues on various occasions in 2015. After a successful operation to treat the detached retina in his right eye, the Bank's medical officer reviewed the Applicant's Personal Accident Claim Form and issued another Medical Certificate dated 13th January 2016, which indicated that he had suffered a permanent disability degree of 40%.
12. The insurer was notified. It referred him to an eye specialist for a second medical opinion. The eye specialist failed to find the connection between the head injury of 13th November 2013 and the Applicant's eye issues which began in December 2014. Consequently, the claim was again rejected. The Respondent appealed against the insurer's decision on behalf of the Applicant but the insurer declined the same holding that it could not flout the principle of Proximate Cause.
13. It was further stated that on 20th June 2023, the Applicant reported the accident that occurred in November 2013 to the Director of Occupational Safety and Health Services. On 20th June 2023, the Director without jurisdiction to entertain the claim, assessed the injury and awarded him KShs.9,045,542.40 as compensation.
14. The Respondent argued that Section 26[1] of WIBA provides that a compensation claim shall be lodged by or on behalf of the Claimant in the prescribed manner within twelve months after the date of the accident. The Claimant's claim was time barred, therefore.
15. It is further contended that even if the erroneously obtained award was to subsist, the Respondent has under section 26[4] of the WIBA 90 days after the award to settle the same, or file an objection within 60 days after receipt of the award.



16. On 25th August 2023, within the statutory 60 days of the award, the Respondent filed an Objection to the award on the grounds that; the Director had no jurisdiction to determine compensation for a claim which was not a work injury and; the claim was time barred as it was lodged outside the statutory timelines without leave.
17. Subsequently, the Respondent received a letter dated 1st September 2023 from the Director acknowledging lodgment of the Objection and that it was done within 60 days of the award. Further, the Director intimated that he would carry out investigations into the grounds raised in the Objection.
18. The Respondent asserted that the Director is yet to render a decision on the Objection, hence the instant application is premature and an abuse of the Court process. In any event, even if the Director were to decide in favour of the Applicant, the Respondent will have 30 days to appeal that decision to this Court. Enforcement of the award can only be sought after the exhaustion of the appeal mechanism.

Analysis and Determination

19. I have carefully considered the Notice of Motion dated 24th July 2023, the grounds and Affidavit in Support thereof; the Notice of Preliminary Objection dated 26th September 2023; and the Replying Affidavit, and the following issues emerge for determination: -

- a. Whether the Applicant's application herein has been prematurely initiated;
 - b. Whether this Court has jurisdiction to enforce awards of the Director of Occupational Safety and Health Services;
 - c. Whether this Court should grant the orders sought by the Applicant in his Application dated 24th July 2023.
- a) Part VIII of the *Work Injury Benefits Act*, 2007 elaborately provides for the post- Director's award events, an objection against the Director's decision, and an appeal to this Court against the decision of the Director as the case may be. Sections 51 and 52 of the Act provide: -

Application

“51. herein

Objections
and been
applied
against
decision.

(1)

(2)

of

the

Director

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.

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.”



20. The Respondent asserted that pursuant to the provisions of Section 51[1] of *the Act*, they filed an objection to the Director's award on the 25th of August 2023. The Court notes that indeed the Respondent raised an objection dated 21st August 2023. The objection raised two grounds; the Applicant's claim was time-barred and; he didn't sustain the injuries, the subject matter in the course of his employment. Further, true as asserted by the Respondent, the Director on the 1st September 2023 wrote;

“RE: Objection To The Decision Of The Director Of Occupational Safety And Health Services- Mike Lanzey Wandu

Reference is made to your objection dated 21st August 2023 and received in this office on 25th August 2023.

After perusal of the documents attached, the following was noted;

1. A demand note was raised by this office on the 29th of June 2023 *vide* ML/DOSHS/WIBA/5586/2023 awarding the Claimant Mr. Mike Lanzey Wandu Kshs. 9,045,576.96.
2. The objection on this demand was raised within 60 days as required by *WIBA* 2007.

This office is carrying out investigations on this matter and will communicate on the same once the investigations are completed”.

21. The Applicant has not in any manner challenged these vital assertions by the Respondent. This, coupled with the fact that I have carefully considered the two documents and concluded that they are authentic, drives me to hold that objection proceedings are pending before the Director. An objection which was rightly filed. The Applicant's instant application for enforcement of the Director's award is premature as argued by the Respondent.

22. In my view, the Applicant's move herein is an affront to the doctrine of exhaustion. The Applicant knew or ought to have known that the *Work Injury Benefits Act*, provides for a procedure for proceedings post the Director's award, that either the Claimant or the employer can pick to assail the award. Further, the Respondent [employer] opted to employ the procedure and challenge the award. After the Director's decision on the objection is rendered, either of the parties has a right to appeal to this court if dissatisfied with the decision. No doubt therefore that the procedure provided for under Part VII of the Act is far from being exhausted. On the doctrine of exhaustion the Court of Appeal in the case of Speaker of *National Assembly vs Karume* [1992] KLR 2 aptly stated: -

“Where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

23. By reason of the premises, I come to an inescapable conclusion that the instant application was prematurely initiated. It is for rejection.

24. Having found as I have hereinabove, I find it unnecessary to delve into the other issues. The applicant's application is dismissed with costs.

25. It is so ordered.



READ, DELIVERED AND SIGNED THIS 9th DAY OF FEBRUARY, 2024.

OCHARO KEBIRA

JUDGE

In the presence of:

Mr. Mutara for Applicant

Mr. Ochieng 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 15th March 2020 and subsequent directions of 21st 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.

OCHARO KEBIRA

JUDGE

