



**Malaba v Securex Agencies (K) Limited (Miscellaneous Application
E166 of 2023) [2024] KEELRC 548 (KLR) (8 March 2024) (Ruling)**

Neutral citation: [2024] KEELRC 548 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E166 OF 2023**

K OCHARO, J

MARCH 8, 2024

BETWEEN

THOMAS WEKESA MALABA APPLICANT

AND

SECUREX AGENCIES (K) LIMITED RESPONDENT

RULING

1. The Applicant herein filed a Notice of Motion dated 10th August 2023 seeking the following orders: -
 - a. This Honourable Court be pleased to adopt the assessment of the Director of Occupational Safety and Health Services made in Claim Reference Number NBI/56828/2019 as a Judgment and Decree of this Court.
 - b. This Honourable Court be pleased to enter Judgment for the Claimant against the Respondent for Kshs. 167,857 as assessed by the Director of Occupational Safety and Health Services made in Claim Reference Number NBI/6828/2019.
 - c. This Honourable Court be pleased to award the Claimant interest on the amount from the date of assessment until payment in full.
 - d. This Honourable Court be pleased to award any other relief it may deem fit and just to grant.
 - e. Costs of this Application be borne by the Respondent.
2. The Notice of Motion dated 10th August 2023 is premised on the Grounds stated therein and the Supporting Affidavit of the Applicant, Thomas Wekesa Malaba, sworn on 10th August 2023.
3. In response to the Notice of Motion, the Respondent filed a Notice of Preliminary Objection dated 20th September 2023 and a Replying Affidavit sworn on 29th September 2023.



4. The Applicant's application is brought under Section 12 of the [Employment and Labour Relations Court Act](#); Sections 1A, 1B and 63 (a) of the [Civil Procedure Act](#); Order 2 and Order 51 of the Civil Procedure Rules 2010; Sections 16, 37 and 51 of the [Work Injury Benefits Act](#); and all other enabling provisions of law.
5. The Grounds upon which the Notice of Motion dated 5th April 2023 is brought are that:
 - i. The Applicant sustained injuries on 23rd October 2019 while in the employment of the Respondent. Subsequently, the matter was lodged with the Director of Occupational Safety and Health Services, under the provisions of the [Work Injury Benefits Act](#). Following the process provided for under the Act, the Applicant's injuries were assessed. He was found to have suffered 10% disablement as a result of his injuries. The Director assessed compensation payable to him for the injuries suffered as Kshs. 167,856.75.
 - ii. That despite, being informed of the award, and a subsequent statutory demand through the Director's letter dated 9th March 2020, the Respondent has refused, neglected and/or failed to remit the compensation to the Claimant. Further, they have refused to pay the compensation even in the face of multiple demands from the Claimant.
 - iii. That the Respondent has not assailed the decision of the Director of Occupational Safety and Health Services in any of those ways provided for under the Act. The Respondent is obliged to settle the aforesaid amount.
6. The Respondent resists the application, on the prime ground that the Applicant is seeking through the application enforcement of the Director's award of 3rd December 2019, yet the application the same time-barred under Section 90 of the [Employment Act](#) 2007.
7. The Respondent through the Replying Affidavit sworn by one Dorothy Kaane, its Human Resources Manager, on 29th September 2023, admits that they received a letter dated 9th March 2020, issued by the Director of Occupational Safety and Health Services demanding payment of the sum of KShs. 167,856. Upon receipt of the same, it forwarded the demand to their insurers for payment. However, the insurers declined to settle the claim as in their view, the Claimant had not suffered injuries.
8. On 25th September 2023 when the matter came up for directions before this Court, I directed that the Notice of Motion application dated 10th August 2023 and the Preliminary Objection dated 20th September 2023 be canvassed by way of written submissions. Both parties have filed their respective submissions.

Analysis and Determination

9. I have carefully considered the Notice of Motion dated 10th August 2023, the Grounds thereof and Affidavit in Support thereof; the Preliminary Objection dated 20th September 2023 and the Replying Affidavit sworn on 29th September 2023, the submissions of both parties and authorities relied on and return that the issues for determination are as follows: -
 - a. Whether the Notice of Motion dated 10th August 2023 is statute-barred by operation of Section 90 of the [Employment Act](#) 2007.
 - b. Whether this Court should grant the orders sought by the Applicant in his Application dated 10th August 2023.
 - a. Whether the Notice of Motion dated 10th August 2023 is statute-barred by operation of Section 90 of the [Employment Act](#) 2007.



10. This application concerns an award of the Director of Occupational Safety and Health Services (hereinafter referred to as the “DOSH”) issued in WIBA Claim Number WIBA/NBI/6828/2019 on 3rd December 2019, a copy of which is attached to the Applicant’s Supporting Affidavit sworn on 10th August 2023. The DOSH awarded the Applicant Kshs. 167,857/- as compensation for his injuries based on an assessment of the Applicant’s permanent disablement at 10%. The award was served upon the Respondent when it was issued.
11. The above facts are admitted by the Respondent through the Replying affidavit.
12. Judicial attention has been given to the matter, the jurisdiction of this Court in the enforcement of DOSH awards. While appreciating the parent Act [the *Work Injury Benefits Act*], as is currently, suffers from the deficiency of providing an enforcement mechanism, buoyed by a liberal interpretation of Section 12 of the *Employment and Labour Relations Court Act*, the provisions of Section 87 of the *Employment Act*, and the maxim, equity will not suffer a wrong without a remedy, the Court has in various matters held that it has the requisite jurisdiction to facilitate the enforcement awards.
13. Affirming that the court has jurisdiction, the Court in the case of *Ng’ang’a v County Government of Nakuru* (Miscellaneous Civil Application E007 of 2022) [2023] KEELRC 789 (KLR) (29 March 2023) (Ruling) aptly expressed itself: -
- “ 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*.”
14. The Respondent has challenged the jurisdiction of this Court to hear and determine the present application on the basis that the same is statute-barred under Section 90 of the *Employment Act* 2007: -
- “Limitations
- 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.”
15. Again, in light of the incomprehensive nature of the *Work Injury Benefits Act* in some crucial aspects relating to workplace injury and, health claims, the court has been in various called upon to determine whether or not the limitation of actions applies to applications for enforcement of DOSH awards. Indeed, judicial precedent has it, that, it applies under the provisions of Section 90 of the *Employment Act*. A position that I agree with. In the case of *Richard Akama Nyambane vs ICG Maltauro Spa* [2020] eklr, the Court held:-
- “ The application of section 87 of the Act, thus put into perspective, all claims premised under the *Employment Act*, 2007 are subject to the provisions of section 90 thereof. Sections 87 and 90 thus read together, the cause of action herein and the orders sought seeking to enforce the



DOSH award, such must be subject to the mandatory provisions of section 90. All claims must be lodged with the court within 3 years from the date the cause of action arose.”

16. The next question that this Court has to answer, therefore is, when does a cause of action arise, or when does the neglect or default occur in a matter like is the instant one? In answering the question, the court in the case of *Elijah Kisyanga Ndende v Manager Zahkem International Construction Ltd* [2022] eKLR, the Court stated that: -

“For purposes of suits and/or applications for enforcement of decisions and/or assessments made by the Director of Occupational Safety and Health Services under the *Work Injury Benefits Act*, time in my view starts running from the date the Director’s decision is received by the employer. An applicant avoiding to address the Court on the issue, therefore, does so at the risk of their application and/or suit being dismissed for being statute barred.”

17. With utmost respect, I hold a different view. To truly ascertain the date of accrual of the course of action, the true meaning of the phrase cause of action must be understood, and the post-DOSH award events and their statutory timelines, must be appreciated and considered.
18. Black’s Law Dictionary, 10th Edition defines cause of action, thus, “a group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person.” In my view, and applying this definition, a cause of action regarding situations where a person is statutorily enjoined to perform an act within, a specific period, can only arise when he fails to act within the set timelines. The basis for suing by an aggrieved party sets in upon the lapse of the last day of the period within which he was supposed to act.
19. Section 26(4) of the *Work Injury Benefits Act* grants an employer in receipt of notification of the award of the DOSH and demand to settle the award, to so do within 90 days of the notification. In my view, therefore, it can only be said that the employer has failed, neglected, or defaulted to settle, in breach of the statutory requirement on the next day after the 90th day. 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. I reach a clear view, therefore, the date of the occurrence of the neglect/default or the date when the cause of action arises, is 90 days from the date of the receipt by the employer of the notification and demand.
20. This matter is not as straightforward as a casual and constrained look at it more specifically on the issue of limitation of action may reveal. I will look at it using a different lens from those used by the Counsel for the parties. I consider it deeper. The computational matrix brought forth hereinabove, will not be applied in this matter owing to its peculiar circumstances attracting the doctrine of estoppel against the Respondent.
21. I note that the Respondent does not dispute the fact that there was an award made against it by the Director and that it didn’t appeal against the award as provided for under the Act. The Respondent expressly admits that it received the Director’s demand to settle the award. After receiving the demand, the Respondent through its letter dated replied;

“We acknowledge receipt of your letter dated 9th March 2020 in regard to the subject matter.

We would like to bring to your attention that the stated claim was forwarded to our underwriter Intra Africa Company Limited on 10th February 2020 and we are still awaiting their feedback though we are making a follow up on the same.



We will advise you on the progress once we get concrete feedback.....”

22. The Respondent has asserted that the underwriter eventually declined to settle the claim. It does not state when. I have carefully considered the documents presented by the Respondent and note the basis of the alleged rejection could be the Medical report dated 30th November 2020. By its representation, the Respondent caused the Applicant to hold onto his horses awaiting the settlement of the claim by the Insurer. The insurer declined to settle the same, almost nine months after the notification. In my view, it would have been imprudent and an exhibition of bad faith for the Applicant to initiate legal proceedings against the Respondent even after it had represented that the settlement was being addressed. The Respondent placed the Applicant in a position not to seek enforcement of the award within time, it is estopped from asserting that the application for enforcement is time barred.
23. Looking at it from the other angle, I hold that throughout, the Respondent was in a state of acknowledgement of the debt to the Applicant, and for purposes of Section 90 of the Employment Act, the neglect and or default occurred when the Respondent failed to settle the claim on account of the fact that its Insurer had declined the claim.
24. By reason of the premises, I dismiss the preliminary objection by the Respondent and allow the Applicant’s application herein dated 10th of August,2023. The Application is allowed in the following terms;
 - I. The award of the Director of Occupational Safety and Health Services made in claim Reference Number NBI/ 6828/2019 is hereby adopted as a judgment of this Court.
 - II. Judgment is hereby entered for the Applicant against the Respondent for KShs. 167,857/- as assessed by the Director.
 - III. The Respondent shall pay interest on the awarded sum, at court rates from the date of the award till full payment.
 - IV. The Respondent is to pay the costs of this suit.
25. It is so ordered.

READ, DELIVERED AND SIGNED THIS 8th DAY OF MARCH, 2024.

OCHARO KEBIRA

JUDGE

In the presence of:

Mr. Maina for Applicant

Mr. Kaura 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

