



Seme v Sino Hydro Corporation Engineering Bureau 15 Co. Ltd (K) (Miscellaneous Application E009 of 2023) [2024] KEELRC 517 (KLR) (7 March 2024) (Ruling)

Neutral citation: [2024] KEELRC 517 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
MISCELLANEOUS APPLICATION E009 OF 2023**

HS WASILWA, J

MARCH 7, 2024

BETWEEN

BENARD EMURIA SEME APPLICANT

AND

**SINO HYDRO CORPORATION ENGINEERING BUREAU 15 CO. LTD
(K) RESPONDENT**

RULING

1. The Applicant herein filed a Notice of Motion dated 1st September, 2023, Brought pursuant to section 87 of the *Employment Act* and all other enabling provisions of the law, seeking for Orders that; -
 1. That this Honourable Court be pleased to adopt as a judgement of this Court, the award of the Director of Occupational Safety and Health Services.
 2. That judgement be entered in favour of the claimant as against the Respondent for Kenya Shillings Six Hundred and Sixty-Three Thousand (Kshs. 663,000) being the amount assessed under the *work injury benefits Act*.
 3. That this Honourable Court be pleased to award interest on the amount from the date of assessment.
 4. That the costs of this Application be borne by the Respondent.
2. The grounds of the Application is that the Respondent retained the services of the Applicant as the Chief Mechanic from the year 2018 at a salary of Kshs 13,825. However, that in the course of employment on 12th November, 2019, the Applicant sustained injuries.
3. Subsequently, that the Employer, Respondent herein, prepared and signed the duly filed statutory notice by the employer of occupational accident of an employee and send to the Director of Occupational Safety and Health for assessment and action.



4. The Director of Occupational Safety and Health assessed the injuries occasioned on the Applicant and awarded compensation of Kshs 663,000 under reference number WIBA/ KER/ 2185/22.
5. That despite demand and notice being served on the Respondent, the Respondent has refused to pay the said money and has neither lodged an appeal as such that the said money is due and adoption is necessary before execution can be carried out.
6. The Application is further supported by the Affidavit of the Applicant sworn on 1st September, 2023, reiterating the grounds of the Application.
7. On 21st September, 2023, the Applicant amended his notice of motion, pursuant to to Section 1A & 3A of the *Civil Procedure Act*, 2010, Order 8 Rule 1 of the Civil Procedure Rules and the inherent jurisdiction of the Court and all other enabling provisions of the law, seeking for the following Orders; -
 1. The Applicant be allowed to amend his miscellaneous application dated 1st September, 2023 and filed in this Honourable Court on the same date as per the draft annexed hereto.
 2. That paragraph 2 of the Application dated 1st September, 2023 which reads that “That judgement be entered in favour of the claimant as against the Respondent for Kenya Shillings Six Hundred and Sixty-Three Thousand (Kshs. 663,000) being the amount assessed under the *work injury benefits Act*”, be amended to read “That judgement be entered in favour of the Applicant for the sum of Kenya Shillings One Million, One Hundred and Twenty-One Thousand, Two Hundred and Thirteen and Seventy-Three cents (Kshs. 1,121,213.73) being the amount assessed under the *Work Injury Benefits Act*.”
 3. That the Amended Miscellaneous Application annexed hereto be treated as the Applicant’s Amended Miscellaneous Application and that the same be deemed as having been duly filed and served.
 4. That the costs of the Application be costs in cause.
8. The Amended Application is premised on the fact the correct award as assessed by the Director of Occupational Safety and Health is Kshs 1,121,213.73.
9. The Application is opposed by the Respondent who filed a replying affidavit deposed upon on 26th September, 2023, by Yang Zhi Feng, the the Project manager of the Respondent.
10. The affiant stated that they are currently carrying out a project in Elgeyo Marakwet and that it’s true that the Applicant was involved in work injury on 12th November, 2019 and an award was made in favour of the Applicant by the Director of Occupational Safety and Health.
11. He stated, however, that the Respondent is insured against work related injuries with Resolution Insurance Co. Limited which was placed under statutory management on 5th April, 2022 as such their insurance is unable to pay the said award.
12. He elaborated further that upon being served with the demand notice, they pursued payment from their insurer, however they were informed that the policy holders compensation declared a moratorium on the payment of insurer to its policy holders and all other creditors for a period pf 12 months.
13. Subsequently, that the policy holders’ compensation fund sent a public notice to all claimants to lodge compensation claims, which was capped at Kshs 250,000, However that the Director of Occupational Safety and Health has not made any claim on behalf of the Applicant herein.



14. He reiterated that since the Respondent was insured, the Respondent cannot be pursued for compensation in light of the fact that there is a moratorium against its insurer. He added that the Respondent stand prejudiced if the Orders issued are granted.
15. The Application herein was canvassed by written submissions, with the Applicant filing on the 19th January, 2024 and the Respondent filed theirs on the 5th February, 2024.

Applicant's Submissions.

16. The Applicant submitted on one main issue; whether this Court has jurisdiction to enforce the award of the Director of Occupational Safety and Health (DOSHS). It was submitted that jurisdiction of this Court either flows from the Constitution or statute and cited the case of Richard Akama Nyambane v Maltauro Spa[2020] eKLR where the Court held that;-

“The Work Injury Benefits Act, 2007 (WIBA) does not provide for an enforcement mechanism in respect of awards of the Director and recourse was section 87 of the Employment Act, 2007 (the Act) as held in the case of Ruth Wambui Mwanggi & another versus Alfarah Wholesalers Limited [2017] eKLR”

17. The Applicant also relied on the case of Samson Chweya Mwandabole v Protective Custody Limited [2021] eKLR where the Court held that;-

“There is a lacuna in law with respect to procedure for enforcement of the awards made by the Director under WIBA. However, this court being endowed with unlimited original and appellate jurisdiction in disputes related to employment and labour relations pursuant to Article 162(2) (a) of the Constitution and section 12 of the Employment and Labour Relations Court Act, I hold that it has the inherent jurisdiction to adopt as judgement 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 Directors reply to objection made under section 51(1) of the WIBA. . It would appear that the former jurisdiction, which I now invoked, 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 section 51(1) and 52(2) of WIBA respectively. In this case, it is common ground that the Respondent did not object to the award under section 51(1) of the Act.”

18. Accordingly, that it's evident that this Court has jurisdiction to determine the matter herein as it is conferred such powers under Article 162(2) of the Constitution of Kenya 2010 as read with section 87 of the Employment Act.
19. Based on the above, the Applicant submitted that, he is entitled to compensation as stated under section 10 of the Work Injury Benefits Act and the Respondent is obligated to pay such compensation failure to which the employer commits an offense and shall liable to pay fine not exceeding Kshs 500,000 or be imprisoned for a term not exceeding one year or both.
20. In conclusion, he urged this Court to adopt the award by Dosh, as prayed in the Amended Notice of Motion.

Respondent's Submissions

21. The Respondent also submitted on jurisdiction of this Court to adopt the Award given by Dosh, and stated that section 52(2) of the Work Injury and Benefits Act, confers appellate jurisdiction to



this Court on matters arising out of an award from the director of occupational Safety and Health. Therefore, that adoption of Dosh award cannot be done by this Court through a miscellaneous Application but by Appeal. In support of this view, the Respondent relied on the case of *Elias Musembi v Great Yaddo Industry Limited* (Miscellaneous Case E080 of 2022) [2022] KEELRC 13025 (KLR), where the Court was of the view that adopting an award by Director of Occupational Safety and Health as judgment of the Court, will appear to compromise the Appellate jurisdiction of the Court under Section 52(2) of *WIBA*.

22. The Respondent also relied on the case of Austin Oduor Odira V Kenya Sweets Ltd & Another where the Court held that; -

“Under section 52 of the *Work Injury Benefits Act, 2007 (WIBA)* a party who is dissatisfied with the decision and award of the Director is allowed to file an appeal against the decision of the Director with the Court. Rule 8 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* address how appeals are to be processed before the court. Upon an award of the Director, where the parties are satisfied, the *WIBA* has not established a framework for the enforcement mechanism. The court being seized of original jurisdiction with regard to employment and labour relations disputes has adopted a purposive approach of parties filing a claim to enforce the decision of the Director. Such approach is limited to the enforcement of the Director’s award as where a party is dissatisfied with the award, an appeal is permissible. See *Ruth Wambui Mwangi & Another Versus Alfarah Wholesalers (2017) eKLR.*”

23. Accordingly, that this Court cannot issued any orders under miscellaneous Application for adoption of the DOSH award unless the same is raised as an appeal.

24. The Respondent also took issue, with the fact that the Applicant has not addressed their concern that their insurer is under statutory management since 5th April, 2022 to date. This he added is because with a moratorium in place execution ought not to take place.

25. On that basis, the Respondent prayed for the Application to be dismissed.

26. I have examined all the averments and submissions of the parties herein. The 1st issue for this court’s determination would in this case be whether this court has jurisdiction to adopt an award of the Director of Occupational Safety and Health made under the WIBA Act. To determine this matter because recourse is made to the law and court law on this subject.

27. The Court of Appeal in *Owners of Motor Vessel Lilian v. Caltex Oil (Kenya) Ltd* held that:

“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 in a continuation of procedures pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

28. Section 51 of *WIBA* provides as follows:

- (1) 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 an objection 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. Director's reply.

29. Section 52 of the other hand provides: -
- (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.
30. My understanding of the above provisions is that this court exercises appellate jurisdiction on decision made by the Director and this include an assessment of damages for Injury occurring at work.
31. There is no other provision in this Act which may guide the execution of the award of the Director under *WIBA*. However, my purposeful interpretation of the execution of the award of the Director would point to the fact that this court cannot adopt the Director's award thus confirming it as the order of ELRC and thereafter change tact and sit as an appeal court where appeals are raised against the award adopted.
32. In *Peter Mutwa Kaloki v. China State Construction & Engineering (K) & Another* eKLR and *Lameck Nyakundi Anyona v. Wji Kenya Construction Company Limited* (2022) eKLR similar sentiments were expressed.
33. The court made a finding that it didn't have jurisdiction and the only way it could entertain matters under *WIBA* was by way of appeal.
34. I believe that is the correct position under the law. In this miscellaneous application, this court is being asked to adopt an award from the Director of WIBA which I find is irregular as this court lacks the requisite jurisdiction to do so. I find the application lacks merit and I therefore strike out the application with no order of costs.

RULING DELIVERED VIRTUALLY THIS 7TH DAY OF MARCH, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

