



Kinyanjui v Newspaper Transporters Ltd & another (Miscellaneous Case E292 of 2023) [2024] KEELRC 953 (KLR) (30 April 2024) (Ruling)

Neutral citation: [2024] KEELRC 953 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS CASE E292 OF 2023**

JK GAKERI, J

APRIL 30, 2024

BETWEEN

MWANGI KINYANJUI APPLICANT

AND

NEWSPAPER TRANSPORTERS LTD 1ST RESPONDENT

DIRECTORATE OF OCCUPATIONAL SAFETY AND HEALTH

SERVICES 2ND RESPONDENT

RULING

1. Before the Court for determination is the Applicant's Notice of Motion dated 11th December, 2023 filed under Certificate of Urgency seeking orders that:-
 1. The Honourable Court be pleased to adopt as a judgment of this court the award made by the Director Occupational Safety and Health Officer on 5th September, 2023.
 2. Judgment be entered for the Applicant against the 1st Respondent at Kshs 594,850.00 being the amount assessed under the *Work Injury Benefits Act* together with special damages of Kshs 185,610/=, a total of Kshs 780,460/=.
 3. The court be pleased to award interest on the amount from the date of assessment until payment in full.
 4. Costs of this suit be borne by the Respondent.
 5. The court be pleased to award any other relief it may deem fit and just to grant.
2. The Application is expressed under the provisions of Article 159 and 162(2) of *the Constitution* of Kenya, 2010, Section 22, 24, 25, 26 and 53 of the *Work Injury Benefits Act*, Section 12 of the



Employment and Labour Relations Act and Section 87 of the Employment Act, 2007 and is based on the grounds set forth on its face and the Supporting Affidavit sworn by the Applicant on 11th December, 2023 who deposes that he was injured on 23rd May, 2022 in the course of his employment and was treated on out-patient on 1st August, 2022 to 22nd August, 2023.

3. The applicant deposes that he was assessed by the 2nd Respondent on 30th August, 2023.
4. That the 2nd Respondent issued a statutory demand dated 5th September, 2023 for the sum of Kshs 594,850.00 calculated at 22% incapacity.
5. The applicant deposes that he spent Kshs 185,610/= as special damages and prays for judgment for the sum of Kshs 780,460.00.

Grounds of objection

6. By its grounds of opposition dated 31st January, 2024, the Respondent states that the court lacks jurisdiction to hear and determine the Notice of Motion as it is not an appeal as contemplated under Section 52(2) of the Work Injury Benefits Act, 2007 and jurisdiction is everything.
7. That the award of Kshs 594,850/= was not received by the Director Occupational Safety and Health Services and the court lacks jurisdiction to award any sum in excess of the amount awarded by the DOSHS and should decline the invitation to award the sum of Kshs 780,460.00 to the applicant and the court is not a court of 1st instance.
8. That the court is not bound by the provisions of Section 26 and 27 of the Civil Procedure Act as regards interest and costs.

Applicant's submissions

9. Counsel for the applicant isolated three issues for determination, namely; whether the notice of motion is merited, court's jurisdiction to enforce the award and costs.
10. On the first issue, counsel urged that the application is merited as the DOSH conducted an inquiry under Section 23 of the WIBA, after notification by the 1st Respondent vide DOSH Form I and an award was made under WIBA Form 4 and a demand was issued and no objection was raised within 60 days.
11. Reliance was made on the sentiments of the court in Samson Chweya Mwendabole v Protective Custody Ltd (2021) eKLR on the jurisdiction of the court to adopt an award made by the DOSH.
12. On jurisdiction, reliance was made on the decision in Richard Akama Nyambane v ICG Maltauro Spa (2020) eKLR on the applicability of Section 8 of the Employment Act, 2007 to urge that the court has jurisdiction to entertain the notice to show cause.
13. Reliance was also made on the decision in Bornface Indolo Luciva v Prime Quantifiers Construction Co. Ltd (2021) eKLR and Elijah Kisyanaga Ndende v Manager Zakhem International Construction Ltd (2022) eKLR to urge that the court assumes jurisdiction under Section 12 of the Employment and Labour Relations Court, 2011 and Article 162 of the Constitution of Kenya, 2010.
14. In a rather contradictory stance, counsel submitted that unless it is by way of appeal, this court has no jurisdiction to consider any issues of fact as that's the preserve of the DOSH to urge that the 1st Respondent lost its right to challenge the award of the DOSH.
15. That since the Respondent made the applicant incur costs, he was responsible for costs.



Respondent's submissions

16. Counsel submitted that the court's jurisdiction under WIBA is appellate under Part VIII of the Act and no application for adoption of awards is contemplated by the Act.
17. Reliance was made on the sentiments of the court in Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989) eKLR.
18. Reliance was also made on Sections 10(2), 19, 36 and 53 of the WIBA, 2007 on the roles of the DOSHS.
19. Counsel invited the court to find and hold that it has no jurisdiction to grant the prayers sought and strike off the notice of motion.

Determination

20. Having carefully considered the notice of motion, supporting affidavit, grounds of opposition and submissions by counsel, the issues for determination are;
 - i. Whether there is an assessment of the applicant's compensation by the DOSHS before the court.
 - ii. Depending on the answer to (i) above, whether the notice of motion dated 11th December, 2023 is merited.
21. According to the applicant, he was involved in an accident at the workplace on 23rd May, 2023 and he attended out-patient treatment from 1st August, 2022 to 22nd August, 2023.
22. It is unclear to the court why treatment commenced 3 months after the alleged accident.
23. Other than the DOSH/FORM I on record, there is no other document attesting to the nature, character or degree of the injuries sustained by the applicant or a medical doctor's prescription.
24. Puzzlingly, it is unclear as to who completed the Part I of the DOSH/FORM I. The form bears a signature but has neither a name nor designation of the signatory or date which are requirements of the form.
25. Relatedly, although Part II of the form was completed by Dr. T. S Mogire at the Kenyatta National Hospital compensation clinic on 23rd August, 2023, there is no evidence of a review by the DOSH.
26. It is also notable that the copy of the DOSH/FORM I on record is neither completed nor authenticated by the DOSH under Part III of the Form. The form is thus incomplete.
27. Similarly, the demand for payment by DOSH under FORM 4 dated 5th September, 2023 lacks a postal or other address.
28. More significantly, however, the letters lacks authentication of the office which issued it and has no acknowledgement by the 1st Respondent.
29. Also noteworthy is the fact that the applicant's counsel's demand letter was submitted by email on 10th September, 2023, 4 days after the DOSH's demand. The applicant availed no evidence to show that service was indeed effected on the Respondent.
30. In sum, there is no evidence before this court to demonstrate the injury sustained by the applicant or the award made by DOSH in favour of the applicant and that the same was served upon the Respondent.



31. The documents placed before the court lacks authentication and acknowledgement by the 1st Respondent and are thus insufficient to enable the court determine whether the Applicant's Notice of Motion is merited or not.
32. Having found that the applicant has not demonstrated that he has an award by the DOSHS, the issues of jurisdiction, costs and interest fall by the way side.
33. In the upshot, the Notice of Motion dated 11th December, 2023 is struck out with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30TH DAY OF APRIL 2024

DR. JACOB GAKERI

JUDGE

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 *Civil 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.

DR. JACOB GAKERI

JUDGE

