



**Lagat v Kenya Ordinance Factories Corporation (Miscellaneous Cause E038 of 2023) [2024] KEELRC 1118 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1118 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
MISCELLANEOUS CAUSE E038 OF 2023  
MA ONYANGO, J  
APRIL 25, 2024**

**BETWEEN**

**STEPHEN LAGAT ..... APPLICANT**

**AND**

**KENYA ORDINANCE FACTORIES CORPORATION ..... RESPONDENT**

**RULING**

1. The application before this court for determination is a Notice of Motion dated 5<sup>th</sup> September 2023 brought by the Applicant under Rule 28 & 31 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016, section 12 of the *Employment and Labour Relations Act*, section 26 of the *Work Injury Benefits Act* and Article 162(2) of the Constitution and all enabling provisions of law.
2. By that application, the Applicant has sought the following orders:
  - i. The Court adopts the assessment of the Director of Occupational Health and Safety as an order of the court;
  - ii. A decree be issued in accordance with the assessment of the Director of Occupational Health and Safety for the sum of Kenya Shillings Two Hundred and Eighty-Eight Thousands (Kshs. 288,000);
  - iii. Costs of the application be paid by the Respondent.
3. The application is premised on grounds that the Applicant is an employee of the Respondent; that on 30<sup>th</sup> March 2022, the Applicant was in the lawful course of his employment with the Respondent when he was instructed to remove cobwebs on a wall of 15ft height when he slipped and fell thus sustaining a fracture on the right leg; that the matter was reported to the Director of Occupation Safety and Health Services who assessed the compensation due to the Applicant as Kshs. 288,000; that the Applicant has served the Respondent with the assessment of the Director of Occupational Safety and Health Services



but no payment has been forthcoming to date yet the deadline was on 26<sup>th</sup> September 2022; that the Respondent has refused to pay the compensation; that the [Work Injury Benefits Act](#) does not provide for a civil remedy for the enforcement of the decision of the Director of Safety and Health services in the event the employer declines to pay the compensation; that it is an equitable legal maxim that no person will suffer a wrong without a remedy and that it is in the interest of justice that this matter be heard expeditiously and the application herein be allowed as prayed.

4. The application is further supported by an affidavit sworn by the Applicant on 5<sup>th</sup> September 2023 reiterating the contents in the grounds on the face of the application.
5. The application was opposed by the Respondent vide the Grounds of Opposition dated 23<sup>rd</sup> October 2023. The Respondent contends that the instant application on the face of it has not attained the mandatory requirements and/or conditions to adopt the order made by the Director of Occupational Health and Safety. It is also the Respondent's contention that this court cannot be moved to adopt the Director of Occupational Health and Safety's award as the Employment and Labour Relations Court is only tasked to determine appeals from the Director. The Respondent maintains that this application should have been filed in the first instance at the Chief Magistrates Court. According to the Respondent, the Applicant has not advanced reasons why this court should exercise its discretion in his favor.
6. The application was canvassed by way of written submissions. The Respondent submissions were filed on 10<sup>th</sup> November 2023. It appears the Applicant did not file his submissions.
7. The Respondent in its submissions stated that this court has no jurisdiction to determine the instant application. According to the Respondent, the enforcement of awards made by the Director should be filed in the magistrate's courts and only come to Employment and Labour Relations court on appeal. Counsel submitted that the Employment and Labour Relations court can only be moved to re-evaluate facts against the award by way of an appeal under section 52 of the [Work Injury Benefits Act](#), 2007.
8. The Court was referred to the case of [Lameek Nyakundi Anyona v W.J.J Kenya Construction Company Limited](#) (2022) eKLR where the court held that the Employment and Labour Relations Court cannot be moved to enforce the Director's award as the law clothes it with jurisdiction to handle appeals from the Director only.

### **Determination**

9. The issue for determination is whether this court has jurisdiction to grant the orders sought in the application being the adoption of an award of the Director under section 26 of the [Work Injury Benefits Act](#).
10. In the instant application, the Applicant avers that he was awarded compensation of Kshs. 288,000 by the Director of Occupational Safety and Health Service which amount was to be paid by the Respondent on or before 26<sup>th</sup> September 2022. From the Respondent's response to the application, the assessment is not denied and was not objected to pursuant to Section 51 of the [WIBA](#).
11. Section 51 of [WIBA](#) provides as follows;
  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 against such decision.
  2. The objection shall be 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.



12. On the other hand, section 26 of the Act provides as follows:
  1. A claim for compensation in accordance with this Act shall be lodged by or on behalf of the claimant in the prescribed manner within twelve months after the date of the accident or, in the case of death, within twelve months after the date of death.
  2. If a claim for compensation is not lodged in accordance with subsection (1), the claim for compensation may not be considered under this Act, except where the accident concerned has been reported in accordance with section 21.
  3. If an employer fails to report an accident or to provide information requested by the Director as specified in the request, the Director may—
    - a. conduct an investigation and recover the cost of the investigation from the employer as a debt due from the employer; or
    - b. levy a penalty on the employer. CAP. 236 [Rev. 2012] Work Injury Benefits [Issue 1] 14
  4. An employer or insurer against whom a claim for compensation is lodged by the Director under this section, shall settle the claim within ninety days of the lodging of the claim.
  5. The Director shall, within thirty days of receipt of the money claimed under subsection (1), pay the money to the employee who made the claim or his dependants.
  6. An employer or an insurer who fails to pay the compensation claimed under this subsection commits an offence and shall on conviction be liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding one year or to both.
13. It is common ground that WIBA does not provide for the procedure or mechanism through which the award of the Director may be enforced in case the employer does not appeal to this court against the award by the Director but fails, refuses, or neglects to settle the award.
14. What is the procedure then to be followed in applying for adoption and subsequent enforcement of an award by the Director where the employer has not objected to the award?
15. Jurisprudence emerging from our courts reveal that there are two schools of thought among Employment and Labour Relations Court Judges with respect to the procedure for enforcement of the awards made by the Director.
16. Nairobi ELRC E121 of 2022, Premas Wafula Wanyama v H.Young Co (East Africa) Limited & Another dealt with this issue substantively and observed as follows:
  - “23. In the instant case Section 26 expressly provides for compensation to an injured employee and succinctly sets out the procedure for making such claims for compensation by the employer or the insurance company.
  24. The 1<sup>st</sup> Respondent herein dutifully complied with the provisions of Section 26 by reporting the accident whereupon an assessment and award was made. It did not file any objection to the award or appeal against the same to this court. It however failed to settle the claim as required by the Act which also criminalizes such non-compliance.
  25. The law leaves no doubt as to who should pay on the timelines within which such payment should be made. The only thing the law does not prescribe is



how to enforce such an award other than the criminal way. Is that what the 1<sup>st</sup> Respondent desires the Applicant to resort to? Is the 1<sup>st</sup> Respondent daring the court saying, I know I am liable to pay but I am not going to pay because the law does not allow you to order me to pay?

26. Under Article 162(2)(a) of the [Constitution](#) and Section 12 of the [Employment and Labour Relations Court Act](#), this court has exclusive jurisdiction to deal with employment disputes between an employer and an employee, which no doubt, this case is.
  27. This court therefore has jurisdiction to hear and determine disputes arising out of work injury matters. The fact that section 52 gives the Court special jurisdiction to hear appeals from the decision of the Director of Occupational Safety and Health does not mean that the court is stripped of its inherent jurisdiction under the [Constitution](#) and the [Employment and Labour Relations Court Act](#).
  28. This argument is fortified by the fact that Article 165 of the [Constitution](#) prohibits the High Court, which is the only court with unlimited original and appellate jurisdiction from hearing matter that fall under the jurisdiction of this court.”
17. As further held in the same decision, the Magistrates courts which would ordinarily have jurisdiction to adopt such awards only exercise donated jurisdiction in employment matters which does not extend to matters under [WIBA](#). The position is thus in my view, that neither the Magistrates court nor the High Court have jurisdiction to grant the orders sought. This court, on the other hand, has inherent original and appellate jurisdiction by virtue of section 12 of the [Employment and Labour Relations Court Act](#), to determine all employment matters. Cases of injury at the workplace and/or in the course of employment squarely fall under the jurisdiction of this court and unless some law or regulation provides otherwise, there is no basis for disputing the same.
18. The issue of adoption of the Director’s award as a judgment of this Court for purposes of execution was also addressed in the case of [Samson Chweya Mwandabole v Protection 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 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 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. In this case, it is common ground that the Respondent did not object to the award under Section 51(1) of the [WIBA](#).”
19. The Respondent raised another issue in its submissions being that section 5 of [WIBA](#) defines “employee” to exclude a casual employee who is not employed for the employer’s trade or business and that the Applicant does not qualify to be an employee under [WIBA](#). The section provides-



- (3) The following persons shall not be regarded as employees for purposes of this Act—
- (a) a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer’s trade or business;
20. The Respondent relies on the decision in Joash Shisia Cheto v Thepot Patrick Charles [2022] eKLR where the court stated:
- “It does appear to me that section 5 (3) (a) of the Act covers only those casual employees who are engaged in the employer’s trade or business. Any other engagement in work which does not relate to the ordinary business or trade of the employer appears to disqualify one from the application of the Act. If my interpretation be correct, then it becomes necessary for persons claiming under the WIBA and who were engaged on casual basis to prove that the engagement was in the trade or business that the employer ordinarily undertakes”
21. In the first place there is no evidence adduced by the Respondent to the effect that the Claimant was a casual. Submissions cannot be used to adduce evidence. Even in its grounds of opposition the Respondent did not raise this issue which should have been done in an affidavit to enable the Applicant defend the allegation. Courts do not operate on ambush. Further, parties are bound by their pleadings and cannot raise issues in submissions which were not raised in their pleadings.
22. Secondly, the Respondent did not object to the award of the Director. It had any objection, that is the stage where the objection should have been made. It is rather late in the day for it to raise this issue now, in its submissions. I will accordingly ignore the same.
23. Going back to the substantive issue herein, it is my view that until the Work Injury Benefits Act is reviewed and a provision made on the manner in which the Director’s awards are to be executed, the courts must do substantive justice and give effect to the very clear and unambiguous intentions of the Act by enforcing the decisions of the Director. Both Article 159(2) of the Constitution and section 20(1) of this court’s Act requires that the court does substantive justice and acts without undue regard to technicalities. If an employee is injured and the employer fails to implement the award or to appeal against the award, the employer should not be heard raising objections to the jurisdiction of this court without stating which court is should have jurisdiction and supporting the same with the relevant law.
24. It is my finding that this court has jurisdiction to grant the orders sought and I proceed to allow the Applicant’s application in the following terms:-
- a. The award of the Director of Occupational Safety and Health Services is hereby adopted as a judgment of this Court, and judgment is hereby entered for the Applicant against the Respondent in the sum of Kshs. 288,000 as per award of the Director.
  - b. Costs of this application are awarded to the Applicant, to be agreed or taxed.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 25<sup>TH</sup> DAY OF APRIL, 2024.**

**MAUREEN ONYANGO**

**JUDGE**

