



Kigomo v Lewa Wildlife Conservancy Limited (Miscellaneous Case E217 of 2023) [2024] KEELRC 1004 (KLR) (24 April 2024) (Ruling)

Neutral citation: [2024] KEELRC 1004 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS CASE E217 OF 2023**

DKN MARETE, J

APRIL 24, 2024

BETWEEN

HELLEN JOAN NJERI KIGOMO CLAIMANT

AND

LEWA WILDLIFE CONSERVANCY LIMITED RESPONDENT

RULING

1. This is an application dated 24th October, 2023 and seeks the following orders of court;
 1. This Application be certified as Urgent.
 2. The Award of the Director of Occupational Health and Safety dated 30th August 2023 be adopted as a Judgment of this Court.
 3. Judgment be entered for the Applicant as against the Respondent for the sum of Kenya Shillings Five Million, Seventy-Four Thousand, Nine Hundred and Sixty-Three and Twenty Cents (KES.5,074,963.20) as per the Award.
 4. Interest on the Judgement Sum be awarded, at Court rates, from 30 August 2023.
 5. Costs of this application be provided for.
2. It is grounded as follows;
 - a. The Applicant was an employee of the Respondent.
 - b. The Applicant was involved in an accident on 26 September 2019 while in the lawful course of her employment with the Respondent out of which she suffered serious injuries.
 - c. A claim was lodged with the Director of Occupational Safety and Health Services who on 30 August 2023 assessed compensation payable to the Applicant at KES 5,074,963.20.



- d. The Respondent's insurer ICEA Lion General Insurance Limited lodged an objection to the decision of the Director on 11 September 2023.
 - e. No decision/written answer to the objection was made within fourteen (14) days as stipulated under Section 52(1) of the Work Injury Benefits Act, 2007 with the effect that the assessment made on 30 August 2023 remain valid and binding on the Respondent.
 - f. The Respondent has despite demand failed to pay the Applicant the amount assessed, in what is a gross breach of the Applicant's right to compensation as set out under Section 10 of the Work Benefits Act.
 - g. The Applicant is in dire need of urgent medical attention and requires the amounts awarded to facilitate urgent access to treatment.
 - h. It is in the interest of justice that this matter be expeditiously heard, and the application herein allowed as prayed.
3. The Respondent in the Replying Affidavit sworn on 3rd November, 2023 opposed the application as follows; That she opposes the application and particular disagrees with paragraph 26 of the Applicant's Supporting Affidavit in this application. That she has brought in a preliminary objection dated 6th November 2023 in further opposition to this application. That the award is overtaken by events and therefore not material for consideration. That an objection has being raised on the award. That the Applicant has continued to participate in the objection process long after the expiry of the 14 days and therefore is barred from relying on it at this stage. There is suspicion of collusion and connivance on the part of applicant when an officer at DOSH which renders their award foul. The objectionable recording against the DOSH officer on the alleged corrupt doctors should have been reported to the police or Anti-corruption offices. That the Respondent is not the right party for suing in this application and DOSH is. This matter is appropriate for a preliminary objection as raised.
 4. It is notable that the parties did not address the preliminary objection until after the close of the proceeding and directions on written submission in substantiation of this application. The preliminary objection therefore requires equal address in this determination.
 5. The preliminary objection dated 6th November, 2023 comes out as follows;
 1. That the Employment and Labour Relations Court does not have jurisdiction to enforce an award of the DOSH on work injury matters.
 2. That the Employment and Labour Relation Court is only endowed with appellate jurisdiction where an aggrieved party wishes to appeal against the decision of the DOSH.
 3. That the Employment and Labour Relation Court has not express jurisdiction to grant the orders sought by the claimant herein
 6. These are controverted applications. The issues are hotly contested.
 7. The applicant raises issue with the nature and party to the application and preliminary objection. It is her submissions ICEA Lion General Insurance Limited is not the right party and has no *locus standi* to be party or prosecute this application.
 8. The applicant further takes issue with the Assessment dated 11th October, 2023 on the following grounds;



- a. Under section 52(1) of the *Work Injury Benefits Act, 2007*, a decision/written answer to the objection made on 11 September 2023 ought to have been made within fourteen (14) days, that is, by 25 September, 2023;
 - b. No decision/written answer to the objection was made within this statutory period;
 - c. The Directorate of Occupational Safety and Health had no authority to make a decision outside the 14-day statutory period, and as such the assessment dated 11 October 2023 is no effect for being made by an officer acting ultra vires;
 - d. There being no legally valid decision overturning the Directorate of Occupational Safety and Health's initial assessment of 30 August 2023, the 30 August 2023 assessment remained valid and binding on the Respondent.
9. Two issues therefore arise for determination in this application and preliminary objection; the jurisdiction of this court in determining an issue under DOSH as presented and the competency of the application.
10. The Applicant reiterates her case that ICEA Lion General Insurance Limited does not have jurisdiction to lodge an objection against the award of compensation dated 30th August, 2023 and that this was essentially and solely the province of the Respondent. She relies on authority of Section 51(1) of the *Act* which provides for the mechanism of challenging the assessment of the director 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.
11. It is her submission that the words "any person" under section 51(1) of the Act is limited to the parties participating in the claim process leading up to the Director's award of compensation, that is, the employer and the employee. This therefore ousts jurisdiction on the part of ICEA Lion General Insurance Limited in so dealing.
12. ICEA Lion General Insurance Limited having not applied for joinder as a party to this suit and application does not therefore have jurisdiction to participate in these proceedings.
13. The objection was therefore the property of the parties to the suit and therefore the invalidity of the objection dated 8th September, 2023 by the insurance firm. She therefore submits a finding of the objection in the following terms;
- a. that the objection dated 8 September 2023 by ICEA Lion General Insurance Limited was invalid, null and void in law;
 - b. that the proceedings initiated by the Director based on that objection was equally invalid, null and void in law; and
 - c. that the Director's Award/Assessment of Compensation dated 30 August 2023 remain valid and available for enforcement.
14. Again, even if the Directors had the legal wherewithal to render a decision in the circumstances, this would not have been available outside the 14 days time limit set out by Section 52(1) of the *Act*. This comes out thus;

52(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.”

15. To buttress this position, the Applicant sought to rely on authority of *Kartay Singh Dhupar & Company Limited –vs- ARM Cement PLC (In Liquidation)* (Civil Appeal 129 of 2022) [2023]KEHC 2417 (KLR)(Commercial and Tax)(23 March 2023) where the court took a similar view regarding adjudicators decisions made outside the 60 days timeline under Section 34 of the *Small Claim Court Act* as follows;

“Guided by these authorities, this court is satisfied that the judgment delivered by Hon. CA Okumu (Ms)/Adjudicator on August 213, 2022 was done outside the statutory timelines set under section 34 of the Small Claims court and hence made without jurisdiction. It is therefore a nullity, bereft of any force or effect in law.

16. The applicant argues and submits that the Respondent has not presented any evidence on the lack of jurisdiction for this court in circumstances. She, (Respondent) has not even indicated which court would have jurisdiction in the circumstance. On this she seeks to rely on authority of *Stephen Wangusi Nyongesa v Dot.Com Bakery Limited* [2022] eKLR addressed the point by reliance on yet another of this Court’s decision; *Samson Chweya Mwendabole v Protective Custody Limited* [2021] eKLR as follows;

“...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.

17. The Respondent in her written submission answers the issues of jurisdiction and competency of the application in the affirmative. It is her case that ICEA Lion General Insurance Limited has locus standi to lodge an application in this cause. Again, this court lacks jurisdiction to entertain the issues in dispute. She however does not come out substantially to support her case to this extend. The application therefore stands in the midst of such dilute opposition to it.

18. I am therefore inclined to allow the application and award relief in the following terms;

- i. That the award of the Director of Occupational Health and Safety dated 30th August 2023 be and is hereby adopted as a Judgment of this Court.
- ii. That Judgment be and is hereby entered for the Applicant as against the Respondent for the sum of Kenya Shillings Five Million, Seventy-Four Thousand, Nine Hundred and Sixty-Three and Twenty Cents (KES.5,074,963.20) as per the award.
- iii. Interest on the judgment sum be awarded at court rates from the date of this ruling until payment in full.
- iv. That the costs of this application shall be borne by the Respondent.

DELIVERED, DATED AND SIGNED THIS 24TH DAY OF APRIL 2024.

D. K. NJAGI MARETE

JUDGE



Appearances:

1. Antony Lesham & Brian Onyango instructed by ADRA Advocates LLP for the Applicant
2. Karuvaga instructed by Adra Matata, Waithaka & Associates Advocates for the Respondent

