



**Haji v CG Retread (MSA) Limited (Miscellaneous Application  
E006 of 2024) [2024] KEELRC 784 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 784 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
MISCELLANEOUS APPLICATION E006 OF 2024**

**M MBARŪ, J  
APRIL 11, 2024**

**BETWEEN**

**RAMADHAN JUMA HAJI ..... APPLICANT**

**AND**

**CG.RETREAD (MSA) LIMITED ..... RESPONDENT**

**RULING**

- 1 The applicant filed an application dated 7 December 2023 under the provisions of Sections 87 and 90 of the *Employment Act* and Rule 17 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 seeking orders that;
  1. spent.
  2. The court be pleased to vary/set aside the award of the Directorate of Occupational Safety and Health Officer made on 31<sup>st</sup> August 2020,
  3. The court to proceed and assess the award as per the Medical report filed by the applicant/claimant.
  4. The claimant be awarded interests at 14% per annum from 31.8.2020.
  5. Costs of this application be assessed and awarded by the court.
- 2 The application is supported by the affidavit of the applicant and on the grounds that he was employed by the respondent from 14 July 2014 until 16 August 2022 as a salesman earning Ksh 25, 000 per month. On 17 March 2020 while on duty, he sustained injury and reported to the respondent who subjected him to the *Work Injury Benefits Act* (WIBA) process to determine the quantum payable.
- 3 The applicant aver that he reported the matter to the Director of Occupational Safety and Health Services (Director) who gave him DOSH form 1 which was processed and the respondent subjected



- him to further medical assessment. On 31<sup>st</sup> August 2020, the director assessed the compensation due at Ksh.118, 016.70 for permanent disability and the fact that he required further medical attention in the future.
- 4 There was no objection to this award within 90 days per WIBA provisions. There was no payment forcing the applicant to file this application which should be allowed and costs assessed by the court.
- 5 In reply, the respondent filed the Replying Affidavit of Johar N. Adamali the manager who aver that the applicant was an employee earning Ksh.36, 500 per month. He sustained an injury while at work and the respondent informed the Director. Following a work injury, the applicant was allowed 6 weeks off after discharge from the hospital on 29 March 2020. He extended without prior notice to the respondent and only reported back after 97 days. While away, the respondent paid a total of Ksh.118,016 tabulated as Ksh.36,500 gross salary at the rate of Ksh.1,216.70 x 97 days.
- 6 Mr. Adamali avers that after the respondent was issued by the director's assessment, he sat with the applicant and agreed that he had received the sum of Ksh. 118,016 out of the total award made. Hence the instant application is time barred in terms of Sections 51 and 52 of WIBA. The applicant had 60 days from the date of the award on 31<sup>st</sup> August 2020 to appeal to this court. It is over 3 years since and he cannot justify the instant application which should be dismissed with costs.
- 7 Both parties attended and agreed to address the application by way of written submissions.
- 7 The applicant submitted that in the case of *Karanja v BA* (a minor suing through the father and the next friend MMP) & another Civil Appeal No. 114 of 2018 where the plaintiff suffered injuries, the court made an award. The WIBA does not have an enforcement mechanism hence the applicant has moved the court under the provisions of Sections 87 and 90 of the Employment Act, 2007.
- 7 In Appeal No.36 of 2019 – *Virginia Wangari Muita* (Suing as the legal representative of the estate of the late Philip Maina Mwangi (Deceased) on her behalf and behalf of the dependents Estate) v Nyoro Construction Co. Ltd the court in enforcing WIBA provisions applied its wide jurisdiction under Article 162(2) of the Constitution and made an award.
- 8 The respondent submitted that upon injury, the applicant was allowed sick off for 6 months with full pay and later he continued to be absent from work without permission for 97 days. He was paid for each day absent an amount of ksh.118,016 as assessed by the director for work injury. The payment is in tandem with Sections 28 and 37 of WIBA.
- 9 The respondent submitted that the applicant has failed to follow the due procedures outlined under Sections 51(1) and 52(2) of WIBA. Aggrieved by the decision of the director, the applicant ought to file an appeal within 60 days as held in *Attorney General v Law Society of Kenya & Another* [2017] eKLR. Without following the correct procedures, the applicant is time barred and hence denies the court jurisdiction. The orders sought should not be issued but dismissed with costs.

## Determination

- 10 There is no dispute that the applicant was injured while at work, the matter was reported to the director who addressed the work injury through the provisions of WIBA. On 31<sup>st</sup> August 2020, the director assessed compensation at ksh.118, 016.70.
- 11 There is no objection to this award by either party.
- 12 The director issued notice to the respondent on 31<sup>st</sup> August 2020 to pay the compensation. This compensation is related to work injuries.



- 13 The applicant is seeking to vary/set aside the award of the Director of Occupational Safety and Health Officer made on 31<sup>st</sup> August 2020. The applicant is seeking the court to assess the award as per the Medical Report filed by the applicant.
- 14 First, to allow the court to vary or set aside the award by the director, such relates to the decision of the director on the award of compensation. As correctly submitted by the respondent, the applicant ought and should have filed an objection to the director first with regard to the awarded compensation. Secondly, any variation by the court therefore should be by way of an appeal to this court in terms of Sections 51 and 52 of the [WIBA](#).
- 15 Did the applicant file objections with the director within the stipulated period?
- 16 Has the director failed to address the objections within the legal mandate under [WIBA](#)?
- 17 These are grey areas the applicant has failed to address.
- 19 To vary or set aside the decision of the director dated 31<sup>st</sup> August 2020, the applicant ought to have filed an appeal. The orders sought and the submissions are at variance. Whereas the applicant's seek to vary the assessment awarded by the director, his written submissions speak to the enforcement of the award. The application as couched cannot be allowed.
- 20 The assertion by the respondent that the applicant was allowed sick off and then remained absent from work for 97 days, is an employment issue unrelated to the issue of work injury. Where the applicant was absent from work without permission or authorization by the employer, such matter is regulated under the [Employment Act](#), 2007. For work injury, such matter is addressed under [WIBA](#).
- 21 Without objection to the compensation as assessed, the applicant cannot move the court as herein done. The application of Sections 51 and 52 of the WIBA only arises where a party is aggrieved by the compensation awarded by the director, objections filed and from the decision of the director, the next cause of action is an appeal to the court. For enforcement of the Director's award, a miscellaneous application is allowed as held in [Ruth Wangui Mwangi & Another v Alfaran Wholesalers Limited](#) [2017] eKLR.
- 22 The respondent has relied on the judgment in [Attorney General v Law Society of Kenya & Another](#) [2017] eKLR. This was the decision by the Court of Appeal. The Supreme Court in the judgment delivered on December 2019 in Supreme Court Petition No. 4 of 2019 Law Society of Kenya v Attorney General & Another emphasized the applicable procedures where a party is aggrieved by the decision of the director. One must appeal to this court. Where the issue is for enforcement of the director's award of compensation, WIBA currently has no enforcement mechanism and the procedure is to invoke the inherent powers of the court under Article 162(2) of the [Constitution](#).
- 23 Without the respondent making any payment for work injury as directed by the director, the injury at work apparent, the sum of Ksh.118, 016.70 is due. What was paid for 97 days is part of employment dues owed to an employee.
- 24 Save, this court is not properly moved. The orders sought to vary and or set aside the award of the director cannot be issued under these proceedings.
- 25 On costs, the applicant is well aware of the procedures applicable under the WIBA on the enforcement of an award in compensation. He has well relied on the case of Appeal No.36 of 2019 – Virginia Wangari Muita, cited above. Why then file a miscellaneous application seeking to vary the decision of the director? The issue of application of Sections 51 and 52 of [WIBA](#) was addressed by the respondent.



Instead, the applicant opted to file a Supplementary Affidavit. He ought to have taken the cue and addressed it accordingly. Costs are due to the respondent.

26 Accordingly, the application dated 7 December 2023 is wrongly filed. It is hereby struck out. The applicant is to pay Ksh.5, 000 costs to the respondent.

27 Accordingly, the application dated 7 December 2023 is without merit and is hereby struck out. Costs of Ksh.5, 000 awarded to the respondent.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 11 DAY OF APRIL 2024.**

**M MBARÚ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

