



**Luvinzu v Timsales Limited (Miscellaneous Civil Application  
E069 of 2023) [2024] KEELRC 857 (KLR) (4 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 857 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
MISCELLANEOUS CIVIL APPLICATION E069 OF 2023**

**DN NDERITU, J**

**APRIL 4, 2024**

**BETWEEN**

**MUGALUSIA GEOFREY LUVINZU ..... APPLICANT**

**AND**

**TIMSALES LIMITED ..... RESPONDENT**

**RULING**

**I. Introduction**

1. By way of a notice of motion dated 18<sup>th</sup> October, 2023 (the application) the applicant, through J. Ndung'u Njuguna & Co Advocates, prays for the following –
  1. That the Honourable Court be pleased to order the Respondent to forthwith pay to the applicant a sum of Kshs 460,895.50/= as assessed and awarded by the Directorate of Occupation health and Safety under the Work Injury Benefits Act (WIBA) 2007 in an award dated 27<sup>th</sup> October, 2020.
  2. That this Honourable Court be pleased to order the Respondent to pay to the applicant a sum of Kshs 460,895.50/= at the rate of 12% per annum from 27<sup>th</sup> October, 2020 until payment in full.
  3. That the costs of this proceedings be borne by the Respondent in any event.
2. The application is expressed to be brought under Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, & 3A of the Civil Procedure Act, and Sections 10, 16, 30, 34, 37, 40, & 51 of the Work Injury Benefits Act (WIBA).
3. The application is based on the grounds on the face of it and supported with the affidavit of the applicant, sworn on even date, with several annexures thereto.



4. Upon receipt of the said application the respondent, through Murimi, Mbago & Muchela Advocates, filed a notice of preliminary objection (PO) dated 14<sup>th</sup> November, 2023 raising the following preliminary issues –
  1. That the applicant’s suit has no merit, frivolous, bad in law and ought to be dismissed with costs.
  2. That the claim is fatally defective, filed in bad faith, an afterthought calculated to waste the humble time of this Honourable court as the same happened more than three (3) years ago.
  3. That the alleged claim is in any event statute barred under the provisions of Section 4(2) of the Limitation Act as read together with Section 90 of the Employment Act.
  4. That the cause of action arose on 5<sup>th</sup> February, 2020 whereas the claim was filed on 19<sup>th</sup> October, 2023 out of the statutory timeline.
  5. That pursuant to Section 4(2) of the Limitations Act as read together with Section 90 of the Employment Act, the claim is time barred as it is brought more than three(3) years after the cause of action arose.
  6. That the applicant has not sought court’s leave to file the claim.
  7. That this court has no jurisdiction to hear and determine this matter by virtue of the aforementioned provisions.
  8. That the suit is therefore statute barred, an afterthought, bad in law and in abuse of the court process and for striking out ex debito justitiae with costs as it is meant to embarrass the Respondent.
5. On 13<sup>th</sup> December, 2023 the court with the concurrence of the counsel for both the parties directed that the application be heard by way of written submissions and that the PO be subsumed in the said submissions in opposition to the application. The respondent was also allocated 14 days within which to file a replying affidavit.
6. Mr. Njuguna for the applicant filed his submissions on 25<sup>th</sup> January, 2024 while Mr. Murimi for the respondent filed on 19<sup>th</sup> February, 2024.
7. Except for the PO the respondent did not file a replying affidavit within the time allocated. I have seen a purported replying affidavit by the respondent that was filed on 15<sup>th</sup> February, 2024. The same was filed completely outside the time allocated and without leave of the court. The same is improperly on record and filed in total and blatant abuse and violation of the court process and clear directions of the court as issued on 13<sup>th</sup> December, 2023. In any event, the intention was to deny the applicant the opportunity to respond thereto and hence prejudice his cause. This is misconduct in court proceedings that this court cannot countenance and the said replying affidavit is hereby struck out and expunged from record.
8. In the foregoing circumstances, the facts as presented by the applicant remain unchallenged and uncontroverted.

## II. Facts as per the Applicant

9. In the supporting affidavit the applicant states that he was an employee of the Respondent when he was injured while at work suffering serious work-related injury.



10. The applicant reported the injury to the respondent and subsequently the respondent submitted the claim to the Directorate of Occupational Safety and Health Services (DOSHS) whereby upon assessment the applicant was awarded a sum of Kshs 460,895.50 in compensation.
11. The said award was communicated and notified to the Respondent by the Director (DOSHS) on 27<sup>th</sup> October, 2020. Again, the respondent was demanded and reminded to settle the award vide a notice dated 14<sup>th</sup> December, 2022. The applicant states that the respondent has failed, refused, and or neglected to settle the award notwithstanding that it did not file an objection to the award.
12. It is against the foregoing background that the applicant has brought this application to court seeking for the prayers set out above, which application is opposed by the respondent through the PO alluded to above.

### **III. Submissions by Respondent's Counsel**

13. Counsel for the Respondent submits that the application should be dismissed for the same is allegedly time barred. It is submitted that the respondent filed a replying affidavit in opposition to the application on 15<sup>th</sup> February, 2024. The court has seen the said replying affidavit and notes that the same was filed way out of the 7 days allocated for filing the same on 13<sup>th</sup> December, 2023. No leave was sought for filing the same way out of time and as such the same has been struck out and expunged from the record in a preceding part of this ruling. In fact, as at the time counsel for the applicant filed his submissions on 25<sup>th</sup> January, 2024 the said replying affidavit had neither been filed and served upon him and this denied the applicant the opportunity to respond thereto.
14. The above described misconduct by the respondent and or its counsel must be condemned as it is in total and blatant abuse of court process and directions that this court cannot countenance. The court calls upon all counsel as officers of the court to uphold the rule of law and play by the rules and directions of the court as they have an eternal duty to assist the court in arriving at the most just and fair conclusion in each cause or matter.
15. Counsel submits that the cause of action arose on 5<sup>th</sup> February, 2020 (the date of the injury) and this application was filed on 19<sup>th</sup> October, 2023, which according to counsel is outside the three years limitation provided for under Section 90 of the *Employment Act*. It is submitted that the three years lapsed on or about 5<sup>th</sup> February, 2023. Counsel has also cited Section 4 of the *Limitation of Actions Act* and cited several decisions on limitation based on this section of the law.
16. As stated above, the court has no business considering the contents of the replying affidavit which was placed on record un-procedurally, irregularly, and in total abuse of court process and directions. In any event, the court has already struck out the same and expunged the same from the court record in the foregoing paragraphs of this ruling.

### **IV. Submissions by Counsel for the Applicant**

17. The applicant is opposed to the PO and his counsel has submitted that this court has the jurisdiction to adopt and enforce the award of the Director. Counsel has submitted that since the respondent did not file a replying affidavit the facts as stated by the applicant are unchallenged and uncontroverted and he has cited *Kennedy Otieno Odiyo & 12 Others v Kenya Electricity Generating Company Limited* (2010) in support of that legal position.
18. The court is urged to follow its own decisions in *Moses Ouma Langi v County Government of Nakuru* (2023) eKLR and *George Mwaura Ng'ang'a v County Government of Nakuru* (2023) eKLR.



Further, counsel has cited [Richard Akama Nyambane v ICG Maltauro Spa](#) (2020) eKLR and [Virginia Wangari Muita v Nyoro Construction Company Limited](#) (2020) eKLR in urging the court to find that the application herein was filed within the limited time of three years and that the court has the jurisdiction to grant the orders as prayed.

19. It is on the basis of the foregoing that the applicant prays that the PO be dismissed and that the application be allowed as prayed.

#### V. Issues for Determination

20. The application and the PO by the respondent as argued through the written submissions by counsel for both parties raise the following issues for determination –
- a. Does this court (ELRC) possess the requisite jurisdiction to enforce an award made by the Director under the WIBA?
  - b. Is the PO as raised by the respondent meritorious?
  - c. Who meets the costs?

#### VI. Jurisdiction

21. A court has no business making or issuing orders in any matter over which it has no jurisdiction as such a court labours in vain and such orders are mere nullities – See [Owners of the Motor Vessel “Lilian S” v Caltex Oil \(Kenya\) Ltd](#) (1989).
22. A proper PO raises matters or point(s) of law that if properly and successfully argued should dispose of a cause or the matters or issues in controversy or contest between the parties – See [Mukbisa Biscuits Manufacturing Limited v West End Distributors Ltd](#) (1969) EA 696, [Oraro v Mbaja](#) (2005) eKLR and, [JN & 5 Others v Board of Management of St. George School Nairobi & Another](#) (2017) eKLR.
23. The ELRC is created as a special court under Article 162(2) of the [Constitution](#) and established under the [Employment and Labour Relations Court Act](#). The jurisdiction of the court is spelt out in Section 12 of that Act as follows –
- (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the [Constitution](#) and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including —
    - (a) disputes relating to or arising out of employment between an employer and an employee;
    - (b) disputes between an employer and a trade union; (c) disputes between an employers' organisation and a trade unions organisation;
    - (d) disputes between trade unions;
    - (e) disputes between employer organizations;
    - (f) disputes between an employers' organisation and a trade union;
    - (g) disputes between a trade union and a member thereof;
    - (h) disputes between an employer's organisation or a federation and a member thereof;
    - (i) disputes concerning the registration and election of trade union officials; and



- (j) disputes relating to the registration and enforcement of collective agreements.
- (2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisationa federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.
- (3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders
  - (i) interim preservation orders including injunctions in cases of urgency;
  - (ii) a prohibitory order;
  - (iii) an order for specific performance;
  - (iv) a declaratory order;
  - (v) an award of compensation in any circumstances contemplated under this Act or any written law;
  - (vi) an award of damages in any circumstances contemplated under this Act or any written law;
  - (vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or
  - (viii) any other appropriate relief as the Court may deem fit to grant.
- (4) In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just.
- (5) The Court shall have jurisdiction to hear and determine appeals arising from –
  - (a) decisions of the Registrar of Trade Unions; and
  - (b) decisions of any other local tribunal or commission as may be prescribed under any written law.

24. Further, Section 87 of the [Employment Act](#) provides as follows –

- 1. Subject to the provisions of this Act whenever——
  - (a) an employer or employee neglects or refuses to fulfill a contract of service; or
  - (b) any question, difference or dispute arises as to the rights or liabilities of either party; or
  - (c) touching any misconduct, neglect or ill treatment of either party or any injury to the person or property of either party, under any contract of service, the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Industrial Court.
- (2) No court other than the Industrial Court shall determine any complaint or suit referred to in subsection (1).
- (3) This section shall not apply in a suit where the dispute over a contract of service or any other matter referred to in subsection (1) is similar or secondary to the main issue in dispute.



25. The foregoing provisions of the law on the jurisdiction of this court are clear on the exclusive original and appellate jurisdiction of this court on matters employment and labour relations. Article 165(5) (b) of the Constitution excludes the High Court, and indeed all other courts, from encroaching on the exclusive jurisdiction of this court. Parties aggrieved by the decisions from this court appeal to the Court of Appeal.
26. Section 52(2) of the WIBA gives this court the jurisdiction to hear and determine appeals against an award made by the Director. However, WIBA does not provide for the procedure or mechanism through which the award of the director shall be enforced in case the employer does not appeal to this court but fails, refuses, or neglects to settle the award. This aspect of the law has been a source of conflicting decisions from this court (ELRC) on whether the court has jurisdiction to enforce an award.
27. Some of the Judges in this court have held that the court can only interact with the award if the decision of the Director is challenged in court by way of an appeal, while others have held that this court has jurisdiction to entertain and indeed hear and determine a cause or action for enforcement of the award. I deliberately adopt the latter view.
28. Essentially, an award made by the Director is in resolution of an employment or labour dispute or claim. It is a process in settlement of an employment or labour dispute or issue between an employer and an employee. The Director in making an award performs a quasi-judicial function and the parties to that process cannot approach the court without exhausting that process as such premature move would be in conflict with the doctrine of exhaustion and in contravention of Section 16 of the WIBA which is in the following terms –
  16. Substitution of compensation for other legal remedies.

No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employee’s employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.
29. While it is correct that WIBA does not provide for the procedure and or mechanism for enforcement of an award of the Director, it is illogical and unjust to argue that an employee whose award has been neglected or denied by an employer, who has not appealed against the award, has no remedy in law. Some courts have argued that the award by the Director should be enforced in a lower court (magistracy) so that a dissatisfied party may appeal to this court (ELRC). As noted above, some courts, and this court takes this school of thought, have held that this court has jurisdiction to enforce such an award.
30. There is really no obscurity in this issue. An employer or an employee who is dissatisfied with the award of the Director and who elects to pursue the issue beyond the Director shall follow the procedure as provided for in Sections 51 and 52 of WIBA culminating in an appeal against the award in this court. Logically, such an appeal shall be attacking the legality of the award in as many ways as one can fathom including such aspects as whether the claimant was an employee, the nature and extent of injury, the quantum of the award, etc.
31. On appeal, this court may either uphold the award or set it aside or give such orders as it may deem lawful in the circumstances. The crux of the matter then becomes, if the court upholds the award or varies it in whatever way or manner but nonetheless there is an award subsisting, is the court not clothed with the jurisdiction to enforce that decision? Would it make any legal or logical sense to return



- the award to the Director and submit that the court has no jurisdiction in enforcing the award of the Director that it has upheld or only varied? The answer to these rhetorical questions, in my considered view, is that the court would have jurisdiction to enforce the award.
32. Where the award is not objected to, as it happened in this matter, and the employer fails, refuses, and or neglects to settle the same, the employee has a right to approach the court for enforcement of the award by way of an application or a cause. The award, if not challenged by way of an objection and or appealed against as provided for by the law, becomes a debt due and payable arising from an employment relationship. I entertain no doubts in my mind that this court (ELRC) has jurisdiction to hear and determine such a cause or matter based on Section 12 of the *Employment and Labour Relations Court Act* and Section 87 of the *Employment Act*.
  33. The jurisdiction of this court to hear and determine an appeal challenging an award by the Director should not be confused or married with the jurisdiction of this court to hear and determine matters and issues of employment and labour relations as provided for in the sections of the law cited in the preceding paragraph. For avoidance of doubt, a decision made by ELRC in its original and exclusive jurisdiction is appealable to the Court of Appeal and no prejudice should be suffered by a party who is dissatisfied with the ruling or judgment of the court in enforcement of an award which award has not been appealed against.
  34. I find no merits in the argument advanced in many a cause of this nature that the enforcement of awards made by the Director should be filed in the magistrates' courts and only come to ELRC on appeal. An award that has not been objected to or appealed against becomes a debt founded on an employment relationship and this court has original, appellate, and exclusive jurisdiction over the same.
  35. For all the foregoing reasons, this court agrees with the holding by Nduma J in *Bornface Indolo Luciva v Prime Quantifiers Construction Company Limited* (2021) eKLR and Kitiku J in *Elijah Kisyanza Ndende v Manager Zakhem International Construction Ltd* (2022) eKLR among many other decisions. ELRC has jurisdiction to enforce the awards by the Director where the award is not challenged by way of an objection or appeal and the employer fails, refuses, and or neglects to settle the award after expiry of the time allowed for lodging such an objection or appeal.
  36. I wish to make the following comment. When an applicant approaches this court (ELRC) for enforcement of the award of the Director, such an applicant should not be asking this court to adopt the award as a judgment of the court; instead, once an award has been made by the Director and an employer fails, refuses, and or neglects to settle the same, without lodging an objection or appeal against such an award in accordance with the law afore-stated, and the period within which to lodge the objection or appeal lapses, the amount in the award becomes due and payable as a civil debt arising from an employment relationship.
  37. An applicant should therefore pray that judgment be entered by the court based on the award and the recovery and enforcement of the resulting judgment of the court shall follow the usual execution process. Since there is no specific procedure provided for the same I opine that the action may be commenced by way of an ordinary cause or, as has been the practice, by way of a miscellaneous application. The court should not pay undue regard to technically but should rather be more concerned with the intention and substance rather than the form.

## VII. Determination

38. For all the foregoing reasons, the court finds and holds that the notice of motion by the applicant dated 18<sup>th</sup> October, 2023 is merited and the same is allowed with the orders hereunder. The PO by the respondent is devoid of merits as the cause of action arose when the award by the Director, the



subject matter of these proceedings, was made and communicated to the respondent vide the notice of demand dated 27<sup>th</sup> October, 2020. The limited period of three years, therefore, ought to have expired on or about 26<sup>th</sup> October, 2023.

### **VIII. Orders**

39. The Applicant's notice of motion dated 18<sup>th</sup> October, 2023 has merits and the same is allowed as follows -
- a. Judgment be and is hereby entered in favour of the applicant as per the award of the Director in the sum of Kshs 460,895.50 together with interest thereon at 14% from the date when the award was communicated to the Respondent on 27<sup>th</sup> October, 2020 till payment in full.
  - b. The PO by the Respondent is devoid of merits and the same is hereby dismissed.
  - c. The Applicant is awarded costs of the application.

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 4<sup>TH</sup> DAY OF APRIL, 2024.**

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**DAVID NDERITU**

**JUDGE**

