



**Wambua v Capital D Elegance Limited & another (Miscellaneous Application
E055 of 2024) [2024] KEELRC 1310 (KLR) (30 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1310 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E055 OF 2024**

L NDOLO, J

MAY 30, 2024

BETWEEN

SHADRACK KITAVI WAMBUA APPLICANT

AND

CAPITAL D ELEGANCE LIMITED 1ST RESPONDENT

BRITAM INSURANCE COMPANY LIMITED 2ND RESPONDENT

RULING

1. By his Notice of Motion dated February 22, 2024, the applicant seeks the following orders:
 - a. An order adopting the assessment by the Director of Occupational Safety and Health Services as a judgment of the Court;
 - b. A decree for Kes 633,360 in accordance with the assessment of the Director of Occupational Safety and Health Services;
 - c. A declaration that the respondents have committed an offence by failing to pay the applicant, contrary to section 26(6) of the [Work Injury Benefits Act](#);
 - d. An order directing the respondents' directors to pay a fine of Kes500,000 or in the alternative, an order committing the Directors to a one-year jail term.
2. The motion is supported by the applicant's own affidavit and is based on the following grounds:
 - a. That the applicant was an employee of the 1st Respondent, Capital D Elegance Limited;
 - b. That the 1st respondent holds a work injury insurance policy with the 2nd respondent, Britam Insurance Company Ltd;



- c. That on March 28, 2022, the Applicant sustained a severe injury, while working for the 1st Respondent;
 - d. That the 1st respondent filed a DOSH Form 1 and reported the accident to the Director of Occupational Safety and Health Services;
 - e. That on January 25, 2023, the Director assessed the compensation due to the Applicant at Kes 633,360;
 - f. That the Applicant served the Respondents with the assessment by the Director but no payment has been made;
 - g. That the Respondents have jointly and severally refused and/or neglected to pay the compensation;
 - h. That section 26(6) of the [Work Injury Benefits Act](#) provides that an employer or an insurer who fails to pay compensation claimed commits an offence and shall, on conviction, be liable to a fine not exceeding Kes 500,000 or to imprisonment for a term not exceeding one year or both;
 - i. That no wrong should be allowed to persist without compensation, if it can be addressed by a court of law;
 - j. That article 159(2) of the [Constitution of Kenya](#) provides that justice shall not be delayed and that it shall be administered without undue regard to procedural technicalities;
 - k. That it is therefore in the interest of justice that this matter is heard expeditiously.
3. The 1st respondent filed grounds of opposition dated March 1, 2024, stating the following:
 - a. That the 1st respondent was not notified of the award dated January 25, 2023;
 - b. That the time frame of 90 days provided under section 26(4) of the [Work Injury Benefits Act](#) is yet to commence running as the Director of Occupational Safety and Health Services is yet to lodge the claim for compensation with the 1st Respondent;
 - c. That the award was made in a vacuum and is not supported by any medical report/treatment notes;
 - d. That the Applicant did not notify the 1st Respondent of the occurrence of the accident within the timelines provided under section 21 of the [Work Injury Benefits Act](#);
 - e. That the Applicant is guilty of laches and unexplained delay in lodging the claim;
 - f. That the application by the Applicant is time barred under section 90 of the [Employment Act](#), having been lodged outside the one-year period for a continuing injury.
 4. The 2nd Respondent's response to the application is contained in a replying affidavit sworn by Hope Wambugu on 15th April 2024.
 5. Wambugu, who describes herself as the Manager-Legal at Britam General Insurance Company (K) Limited, depones that the application lacks merit and should be dismissed at the first instance for the following reasons:
 - a. The Court lacks jurisdiction to enforce awards emanating from the Director of Occupational Safety and Health Services;



- b. There is no provision in the *Work Injury Benefits Act*, the *Employment and Labour Relations Court Act* or the *Employment Act* which allows the Court to enforce compensatory awards by the Director;
 - c. There is no provision for the Court to adopt an award of the Director as its judgment.
6. Wambugu further depones that the 2nd respondent has been erroneously joined in these proceedings and should be struck off for the following reasons:
- a. There was no employer-employee relationship between the 2nd Respondent and the applicant;
 - b. The 2nd respondent was not a party to the alleged proceedings before the Director of Occupational Safety and Health Services and cannot therefore be joined in the execution proceedings;
 - c. There are no statutory or contractual obligations as between the applicant and the 2nd respondent;
 - d. The alleged award by the Director was not addressed to the 2nd respondent.
7. According to the 2nd respondent, the issue of existence or non-existence of an insurance policy covering the subject matter of the suit ought to have been raised and addressed in the primary proceedings and not at the execution stage.
8. It is deponed that there is no proof that the 2nd Respondent had issued any insurance cover to the 1st Respondent; in this regard, the Applicant is accused of using the instant proceedings as a fishing expedition.
9. Wambugu points out that the Applicant has not produced any medical report in support of the alleged injuries leading to the award by the Director, which he states was made in a vacuum.
10. In the replying affidavit sworn on behalf of the 2nd Respondent, the jurisdiction of this Court to hear and determine the application has been called to question. As this issue goes to the root of the matter, I will deal with it first.
11. In their written submissions dated April 15, 2024, the respondents cite the Supreme Court decision in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR where it was held that:
- “A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”
12. The Respondents submit that there is no provision of law that grants this Court jurisdiction to enforce awards made by the Director of Occupational Safety and Health Services.
13. In its decision in *Akboya (Suing as the administrator of the Estate of Brian Mutambi Amakobe) (Deceased) v Uhuru Heights Limited* [2024] KEELRC 244 (KLR) this Court stated as follows:
- “As far as work injury claims are concerned, the only jurisdiction granted to the Employment and Labour Relations Court is appellate and there can be no room to expand this jurisdiction to cover issues which arise in the course of processing of claims before the Director.”



14. I have no reason to depart from this position, meaning that this Court lacks jurisdiction to entertain the applicants' motion. The only thing to do in the circumstances is to strike out the motion, which I hereby do.

15. Each party will bear their own costs.

16. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY MAY 2024

LINNET NDOLO

JUDGE

Appearance:

Mr. Ndwiga for the Applicant

Mr. Njuguna for the Respondents

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