



Mwero v Director of Occupational Safety Health Service & another (Miscellaneous Application E045 of 2023) [2024] KEELRC 13632 (KLR) (23 May 2024) (Ruling)

Neutral citation: [2024] KEELRC 13632 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
MISCELLANEOUS APPLICATION E045 OF 2023**

**AK NZEI, J
MAY 23, 2024**

BETWEEN

SULEIMAN JUMA MWERO APPLICANT

AND

**DIRECTOR OF OCCUPATIONAL SAFETY HEALTH SERVICE 1ST
RESPONDENT**

MOMBASA APPAREL [EPZ] 2ND RESPONDENT

RULING

1. The application before me is the Applicant's Notice of Motion dated 27/9/2023, expressed to be brought under Sections 27 and 28 of the *Limitation of Actions Act*, Sections 1A, 3,3A & 63(c) of the *Civil procedure Act*, Order 50 Rule 6 and Order 51 of the *Civil procedure Rules*. The Applicant seeks the following orders:-
 - a. that the Court be pleased to grant the Applicant leave to object and to appeal against the decision of the 1st Respondent herein out of time for reliefs of damages for injuries suffered at the 2nd Respondent's premises.
 - b. that the annexed memorandum of appeal be deemed as duly filed upon payment of the requisite fees.
 - c. that the Court be pleased to grant any other orders it deems just and fit.
 - d. that costs be provided for.
2. The application is based on the Applicant's supporting affidavit sworn on 27/9/2023. It is deponed in the said affidavit that the Applicant, having been the 2nd Respondent's employee, sustained 30% burns in the 2nd Respondent's premises on 24/12/2020, upon which he was hospitalized for 18 days and resumed duty one month after discharge from the hospital. That taking advantage of the Applicant's



- illiteracy, the 2nd Respondent's Human Resource Officer on 25/5/2021 instructed the Applicant to sign Form DOSH/WIBA 5/A without knowledge and understanding of the contents thereof.
3. It is further deponed in the said supporting affidavit that the Applicant continued working until December 2021 when his employment was terminated without notice, and that it was upon termination that the Applicant came to understand the contents of the aforesaid Form and the consequences of the signature that he appended thereon.
 4. The application is opposed by the Respondents herein. The 1st Respondent filed grounds of opposition dated 27/11/2023 while the 2nd Respondent filed a preliminary objection, also dated 27/11/2023; and on 29/11/2023, I directed that both the Applicant's Notice of Motion herein and the 2nd Respondent's preliminary objection be heard together. I have treated the 2nd Respondent's preliminary objection as the 2nd Respondent's response to the Notice of Motion Application herein.
 5. Documents annexed to the Applicant's supporting affidavit include a copy of Form DOSH/WIBA5/A, duly executed by the Applicant and his then employer (the 2nd Respondent), and dated 25/5/2021. The said Form is titled "Form Of Agreeemnt As To Work Injury Benefit To Be Paid By The Employer To The Injured Employees." It is worthy noting, for record purposes, that whereas it is indicated in the said document that the Applicant was on 25/5/2021 paid Ksh. 20,000 by the 2nd Respondent as compensation for the injuries that he sustained, the basis of the said sum has not been demonstrated as no documents have been filed herein regarding assessment by the 1st Respondent (the Director) of the compensation payable.
 6. In my view, the issues for determination in this matter are whether this Court has jurisdiction to entertain the application herein, and whether the orders sought by the Applicant can issue.
 7. Section 51 of the *Work Injury Benefits Act* (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."
 8. Section 52 of the said *Act* (WIBA) on the other hand provides as follows:-
 - "(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.
 - (2) An objector may, within thirty days of the Director's reply being received by him, appeal to the Industrial Court against such decision."
 9. The term "Industrial Court" as used in the foregoing provision refers to the fore-runner of this Court, and in the context of the provision refers to this Court.
 10. The statute, in this case the *Work Injury Benefits Act* (WIBA), does not confer jurisdiction on this Court to extend time where an injured employee fails to lodge an objection with the Director pursuant to Section 51(1) of *WIBA* or to file an appeal to this Court pursuant to Section 52(2) of the said *Act*.



11. As stated by the Supreme Court of Kenya in the case of *Samuel Kamau Macharia v KCB & Another*[2021] eKLR:-

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

12. In the absence of any provision of law conferring jurisdiction on this Court to extend the timelines set out in Sections 51 and 52 of *WIBA*, this Court is without jurisdiction to extend such timelines, and must down its tools. Without jurisdiction, the Court cannot even attempt to determine the second issue herein. This seals the fate of the application herein.

13. Consequently, and having considered the written submissions filed herein, I find the Notice of Motion 27/4/2023 to be frivolous and an abuse of this Court’s process. The same is hereby dismissed. Each party will bear its own costs of the application.

14. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23RD MAY 2024

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Applicant

.....Respondent

