



Lwanda v Armytex Internaitonal Security Services Ltd (Miscellaneous Application E057 of 2023) [2024] KEELRC 1536 (KLR) (13 June 2024) (Ruling)

Neutral citation: [2024] KEELRC 1536 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E057 OF 2023**

**AK NZEI, J
JUNE 13, 2024**

BETWEEN

MOSES SIMIYU LWANDA APPLICANT

AND

ARMYTEX INTERNAITONAL SECURITY SERVICES LTD RESPONDENT

RULING

1. Before me is the Applicant's Notice of Motion dated 1/12/2023 and expressed to be brought under Sections 10(1) (2), 26(4) and 26(6) of the [Work Injury Benefits Act](#). The Applicant seeks the following orders:-
 - a. that the Court be pleased to adopt the assessment of the Director of Occupational Safety as a judgment of the Court.
 - b. that a decree be issued in accordance with the assessment of the Director of Occupational Safety for kshs.851,913.33, plus interest of kshs. 49,694.95.
2. The application is based on the Applicant's supporting affidavit and a further affidavit sworn on 1/12/2023 and 19/1/2024 respectively. It is deponed in the said affidavits:-
 - a. that while working for the Respondent herein, the Applicant was involved in a road traffic accident on 25/11/2020 whereby he sustained very severe injuries.
 - b. that the accident was reported to the Director of Occupational Safety and Health Services Mombasa, who subsequently assessed the award (compensation) payable to the Applicant at ksh. 851,913.33.
 - c. that the Respondent was on 1/11/2023 served with the Director's letter requesting it to pay, but the Respondent refused to pay, despite lapse of the statutory period of ninety (90) days provided for under Section 26(4) of the [Work Injury Benefits Act](#).



- d. that the Respondent did not object against the Director's decision within sixty (60) days of the decision as per the statute.
3. Documents annexed to the said affidavit included Form DOSH/WIBA 4 dated 14/6/2023, signed by the Director and containing the Director's assessment of the compensation payable to the Applicant, kshs. 851,913.33.
4. The Respondent responded to the application vide a replying affidavit of Japheth Mugambi Gaichu, the Respondent's General Manager, sworn on 13/1/2024. The Respondent admits the Applicant's claim for kshs. 851,913.33, but states as follows:-
 - a. that the Applicant's application is misconceived, misplaced and premature as there has been constant and ongoing engagement between the claimant and the Director; and that vide a letter dated 30/11/2023 and addressed to the Director, the Respondent gave a payment plan to defray the kshs. 851,913.33 in 12 months; and forwarded to the Director 11 post dated cheques and a bankers cheque for an upfront payment of kshs. 70,993.
 - b. that the Applicant has no right of audience before this Court.
5. the Applicant denied, in his affidavits, having received any payment from the Respondent, or having instructed the Director to accept post-dated cheques.
6. Both parties filed written submissions on the application pursuant to this Court's directions in that regard, which I have considered.
7. As I have stated in various other decisions of this Court, the *Work Injury Benefits Act* (WIBA) is silent on how awards of compensation made by the Director of Occupational Safety and Health Services (the Director) to employees who suffer work injuries or occupational diseases are to be enforced. At the same time, the Act does not expressly divest this Court of jurisdiction to enforce such awards, and especially where an award of compensation by the Director has not been objected to in accordance with the statute (WIBA) and the employer has refused to pay the assessed compensation upon demand.
8. As I stated in the case of *Amir Swaleh Omar -vs- Mackenzie Maritime [e.a] Limited [2022]* eKLR:-
 - “ 17. The Act (WIBA) is silent on how the awards of compensation made by the Director in favour of employees involved in occupational accidents or who suffer occupational diseases are to be enforced. At the same time, the Act does not expressly divest this Court of jurisdiction to enforce such awards; and especially where the award of compensation by the Director has not been objected to and the employer has refused to pay the assessed compensation. Did parliament intend that an employee caught up in such a situation would be left at the mercy of an employer who may choose either to pay or not to pay the assessed sum? I do not think so.
 18. What would be the purpose of the Director making or undertaking inquiries in order to determine the issue of liability and proceeding to assess the compensation payable if the compensation assessed by the Director was not meant to be paid to the injured employee” In my view, once the Director assesses the compensation payable and the same is not objected to pursuant to Section 51 of the WIBA, the assessed sum becomes the injured employee's right and entitlement regarding which the employee can move to Court and seek enforcement of that right by seeking entry of judgment in terms of the



Director's assessment, and issuance of a decree which can then be executed to realize that right.

19. Indeed, failure by an employer to pay a demanded compensation that has been assessed by the Director and to which no objection has been lodged creates a dispute over a liquidated claim, which this Court can entertain and determine. Article 50(1) of *the Constitution* of Kenya 2010 provides:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court, or if appropriate, another independent and impartial tribunal or body.

9. The foregoing position resonates with the facts of the Applicant's case herein; and I need not belabor the point that the assessed compensation of kshs. 851,913.33, to which the Respondent did not object pursuant to the statute (WIBA), is a right already vested in the Applicant, and one which this Court will not hesitate to enforce. Under Article 162(2) (a) of *the Constitution* of Kenya 2010, this Court has inherent jurisdiction over all employment and labour relations disputes except where the jurisdiction has been expressly ousted by the statute over particular matters specified in the statute. A good example of such statutory provisions is Section 16 of *WIBA* which provides as follows:-

“No action shall lie by any 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.”

10. It is clear from the foregoing statutory provision that this Court, and indeed all the Courts, have no jurisdiction to determine issues of liability and assessment of compensation in cases involving work injuries or occupational diseases. Section 23 of the *WIBA* mandates the Director to make such inquiries as are necessary to decide upon any claim or liability in accordance with the Act, while Sections 28 and 30 of the Act provide for assessment of compensation by the Director.
11. Once the Director's decision is made and the same is not objected to or is not the subject of an appeal pursuant to Sections 51 and 52 of *WIBA*, then, as already stated in this Ruling, this court can be moved to enforce the award made by the Director as the Applicant has done in the present case.
12. I am satisfied that the Applicant's Notice of Motion dated 1/12/2023 is merited, and I allow the same in the following terms:-
- a. the award made by the Director of Occupational Safety and Health Services on 14/6/2023 is hereby adopted as a judgment of this Court and, accordingly, judgment is hereby entered for the Applicant against the Respondent for kshs. 851,913.33 being the amount of compensation assessed by the Director.
 - b. the Applicant is also awarded interest at Court rates, to be calculated from the date of this Ruling.
 - c. a decree shall issue forthwith.
13. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 13TH JUNE 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

