



**Ogeto v East Africa Cans and Closures Limited (Miscellaneous Case E037 of 2024) [2024] KEELRC 2073 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2073 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
MISCELLANEOUS CASE E037 OF 2024**

**JK GAKERI, J**

**JULY 31, 2024**

**BETWEEN**

**DANCAN AYIECHA OGETO ..... APPLICANT**

**AND**

**EAST AFRICA CANS AND CLOSURES LIMITED ..... RESPONDENT**

**RULING**

1. Before the Court for determination is the Respondent's Preliminary Objection dated 8<sup>th</sup> March, 2024 contending that the Claimant's Application dated 14<sup>th</sup> February, 2024 is improperly before the court as this court has no jurisdiction to enforce decisions arising from the Director of Occupational Safety and Health Services (herein after DOSHS) and the same should be struck out.
2. In his Replying Affidavit, the Applicant deposes that the application dated 14<sup>th</sup> February, 2024 is properly in court as the court has both original and appellate jurisdiction over disputes relating to or arising out of employment.
3. The Claimant deposes that he is an employee of the Respondent, was injured on 12<sup>th</sup> July, 2022 and the DOSHS assessed the injury at Kshs.456,049 on 3<sup>rd</sup> May, 2023 but the Respondent is yet to pay.
4. In his Supplementary Affidavit sworn on 3<sup>rd</sup> June, 2024 and filed on even date at 16.33 pm, the Applicant deposes that he had enclosed copies of duly stamped DOSH 1 and DOSH 4 and marked as annexures DAO 5 (a-e)
5. Regrettably, nothing was attached to the Supplementary Affidavit or filed thereafter as per the Case Tracking System (CTS) by 20<sup>th</sup> June, 2024 when the court prepared this ruling.



## Respondent's submissions

6. On jurisdiction, the Respondent relies on the provisions of the [Work Injury Benefits Act](#) (WIBA), specifically Sections 51 and 52 as the latter confers on this court's jurisdiction to hear appeals from the decisions of the DOSHS and cites the sentiments of the court in *Lameck Nyakundi Anyona V W.J.J Kenya Construction Co. Ltd* (2022) eKLR where the Court held that neither WIBA or the [Employment and Labour Relations Court Act](#) nor the [Employment Act](#) had an express provision enabling the court to enforce awards made by the DOSHS as it was the appellate court in such matters.
7. Reliance was also made on the sentiments of the Supreme Court of Kenya In the matter of Interim Independent Electoral Commission (2011) eKLR as well as *Samuel Kamau Macharia & another V Kenya Commercial Bank & 2 others* (2012) eKLR on jurisdiction of courts generally.
8. The decisions in *Saidi Mohamed V Diamond Industries Ltd* (2018) eKLR, *Peter Mutua Kaloki V China State Construction & Engineering Corp (Kenya) & another* (2022) eKLR were cited to reinforce the submission.
9. Counsel urges the court to adopt the view in *Peter Mutua Kaloki's* case above.
10. On costs, counsel cited the sentiments of the court in *DGM V EWG* (2021) eKLR to urge that it ought to be awarded costs for having had to instruct an advocate.

## Applicant's submissions

11. Concerning enforcement of DOSHS awards, counsel for the Applicant admits that although WIBA does not expressly confer jurisdiction to enforce awards, Section 87(1)(c) of the [Employment Act](#), 2007 confers jurisdiction to address complaints touching on personal injury.
12. Reliance is placed on provisions of Constitution, [Employment and Labour Relations Court Act](#), 2011, the [Employment Act](#), 2007 and WIBA to urge that the court has jurisdiction to enforce the awards.
13. Also relied upon are the sentiments of B.O.M Manani in [Joash Shisia Cheto V Thepot Patrick Charles ELRC No. E005 of 2021](#) Malindi, where the judge examined holdings in several earlier decisions such as *Richard Akama Nyambane V ICG Maltauro Spa* (2020) eKLR, *Samson Chweya Mwendabole V Protective Custody Ltd* (2021) eKLR, *Austin Oduor Ondira V Kenya Sweets Ltd & another* (2021) eKLR, *Lameck Nyakundi Anyona V W.J.J Kenya Construction Co. Ltd* (Supra), *Edwin Songoro & another V Amony Koech Yatich & another* and *Virginia Wangari Muita V Nyoro Construction Co. Ltd* (2020) eKLR to isolate the general principles.
14. On costs, counsel submits that since the Respondent precipitated the action, it was the offending party and costs would be tantamount to rubbing salt to the injury.
15. As the Respondent's Notice of Preliminary Objection raises the question of the court's jurisdiction to hear and determine the Claimant's Application, the notice meets the threshold of a Preliminary Objection enunciated by the Court of Appeal in *Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd* (1969) EA 696.
16. It is indeed one of the examples given by Law J.A in his judgment in the case.
17. The issues for determination are;
  - i. Whether there is a valid assessment of compensation by the DOSHS.



- ii. Depending on that answer to (i) above, whether the court has jurisdiction to enforce the DOSHS award.
18. Concerning the 1<sup>st</sup> issue, the documentation on record provide a determinative answer.
19. As admitted by the Applicant in its Supplementary Affidavit, the court has noted that the DOSH Form 1 had not been signed and stamped in Part III and DOSH Form 4 dated 3<sup>rd</sup> May, 2023 had not been stamped.
20. The affiant depones that his counsel wrote to the DOSHS on 22<sup>nd</sup> April, 2024 who wrote back enclosing the duly stamped DOSH 1 and DOSH 4 and copies of the documents were attached and marked as annextures.
21. Regrettably and as adverted to elsewhere in this ruling, the alleged signed and stamped forms were not filed in the E-filing system as the Supplementary Affidavit dated 3<sup>rd</sup> June, 2024 was filed on even date and had no annextures.
22. Consequently, the incomplete DOSH/FORM 1 and unauthenticated DOSH/FORM 4 remain as the foundation of the Claimant's application.
23. The Applicant's case is grounded on two documents, namely;
  - i. Copy of DOSH/FORM 1 and
  - ii. Copy of DOSH/FORM 4
24. While the former is the notification of the occupational accident or disease by the employer, the latter is a demand by DOSH for payment for the work injury benefit.
25. First, the DOSH/FORM 1 is incomplete as it is neither completed nor authenticated by the DOSHS under Part III.
26. It is unclear to the court why Part III of the form was not completed and signed by the DOSHS.
27. In a nutshell the DOSH/FORM 1 is incomplete for purposes of the instant application.
28. Similarly, the demand for payment DOSH/FORM 4 dated 3<sup>rd</sup> May, 2023 signed by one Mr. James Mithanga lacks a Postal address or other address at all.
29. Equally, the document identifies the signatory designation as A. Director besides the title of Occupational Health and Safety Officer. It is thus unclear whether the document was signed by the Director or the Occupational Health and Safety Officer.
30. It is also unclear as to whether the demand was actually served on the employer.
31. Flowing from the foregoing, it is clear that the two documents relied upon by the Applicant are incomplete and being the cornerstone of the Applicant's Notice of Motion dated 14<sup>th</sup> February, 2024, it is evident that the same is defective and cannot proceed to the next stage of determination whether the court has or has no jurisdiction.
32. There is neither a valid nor competent assessment by DOSHS for consideration by the Court.
33. In the upshot, the Applicant's Notice of Motion dated 14<sup>th</sup> February, 2024 is struck out with no orders as to costs.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 31<sup>ST</sup> DAY OF JULY 2024**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

