



**Makomboki Tea Factory Limited v Mwaura (Miscellaneous Application  
E002 of 2024) [2024] KEELRC 2145 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2145 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
MISCELLANEOUS APPLICATION E002 OF 2024**

**ON MAKAU, J**

**JULY 31, 2024**

**BETWEEN**

**MAKOMBOKI TEA FACTORY LIMITED ..... APPLICANT**

**AND**

**JAMES MUHIA MWAURA ..... RESPONDENT**

**RULING**

1. This Ruling relates to the Applicant’s Notice of Motion Application dated 5<sup>th</sup> March 2024. The Application is brought under section 12 of the *Employment and Labour Relations Court Act*, section 25 and 51 of the *Work Injury Benefits Act*, and seeks orders that:
  - a. That the assessment in the demand claim referenced as WIBA/MUR/158/22/23 be referred to the County Occupational Safety and Health Officer Murang’a Director for reassessment.
  - b. That the costs of the Application be provided for.
2. The Application is premised on the grounds set out on the body of the motion and the Supporting Affidavit sworn on the same date by Mathius Ithiga, the Applicant’s Factory Unit Manager. In brief, the applicant’s case is that on 17/12/2021, it filled out the employer’s Notice of Occupational accident/diseases of an employee and thereafter informed the Insurer of the same through its insurance broker. Subsequently, the insurer sought for a second medical opinion from the Respondent, but by the time the appointment was scheduled for 20/09/2023, the Respondent had already obtained assessment by the Director Occupational Safety and Health Officer (DOSHO) based on 50% permanent disability as assessed by Dr. Jacqueline Mwangi.
3. It is further applicant’s case that the applicant was unable to get a second medical opinion to establish whether the respondent suffered any permanent incapacity. Further, it was not able to challenge the assessment by DOSH within the 60 days’ timeline as the same was not brought to its attention as required by law. As a result, the Respondent moved to the Magistrate Court at Thika *vide* Case



No.E001 of 2024 seeking for adoption of the assessment of DOSH into judgment of the Court for execution purposes.

4. In the meantime, the Applicant has settled a portion of the assessed compensation which it felt was the just amount based on the second medical assessment. He averred that in the interest of justice the matter ought to be referred back to DOSHO for consideration of the second medical assessment and an independent medical assessment by a doctor approved by DOSH. He averred that there shall be no injustice caused to the Respondent if the Orders sought are granted. He urged the Court to enlarge time for the Applicant to make an objection to DOSH, before the adoption of the assessment as a judgment of the Court, or else the Applicant will be condemned unheard.
5. The Respondent opposed the motion by his Replying Affidavit sworn on 8<sup>th</sup> April 2024 in which he averred that he was employed as a General Worker (Green Leaf off loader); that he was involved in an occupational accident while undertaking his official duties and suffered 50% permanent incapacity; that the Applicant requested him to avail his documents for compensation purposes and he complied; that the Applicant then reported the accident to DOSH on 17<sup>th</sup> December 2021 and as a result, the DOSH assessed the compensation at Kshs. 1,959,600.
6. He averred that the Applicant was served with the assessment by DOSH; and that he also personally served the Applicant on 27<sup>th</sup> June 2023 which service was received by Julia Wanjiku who refused to stamp his copy. Further, the Applicant was thereafter served with a demand letter by his advocates on 30<sup>th</sup> January 2024 through their email address info@makomboki.ktdateas.com and copied to jwanjiku@makomboki.ktdateas.com.
7. The respondent further averred that the Applicant failed to challenge the assessment within the timeline prescribed under sections 51 and 52 of [WIBA](#), 2007 and therefore the Court lacked jurisdiction to remit the assessment back to DOSH for reconsideration as the time provided for under sections 51 and 52 has already lapsed and the director has since become functus officio. Finally, he contended that there was no legal provision providing for extension of time to object to the assessment and thus the application was fatally defective, frivolous, scandalous, misconceived and an abuse of court process. This Court was therefore urged to dismiss the application with costs.
8. The application was canvassed by way of written submissions. However, the Respondent failed to file any submissions.

### **Applicant's submissions**

9. The Applicant raised the following issues for determination:
  - a. Whether the Court has jurisdiction to hear and determine the matter.
  - b. Whether the DOSH assessment was properly served upon the Applicant.
  - c. What is the effect of failure to serve the DOSH assessment upon the Applicant.
10. Before addressing the above issues, a few paragraphs were dedicated to setting out the law applicable to the dispute before the court. It was urged that the process of compensation is initiated by the employer's report to DOSH of the occurrence of the injury as per section 21 and 22 of the Act. The Director is then mandated to conduct an inquiry by section 23 of the Act before determining the relief to be awarded. Section 25 of the [WIBA](#) require the employee to be subjected to a medical examination as required by DOSH, or the employer with the Director's approval. The employer is thereafter mandated to settle the award within 90 days of the same as per section 26(4) of [WIBA](#). However, where the employer is dissatisfied with the award, an appeal may be lodged within 60 days



- thereof and the DOSHO is to determine the same within 14 days of the objection as per section 52 of the Act.
11. It was contended that the Act provides the employer with avenues to ventilate its grievance but the same would only be applicable if there is service of the assessment by the DOSH. Otherwise it was urged that there was no express provision on setting aside an award.
  12. On the issue of jurisdiction, it was submitted that the failure to provide for appeal channels by law indicates that there is a lacuna in the law. It was submitted that the Act should not be interpreted in a way that breaches the rules of natural justice as enshrined under Article 47 and 50 of the Constitution. It was urged that the court has inherent power which should be exercised in the circumstances of the matter herein. Reliance was placed on the case of Wambugu v Director, Occupational Health and Safety Services & another (Miscellaneous Application E030 of 2022) [2023] KEELRC 62 (KLR) (20 January 2023) (Ruling) and the case of Dickson Muricho Muriuki v Timothy Kagonda Muriuki & 6 others [2013] eKLR where the court discussed circumstances when the inherent power of the court to do justice should be invoked.
  13. Reliance was also placed on Katumbi & Another (suing as the administrators and personal representatives of the estate of Boniface Kyungu Nzioka deceased) v Kinyanjui (Miscellaneous Application E077 of 2023) [2023] KEELRC 3062 (KLR) where the court referred an award back to DOSH to first determine an objection lodged by the respondent before the award could be adopted as judgment of the court.
  14. On the second issue, in countering the Respondent's averments on service, it was submitted that the law on service seeks to serve a critical ingredient of natural justice by prescribing a procedure that would guarantee service. Rule 12 of this Court's procedure rules was relied upon to argue that service upon the Applicant ought to have been through its secretary director or principal officer. It was contended that there was no indication whether the said Julia had authority to receive service.
  15. It was also argued that Respondent did not also qualify as a process server and therefore, could not be cross examined on the veracity of his assertions. In arguing that there was no service of the assessment by DOSH, the Applicant submitted that the copy on the record did not contain its stamp showing receipt.
  16. On the third issue, it was submitted that WIBA provided for two avenues for challenging the award of DOSH by an aggrieved party. It was submitted that the first was provided for under section 25, namely medical examination by a medical practitioner designated by the DOSH or employer with approval of the DOSH as was held in the case of Willys Injera v Trade Winds Aviation Services Ltd. Nairobi Misc Appl. No. E212 of 2022 [2023] KEELRC 1325 (KLR).
  17. The second one was submitted to be an objection lodged within 60 days of the award as per section 51(1) of WIBA as it was held in the case of Attorney General v Law Society of Kenya & Another [2017] eKLR. It was argued that the failure to serve the Applicant with the assessment by DOSH denied it the opportunity to object to the award within the stipulated timelines, and thus infringing its right to be heard.
  18. For emphasis, reliance was placed on the case of Republic v Disciplinary Committee Ex-parte Karimi C. Njau [2014] eKLR and Republic v Betting Control and Licensing Board & Another Ex-parte Outdoor Advertising Association of Kenya [2019] eKLR to therefore urge that it is only substantively and procedurally fair if the matter to be referred back to the DOSH for the Applicant to exhaust the available means of challenging the decision.



19. It was submitted that the failure to object the decision within 60 days was due to lack of awareness of the assessment. It was submitted that the Respondent should not be allowed to benefit from the failure by the Applicant to object. It was submitted that since the objection was on the merit of medical report, the appropriate forum is DOSH.

### **Analysis**

20. Having considered the application, the response and the submissions therein, the issues that arise for determination are as follows:
- a. Whether this Court has the jurisdiction to refer back an award by DOSH or enlarge time for filing of an objection before DOSH after adoption of the same by a court of law.
  - b. Whether the application is merited.
21. The Respondent argued that the Court lacks the jurisdiction to return the matter back to the DOSH as the prescribed time had already lapsed and the director became functus officio. The Applicant on the other hand argued that the Court had the inherent power to return the matter in the interest of justice. The Applicant's main contention was that it was not served with the decision of the DOSH in good time to enable it to file its objection within the stipulated timeline.
22. The *WIBA* under sections 51 and 52 provides for appeals against the decision of the DOSH to be through an objection to the Director and appeal to this Court. It states as follows:
- “ 51.
- (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 an objection against such decision.
  - (2) The objection shall be in writing in the prescribed form accompanied by particulars containing a concise statement of the circumstances in which the objection is made and the relief or order which the objector claims, or the question which he desires to have determined.
- 52.
- (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.”
23. There is no doubt that by dint of the foregoing provisions, the applicant was availed an avenue to challenge the award of damages by the DOSH, first through objection proceedings, and secondly by an appeal to this Court. The applicant alleges that it was not served with the assessment by DOSH to



enable it exercise its right of objection. It also alleged that it obtained a second medical examination by another doctor who opined that the respondent only suffered 5% permanent incapacity.

24. I wish to say that the said matters raised by the applicant herein ought to have been raised before the Thika Magistrates court where the Award by the DOSH was filed for adoption and enforcement. There is no appeal or judicial review proceedings before me. The application seeks substantive orders against an arbitrator without joining him to respond to the said accusation of procedural impropriety and irrationality. Having put all those matters into consideration, I find that the court has not been properly moved and I have no jurisdiction to grant the orders sought.
25. It has been argued that the Court has inherent jurisdiction but in the circumstances of this matter, I am not convinced. Inherent jurisdiction is not a card to be pulled out when a party finds himself out of order with the adjectival law. Inherent jurisdiction of the Court should only be invoked where there is a gap in law and only to ensure that the ends of justice are met since a Court exists to do justice.
26. In conclusion, I must say that a court should down tools immediately it finds that it has no jurisdiction over a matter. I honorably do so and proceed to strike out the application dated 5<sup>th</sup> March, 2024 with costs.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 31ST DAY OF JULY, 2024.**

**ONESMUS N MAKAU**

**JUDGE**

**Order**

This ruling has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N MAKAU**

**JUDGE**

