Omollo v Securex Agencies [K] Limited (Miscellaneous Application E097 of 2024) [2024] KEELRC 2540 (KLR) (22 October 2024) (Ruling)

Neutral citation: [2024] KEELRC 2540 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

MISCELLANEOUS APPLICATION E097 OF 2024

K OCHARO, J

OCTOBER 22, 2024

BETWEEN

DAN JUMA OMOLLO ..... APPLICANT

AND

SECUREX AGENCIES [K] LIMITED ..... RESPONDENT

RULING

Background

1. Through his Notice of Motion Application dated 19th September 2024, the Applicant seeks the following orders: -

    a. Spent.

    b. That the Honourable Court be pleased to adopt as its judgment, the assessment/award of the Directorate of Occupational Safety and Health Services, Mombasa made on 23rd March 2023.

    c. A decree to issue for;

        I. The sum of Kshs. 437, 620.80 being the Director's award made on 23rd March, 2023; and

        II. Interest thereon compounded annually at the Court rates from the award date until payment in full.

    d. That costs of this application be awarded to the Applicant.

2. The Notice of Motion is premised on the grounds set out on its face and the Supporting Affidavit of the Applicant, sworn on September 19, 2024.

3. The Respondent resisted the application through a Replying Affidavit sworn on 17th October 2024 by Francis Bundi, its Fleet Officer.

4. The Applicant's application is expressed to be brought under Articles 27[1] & [2], 41[1] and 162 of the *Constitution* of Kenya 2010; Section 12 of the *Employment and Labour Relations Court Act*; Section 10[1],19[2] and 51 of the *Work Injury Benefits Act*.

The Application.

5. The Applicant states that at all material times, he was an employee of the Respondent. Further, on the 20th of September 2021, he suffered workplace injuries. The incident was reported to the Director of Occupational Safety and Health Services, Mombasa. Subsequently, an assessment of the injuries suffered was done, and a conclusion was drawn that he had suffered a temporary total incapacity.

6. On 23rd March 2023, the Director required the Respondent to pay the Applicant compensation, KSHS. 437, 620.80, for the injuries suffered. The Respondent was supposed to pay this sum to the Director for onward transmission to him [the Applicant] within 90 days. The Respondent didn't.

7. Despite being aware of the award, the Respondent neither filed an objection nor an appeal assailing the same.

8. It is further stated that despite demands that the Respondent settle the awarded sum, it has failed, refused and or ignored.

The Response

9. The Respondent contends that the Applicant had earlier filed an application dated 19th September 2024 seeking orders like those sought in the instant application.

10. The Respondent further argues that this Court doesn't have jurisdiction to enforce the award of the Director of Occupational Safety and Health Services made on 23rd March 2023.

Analysis and Determination

11. I have carefully considered the Notice of Motion application; the Grounds thereof and Affidavit in Support; the Replying Affidavit; and distil a single issue for determination, thus; Whether this Court should award the orders sought by the Applicant

12. Before I delve further into considering the issue, I find it imperative to state the *Work Injury Benefits Act* hasn't provided for the procedure for enforcement of the Director's award. Equity will not suffer a wrong without a remedy. This court hasn't left those who deserve the enjoyment of the sums assessed by the Director as compensation for injuries suffered to be without recourse due to the lacuna in the provisions of the Act, and more specifically where the person under a duty to settle the award is deliberately and without justification refusing to.

13. In finding a solution to the stated deficit, in provision, the court has had to read the stipulations of the WIBA Act, not in isolation from other statutes and constitutional provisions that are relevant to the jurisdiction of this court, but together.

14. The deficit has attracted considerable attention of the court, in various cases, and the position hereinabove expressed is affirmed. Elijah Kisyanga Ndende –Vs- The Manager Zahkem International Construction Ltd [2022] eKLR, the Court held: -

> " The *Work Injury Benefits Act* is silent on the procedure to be followed in enforcing the Director's decision made on assessment of compensation payable to an employee for work injuries. In this Court's view, however, the legislature never intended that an employee whose employer fails and/or refuses to pay the amount of compensation assessed by the Director of Occupational Safety and Health Services under WIBA would be without civil remedy, and particularly so where the employer never objected to the Director's decision on assessment of compensation payable."

15. Similarly, in Samson Chweya Mwandabole –Vs- Protective Custody Limited [2021] Eklr, the Court held as follows: -

> " ...However, this Court being endowed with unlimited original and appellate jurisdiction in disputes related to employment and labour relations pursuant to Article 162(2) of the *Constitution* and Section 12 of the *Employment and Labour Relations Court Act*, the Court has inherent jurisdiction to adopt as a judgment the Director's award for purposes of execution. This jurisdiction should not be confused with appellate jurisdiction which is expressly donated under Section 52(2) of the WIBA in respect of the director's reply to an objection made under Section 51(1) of WIBA. It would appear that the former jurisdiction, which I now invoke, can be exercised by the Court where there is no challenge mounted against the Director's award by any party by way of objection or appeal under Sections 51(1) and 52(2) of the WIBA respectively."

16. In Joash Shisia Cheto v Thepot Patrick Charles [2022] eKLR, after analyzing various decisions on the issue of enforcement of DOSH awards, the Court stated: -

> 51. The general position established by a majority of these decisions is as follows: -
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> a. The law does not provide for mechanisms of enforcing the Director's award against a reluctant employer.
>
> b. In the face of this lacuna, the holder of the award can move the court to seek for enforcement of the award. A majority of the decisions favour the view that the ELRC can be moved for this purpose pursuant to its jurisdiction under article 162 of the *Constitution* as read with section 12 of the ELRC Act. Only one decision holds the view that the ELRC cannot be moved for this purpose. A few share the view that the Magistrate's court may be moved where pecuniary jurisdiction allows.
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> c. The proceedings for enforcement may be in summary form by way of miscellaneous causes or in the form of ordinary causes but confined to matters of enforcement only.
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> d. Unless by way of appeal under section 52 of the WIBA, it is not open to the court to consider the merits of the Director's award or indeed go on a fact-finding mission. This jurisdiction is the preserve of the Director.
>
> 52. I agree with these general principles.

17. Sight should not be lost on the fact that among the national values and principles of governance stipulated under Article 10 of the *Constitution* of Kenya,2010, that bind this Court whenever it applies

or interprets the law, are social justice, the rule of law, and human rights. If this Court were to fold its hands and say "Behold WIBA does not provide for an enforcement mechanism, there is nothing I can do", the citizens' right of access to justice under Article 48 shall suffer, employers will deliberately refuse to settle the awards by the Director, as a result, the rule of law and social justice will suffer. Therefore, the Court is obligated, to issue facilitative orders to enable enforcement of the Director's awards in deserving cases.

18. This Court hasn't lost sight of the fact that the Employment and Labour Relations Court Procedure Rules, 2024, came into effect on 18th August 2024. A purposive reading of Rule 59, will reveal that this Court has jurisdiction to entertain an application such as the instant application and render itself on the same.

19. While the Respondent possessed the right to file an objection against the award under Section 51 of the *Work Injury Benefits Act* and a right of appeal to this Court under Section 52 thereof, it failed to avail itself of these procedures within the statutory period. Section 51 and 52 provide that: -

> "(1) Any person aggrieved by a decision of the Director on any matter under this Act, may within sixty days of such the decision, lodge an objection with the Director 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.
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> 52. Director's reply
>
> (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."

20. Absent an objection and or appeal by the Respondent against the award dated 23rd March 2023, this Court's jurisdiction to enforce the said award in the face of the Respondent's non-settlement of the same, has matured.

21. The Applicant having sufficiently demonstrated; the existence of the award by the Director made on 23rd March 2023, in his favour; that the award has not been assailed in any of the ways provided for under the law; and that the Respondent has not settled the award to date, I return that he is entitled to the Orders sought in his application dated 19th September 2024, save that the interest shall be simple, not compounded as sought by the Applicant.

22. In the upshot, I allow the Notice of Motion application dated September 19, 2024, with costs.

23. It is so ordered.

READ, DELIVERED AND SIGNED THIS 22ND DAY OF October 2024.

OCHARO KEBIRA

JUDGE

In the presence of:

Mr. Odunga for Applicant.

Ms. Odira for Respondent.