



**Wesafu v Mibrinsh Investments (Miscellaneous Application E187 of 2023)
[2024] KEELRC 13412 (KLR) (13 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13412 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E187 OF 2023
K OCHARO, J
DECEMBER 13, 2024**

BETWEEN

MARTIN ECHESA WESAFU APPLICANT

AND

MIBRINESH INVESTMENTS RESPONDENT

RULING

Background

1. Through his Notice of Motion Application dated 13th September 2023, the Applicant seeks the following orders: -
 - a. Spent.
 - b. That the Honourable Court be pleased to adopt as its judgment, the award of the Directorate of Occupational Safety and Health Officer-Nairobi County as against the Respondent herein.
 - c. That judgment be entered for the Applicant against the Respondent for Ksh. 321,009 [Three Hundred and Twenty -one Thousand and Nine Shillings Only] being the amount assessed under the *Work Injury Benefits Act*.
 - d. That this Honourable Court be pleased to award interest on the amount from the date of assessment until payment in full.
 - e. That this Honourable Court be pleased to grant any other relief this court may deem fit and just to grant.
 - f. 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 13th September 2023.



3. The Respondent resisted the application through a Replying Affidavit sworn on 17th October 2023 by Joseph Naibei Cheren its Director.
4. The Applicant's application is expressed to be brought under Order 51 Rule 1 of the Civil Procedure Rules; 1B and 3A of the Civil Procedure Act; and Section 51 of the Work Injury Benefits Act.

The Application

5. at all material times, he was an employee of the Respondent. Further, on the 1st February 2022, he suffered workplace injuries. The incident was reported to the Director of Occupational Safety and Health Services. Subsequently, an assessment of the injuries suffered was done, and on 30th May 2023, he was awarded Ksh. 321,009 as damages for the injuries suffered.
6. The award was served upon the Respondent. He didn't file an objection within 60 days as required by the law or at all.
7. Despite all reasonable and diligent efforts by the Applicant to have the Respondent settle the award of the Director, the Respondent has failed, ignored and neglected to do so.
8. It becomes imperative therefore, for this Court to enforce the award of the Director of Occupational Health & Safety Services.

The Response

9. The Respondent states that he got surprised when he was served with the instant application to realize that the Occupational Safety and Health Officer-Thika had adjudicated over a claim flowing from an accident that allegedly occurred on 1st February 2022 and condemned it to pay the Applicant Ksh. 321,009.
10. The Respondent contended that he was never invited to the office of Occupational Safety and Health Officer-Thika with regard to the subject accident. Further, no demand was served upon it as alleged by the Applicant through the affidavit of service of Isaac Malonza sworn on 8th April 2023.
11. Every visitor to the Respondent's premises, passes through the gate of BIDCO Africa. Such a visitor must register his or her details at the gate while checking in. The register for 6th April 2023, doesn't show that the process server did check in and out.
12. The Respondent is a registered business name. Service on such a business should be effected pursuant to the provisions of Order 5 Rule 8 of the Civil Procedure Rules. The service of the process ought to be effected on the defendant personally. The process server alleged that he served Mical Agina, who was neither an employee, agent or otherwise associated with it.
13. The Respondent asserts that the notifications contemplated under the Work Injury Benefits Act on employers are very vital in the process leading to assessment of the injuries suffered by the employee and the Director's award as a result thereof. None of the notices was served on him. As such, the Applicant unjustly and unlawfully obtained the award that he intends to enforce through the instant application.
14. Had service been effected on it, the Respondent would have defended itself against the Applicant's claim or appealed against the liability and quantum assessed by the Director.
15. The Court should decline the invitation by the Applicant to enforce an award which was irregularly obtained without service of the requisite notices and the demand upon the Respondent.



Analysis and Determination

16. I have carefully considered the Notice of Motion application; the Grounds thereof and Affidavit in Support; the Replying Affidavit; and the submissions by the Applicant and authorities relied on, and distil a single issue for determination, thus; Whether this Court should award the orders sought by the Applicant
17. 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.
18. 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.
19. The deficit has attracted considerable attention of the court, in various cases, and the position hereinabove expressed is affirmed. [Elijah Kisyinga Ndende v The Manager Zakhem 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.”
20. Similarly, in [Samson Chweya Mwandabole v 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.”
21. 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: -

 - 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.
- 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.
- 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."

- 22. 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.
- 23. 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 69, will reveal that this Court has jurisdiction to entertain an application such as the instant application and render itself on the same.
- 24. 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, apparently it failed to avail itself of these procedures within the statutory period. Section 51 and 52 provide that: -

" 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 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. 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."

25. Absent an objection and/or appeal by the Respondent against the award dated 30th May 2023, this Court's jurisdiction to enforce the said award in the face of the Respondent's non-settlement of the same, has matured.
26. I have carefully considered the matters raised by the Respondent in response to the Applicant's application. Largely, they are in the attack on the merits of the award and or the process leading to the award. In my view, the grounds and material presented by the Respondent could be proper material and or grounds in a process that involves merit consideration, like the appeal process contemplated under section 52 of the Act, or a judicial review application to this court. The grounds and or material as presented by the respondent are irrelevant in the proceedings like the instant one, where the Court's authority is limited and does not extend to the examination of merits and or consideration of the propriety of the process leading to the award.
27. The above-stated position by this Court draws inspiration from the decision in *Joash Shisia Cheto v Thepot Patrick Charles* [2022] eKLR, where the Court aptly stated;

“[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.”
28. The Applicant having sufficiently demonstrated; the existence of the award by the Director made on 30th May 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 same to date, I return that he is entitled to the orders sought in his notice of motion application.
29. In the upshot, I allow the Notice of Motion application dated 13th September 2023, with costs.
30. Interest on the sum awarded shall be at court rates from the date of the award of the Director, till full payment.
31. It is so ordered.

READ, DELIVERED AND SIGNED THIS 13TH DAY OF DECEMBER 2024.

OCHARO KEBIRA

JUDGE

In the presence of

..... for the Applicant.

.....for the Respondent.

