



Nguyete v Timberland Construction Ltd (Miscellaneous Application E065 of 2022) [2023] KEELRC 59 (KLR) (19 January 2023) (Ruling)

Neutral citation: [2023] KEELRC 59 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E065 OF 2022**

**AK NZEI, J
JANUARY 19, 2023**

BETWEEN

SAMUEL MRIMA NGUYETE APPLICANT

AND

TIMBERLAND CONSTRUCTION LTD RESPONDENT

RULING

1. Before me is a notice of motion dated September 21, 2022. The applicant seeks the following orders:-
 - a. that this court do adopt as its judgment the award of the director of occupational safety and health services made on 11/8/2021.
 - b. that judgment be entered for the applicant against the respondent for the sum of ksh. 183,213, plus costs and interest at court rates.
 - c. that costs of the application be provided for.
2. The application is predicated on the supporting affidavit of Samuel Mrima Nguyete (the applicant) sworn on September 21, 2022. It is deponed in the said affidavit:-
 - a. that the applicant was employed by the respondent as a Wood Machine Operator until 8/3/2021 when he sustained a crush injury of his right hand 2nd and 4th fingers leading to their amputation.
 - b. that the matter was reported to the Director of WIBA and DOSH 1 Form was filled and returned for assessment of quantum payable to the Applicant.
 - c. that on 11/8/2021, the applicant's permanent incapacity was assessed at 10% and compensation payable to him was assessed at ksh. 183,213.



- d. that the respondent did not appeal or object to the decision, and did not pay the assessed compensation.
 - e. that the *Work Injury Benefits Act* does not have enforcement mechanisms, but this court has unlimited original and appellate jurisdiction over disputes relating to employment and labour relations pursuant to article 162(2) (a) of the *Constitution*, and has inherent jurisdiction to adopt as judgment the Director’s award for purposes of execution.
 - f. that refusal by the respondent to pay the awarded sum amounts to an injustice against the applicant.
3. Copies of Forms Dosh 1 and Dosh/wiba 4 (dated August 11, 2021) and letters by the Director of Occupational Safety and Health Services calling upon the Respondent to settle the assessed compensation were filed with the application.
 4. There is on record an affidavit of service indicating that the application was served on the respondent on October 3, 2021. The respondent did not file any response to the application.
 5. On October 25, 2022, the court fixed the application for hearing on November 15, 2022, and directed that a hearing notice be served. There is on record an affidavit of service indicating that a hearing notice was served on the respondent on October 27, 2022. When the application came up for hearing on November 15, 2022, there was no appearance on the part of the respondent. The applicant moved the court to allow the unopposed application.
 6. The respondent is not shown to have objected to the director’s decision on assessment of compensation payable to the applicant pursuant to section 51 of the *Work Injury Benefits Act* which provides:-
 - “(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.”
 7. On whether this court can enforce the Director’s decision on assessment of compensation payable, this court stated as follows in the case of *Amir Swaleh Omar -vs- Machenzie Maritime [e.a] Limited* [2022] eKLR:-
 - “17. 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 intent 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.”

8. The foregoing position holds valid in the present case; and I find and hold that this Court has jurisdiction regarding enforcement of the Director's decision, and particularly where the same has not been objected to; as the issues of liability between the employer and the injured employee and quantum of compensation payable stand determined by the Director pursuant to sections 16 and 23 of the *Work Injury Benefits Act*. This court stated as much in the case of *Firdaus Athman Abubakar -vs- Modern Coast Builders And Contractors Limited* [2022] eKLR.

9. I allow the notice of motion dated September 21, 2022 in the following terms:-

- a. the award of the Director of Occupational Safety and Health Services made on August 11, 2021 awarding the applicant ksh. 183,213 as compensation is hereby adopted as a judgment of this court, and judgment is hereby entered for the applicant against the respondent for ksh. 183,213.
- b. the applicant is also awarded costs of these proceedings and interest at court rates.
- c. interest shall be calculated from the date of this Ruling until payment in full.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19TH DAY OF JANUARY 2023

AGNES KITIKU NZEI

JUDGE

Order

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

Appearance:

N/A for Applicant

N/A Respondent

