



Onchieku v China Communications Construction Company Limited (Employment and Labour Relations Cause E693 of 2021) [2023] KEELRC 21 (KLR) (16 January 2023) (Ruling)

Neutral citation: [2023] KEELRC 21 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E693 OF 2021**

**BOM MANANI, J
JANUARY 16, 2023**

BETWEEN

EZEKIEL OMBASO ONCHIEKU APPELLANT

AND

**CHINA COMMUNICATIONS CONSTRUCTION COMPANY
LIMITED RESPONDENT**

RULING

Introduction

1. The Claimant is an employee of the Respondent. He has filed this cause to seek compensation for injuries he sustained in the course of employment. The cause is said to be an appeal from the decision of the Director of Occupational Safety and Health (the Director) under section 52(2) of the *Work Injury Benefits Act* (WIBA).
2. The Respondent disputes the court's jurisdiction to entertain the claim. In the Respondent's view, there is no appeal in terms of section 52(2) of the WIBA to entitle the court to assume jurisdiction over the matter. Accordingly, the Respondent has filed a preliminary objection on account of jurisdiction.

The Preliminary Objection

3. The preliminary objection is anchored on the Notice of Preliminary Objection dated September 12, 2022. It raises three grounds whose totality is that under sections 51 and 52 of the WIBA, the initial jurisdiction to entertain a work injury claim lies with the Director. The court's jurisdiction lies only by way of an appeal from the decision of the Director. As such, the current action, having been filed before a decision by the Director in terms of the aforesaid provisions of statute is bad in law and ought to be struck out.



4. As argued by the Claimant, a preliminary objection ought to be premised on a pure point of law that can be deciphered from the pleadings either expressly or by implication without the need for elaborate evidence. It is usually taken on the assumption that the facts around the point of law are not in dispute. If successfully canvassed, the point of law raised should have the potency of bringing the matter to closure. This is the general guide that was developed in the now celebrated decision of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd (1969) EA*.
5. I have analyzed the issue raised in the preliminary objection before me and come to the conclusion that it meets the above parameters of a preliminary objection. The question raised by the Respondent is one of jurisdiction. It is a pure point of law and arises from the pleadings as presented by the parties. If successfully urged, this is a matter that will dispose of the suit.
6. The parties further agree that as a matter of law, work injury claims ought to be placed before the Director as the port of first call. It is further common ground that matters arising from work injury and occupational disease claims can only be escalated to this court by way of appeal from the decision of the Director under section 52 as read with section 51 of the WIBA. That far, it is correct to say that the issues are not contested.
7. The only issue in dispute is perhaps what constitutes a decision by the Director for purposes of triggering an appeal under section 52(2) of the WIBA. But again, this is a matter of law that does not require evidence to establish. And neither is it a matter for the discretion of the court.
8. Sections 51 of the WIBA provides as follows:-
 - a. '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.
 - b. 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.'
9. Section 52 thereof provides as follows:-
 - a. '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.
 - b. An objector may, within thirty days of the Director's reply being received by him, appeal to the Industrial Court against such decision.'
10. In the documents filed by the Claimant, he avers that after his work injury on August 8, 2019, the Respondent reported the accident to the Director by filling DOSH form 1. That upon this report, the Claimant was assessed for purposes of determining his degree of incapacity which was fixed at 5%. Based on this assessment of incapacity, the Director assessed the Claimant's compensation at Ksh 134,432/.
11. The Claimant avers that he was dissatisfied with this assessment. He therefore wrote to the Director for review. This was through his lawyers' letter dated May 19, 2020. That despite this communication, the Director has not reacted to the Claimant.
12. The Claimant's counsel argues that the non response by the Director is in a sense a decision which ought to trigger the right to appeal to the court under section 52(2) of the WIBA. And hence the current appeal which was filed on August 20, 2021.



13. On the other hand, the Respondent argues that following the accident in question, a report was made to the Director as required under the WIBA. That the Director made an initial assessment of the Claimant's incapacity at 5%. However, the Respondent's insurers sought a review and the matter remains in abeyance.
14. In the Respondent's view, the process before the Director is yet to be concluded. The Director has never rendered a decision on an objection by either of the parties in terms of sections 51 and 52 of the WIBA to warrant invoking of the right to appeal under section 52(2) of the Act. Consequently, to the extent that this process has not matured in terms of the provisions of law aforesaid, the current proceedings before the court are incompetent. The court has no jurisdiction to entertain the proceedings which, though disguised as an appeal, are not an appeal within the meaning of section 52(2) of the WIBA.
15. It is not in contest that the jurisdiction of this court under section 52(2) of the WIBA is by way of appeal. The court has no original jurisdiction over work injury claims under the said section.
16. As the section indicates, this jurisdiction arises only in respect of a review decision by the Director. Whilst the Respondent's position is that the Director has not made a decision under section 52(1) of the WIBA to warrant the purported appeal under section 52(2) of the Act, the Claimant avers that the failure by the Director to respond to his lawyer's letter of May 19, 2020 is a decision capable of being challenged by way of appeal under section 52(2) of the WIBA. It is therefore necessary that the court pronounces itself on the meaning of the term 'decision' under the aforesaid provision of law.
17. *Black's Law Dictionary* defines the term 'decision' to denote 'a judicial or agency determination after consideration of the facts and the law.' In a sense, the term denotes a positive pronouncement arrived at upon a careful analysis of a set of facts and law.
18. Under sections 51 and 52 of the WIBA, a party who is dissatisfied with the Director's decision under the Act is entitled to object to that decision in writing. The objection is to be lodged with the Director within sixty (60) days of the Director's decision. Upon receipt of the objection, the Director is required to respond to the objection within fourteen (14) days and in writing. He may vary or uphold his initial decision with reasons given to the objector. A copy of the Director's response is to be send to any other person affected by the decision.
19. If either of the parties to the dispute is still unhappy with the reviewed decision by the Director, he may appeal to the Employment and Labour Relations Court. Such appeal must be lodged within thirty (30) days of the Director's response to the objection.
20. The totality of the foregoing leaves no doubt in my mind that the Director's decision is a positive determination by him after consideration of the facts and law. The fact that the law obligates the Director to give reasons for his decision and to communicate the decision to the affected parties within the set timeframe can only denote the rendering of a positive decision. It is therefore incorrect for the Claimant to insinuate that non action by the Director on his objection constitutes a decision.
21. From the record, after the Director was notified of the accident by the Respondent, he caused to be assessed the compensation due to the Claimant. This assessment is evidenced in the DOSH demand dated November 27, 2019.
22. This assessment comprises the Director's decision against which the parties to the action were entitled to object within sixty (60) days of the decision. There is no evidence that any of the parties objected to the decision within the sixty (60) days provided for under section 51(1) of the WIBA. The Claimant's advocates wrote to the Director on May 19, 2020 objecting to the assessment. This was more than four (4) months down the line from November 27, 2019.



23. There is no evidence that the Director has reacted to the Claimant's lawyers' letter aforesaid. This could possibly be because the Director considers that there was no objection to his assessment in terms of section 51(1) as the purported objection was presented inordinately out of time.
24. There being no decision by the Director to the Claimant's Advocates' letter of May 19, 2020, there is nothing to trigger an appeal to the court under section 52(2) of the Act. Consequently, what the Claimant has filed before this court is not an appeal as contemplated under section 52(2) of the WIBA.
25. The Claimant suggests that where the Director fails to act on an objection, this court should assume jurisdiction on the case under article 162 of the *Constitution*. He relies on the decision of the Supreme Court in *Law Society of Kenya v Attorney General & another [2019] eKLR*. The statement by the Supreme Court in the aforesaid cause that a party who is unhappy with the Director's decision can appeal to the Employment and Labour Relations Court certainly contemplates filing of competent appeals under section 52(2) of the WIBA: not what the Claimant has filed. Importantly and as was emphasized in the Supreme Court decision aforesaid, where the law establishes an alternate forum for dispute resolution, a litigant is duty bound to submit to such alternative forum before approaching a court of law.
26. The Claimant may perhaps have a valid grievance following the Director's failure to formally respond to his lawyers' letter of May 19, 2020. However, the way to address this inaction is not by filing a purported appeal under section 52(2) of the WIBA. Rather, the Claimant can pursue the matter through a Judicial Review motion to compel the Director to discharge his statutory mandate. In my view, the Claimant is not rendered remediless as a result of the alleged Director's inaction.
27. On the issue of enforcement of the Director's award of Ksh 134, 432/, it is perhaps correct as the Claimant asserts that the WIBA has weak enforcement procedures. The Act does not appear to provide for mechanisms for enforcing the Director's award through civil action. However, it has been suggested that parties can still overcome this challenge by applying to enforce the award under section 87 of the *Employment Act* as read with section 12 of the *Employment and Labour Relations Court Act*.

Determination

28. For the reasons set out in the preceding sections of this ruling, the court finds that the current claim has been improperly presented as an appeal. It is a claim invoking the court's original jurisdiction but disguised as an appeal. It offends the express provisions of sections 51 and 52 of the WIBA.
29. The case having been filed in flagrant disregard of the provisions of statute aforesaid, this court has no jurisdiction to entertain it. Accordingly, it is struck out with costs to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 16TH DAY OF JANUARY, 2023

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Claimant

.....for the Respondent

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties 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.

B. O. M Manani

