



REPUBLIC OF KENYA



**Okata v Kenapen Ltd (Cause E166 of 2022)
[2023] KEELRC 471 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 471 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E166 OF 2022
BOM MANANI, J
FEBRUARY 23, 2023**

BETWEEN

AGGREY MUNALA OKATA CLAIMANT

AND

KENAPEN LTD RESPONDENT

RULING

Introduction

1. The Claimant in the cause served as an employee of the Respondent until 31st March 2021 when his contract was terminated. During the currency of his contract, the Claimant allegedly suffered injury on 10th September 2020 whilst on duty.
2. It is alleged that while the Claimant was sharpening a blade to be fixed onto one of the machines in the Respondent's premises, the blade broke into pieces inflicting injury on him. By these proceedings, the Claimant prays that he be compensated for the injury he sustained.
3. Whilst admitting the occurrence of the industrial accident, the Respondent asserts that it filed a report thereof with the Director of Occupational Safety and Health Services (Director) by filling the requisite forms. According to the Respondent, despite having made the above report, the Director is yet to render his decision on the matter. Therefore, the court's jurisdiction has been invoked prematurely.

Preliminary Objection

4. Together with the Memorandum of Response, the Respondent filed a Notice of Preliminary Objection dated 26th May 2022. The objection is founded on the provisions of the [Work Injury Benefits Act](#) (WIBA).



5. In the Respondent's view the WIBA vests original jurisdiction to resolve work injury and occupational disease claims in the Director. The power of the court to entertain such matters only arises by way of an appeal from the decision of the Director under section 52 of the Act.
6. The Respondent contends that the Employment and Labour Relations Court (ELRC) lacks original jurisdiction to entertain such causes. Therefore, in so far as the current case invokes the court's original jurisdiction, in the absence of a decision from the Director, it is misconceived, bad in law and ought to be struck out.

Analysis

7. The court issued directions that the point of law raised by the Respondent be canvassed through written submissions. In compliance with these directions, the parties have filed their respective submissions.
8. Although the document instituting the cause is titled Memorandum of Claim, the Claimant describes the cause as an appeal from the decision of the Director. At the same time, he indicates that the Respondent did not report the accident to the Director. The Claimant further contends that although he wrote to the Director through his lawyers on record about the accident, the Director is yet to react to the letter.
9. From the foregoing, it is clear to me that there has been some kind of inaction by the Director on this accident. As a result, the Claimant has opted to move this court to seek redress.
10. The question the court must address is whether the inaction by the Director constitutes a decision capable of being appealed against under section 52(2) of the WIBA. In Elrc Cause No E693 of 2021 Ezekiel Ombaso Onchieku China Communications Construction Company Limited (unreported), the court considered a similar question. The court underscored the fact that the decision of the Director that ought to trigger an appeal under section 52(2) aforesaid must be a positive determination. Consequently, inaction by the Director does not constitute a decision under section 52(1) of WIBA. The court expressed itself as follows on the subject:-

“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.”

11. The Claimant readily admits in his pleadings that although he wrote to the Director concerning the accident, there has been no response from that office. The Respondent also contends that although it reported the suit accident to the Director, he has remained nonresponsive on the matter. Consequently and in my view, there has been no decision by the Director capable of triggering an appeal under section 52(2) of WIBA.
12. The foregoing being the position can the Claimant, in the circumstances of this case, move the ELRC for relief under section 52(2) of the WIBA? I think not. To the extent that there is no decision by the Director, the Claimant cannot invoke the court's jurisdiction under the aforesaid section of statute. This is because the section confers appellate but not original jurisdiction on the ELRC.
13. What the Claimant has done in my view is to invoke the court's original jurisdiction under the guise of an appeal. This is inappropriate. The ELRC has no original jurisdiction to entertain work injury and occupational disease claims. As was stated by the Supreme Court in *Law Society of Kenya v Attorney*



General & another [2019] eKLR, the first port of call for these matters is the Director's office with the court coming in only at the appellate level.

Determination

14. Having regard to the foregoing, the court finds that it has no original jurisdiction to entertain the current claim which is disguised as an appeal. Accordingly, the claim is struck out with costs to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 23RD DAY OF FEBRUARY, 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

