



Kiruga v Koba Waters Limited & another (Miscellaneous Application E071 of 2022) [2023] KEELRC 419 (KLR) (9 February 2023) (Ruling)

Neutral citation: [2023] KEELRC 419 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E071 OF 2022
MN NDUMA, J
FEBRUARY 9, 2023**

BETWEEN

JOYCE WATIRI KIRUGA APPLICANT

AND

KOBA WATERS LIMITED 1ST RESPONDENT

AFRICA MERCHANT ASSUARANCE LIMITED 2ND RESPONDENT

RULING

1. The applicant vide miscellaneous application serving before Court prays for an order in the following terms:-
 1. That the honourable Court adopts the assessment of the Director of Occupational Safety and Health Services as a judgment of the Court.
 2. That a decree for Kshs 510,000 to issue in accordance with assessment of the Director of Occupational Safety and Health Services Jointly and severally against the Respondents.
 3. That a declaration to issue that the Respondents have committed an offence contrary to section 26(6) of the [Work Injury Benefits Act](#) for failing to pay the applicant.
 4. That the Court commits the Directors of the Respondent to one year in jail or fines them Kshs 500,000 or both.
 5. That the costs of this application be provided for.
2. The application is premised on grounds set out on the face of the Notice of Motion and buttressed in the supporting affidavit of the applicant the nub of which is that on November 7, 2016 the applicant sustained an injury while working for the 1st respondent.



3. The 1st respondent filed a Dosh Form 1 and reported the accident to the Director of Occupational Safety and Health.
4. That on or about August 23, 2017, the Director assessed the compensation due to the Applicant at Kshs 510,000.
5. That the applicant served the Respondents with the assessment of the Director of Occupational Safety and Health but no payment has been forthcoming.
6. That the respondents jointly and severally refused and or neglected to pay the compensation.
7. That section 26(6) of the *Work Injury Benefits Act* provides that:-

“An employer or any insurer who fails to pay the compensation claimed under this subsection commits offence and shall on conviction be liable to a fine not exceeding five hundred thousand shillings or to imprisonment to a term not exceeding one year or to both.”
8. The applicant relies on the equitable legal maxim that no person will suffer a wrong without a remedy.
9. That justice shall be administered without regard to technicalities as set out under Article 159(2) of the *Constitution*.
10. That the application be granted.
11. The respondents filed a replying affidavit of Grace Njuguna, a legal officer of the 2nd respondent who deposes that the application is fatally defective since the 2nd respondent was not a party to the suit.
12. That the Insurance Policy between the 1st and 2nd respondents is a contract of indemnity intended to cushion the 1st respondent against risks and or liability to compensate the injured employees and it is not a contract between the 2nd respondent and the said employees.
13. That the provisions of *Work Injury Benefits Act, 2007*, does not expressly provide for the execution of the orders sought herein.
14. That as a result of the lacuna in the enabling provision as regards enforcement of the award issued by the Director, it is hazardous for the Court to determine something that is purely for legislation to cure.
15. That an award under *Work Injury Benefits Act* (WIBA) may only be entered by filing suit with Court under the provisions of section 89 of *Employment Act* as read with the provisions of the *Occupational Safety and Health Act*.
16. That the suit filed in any event would be time barred since the cause of action arose on the November, 2016 and provision of Section 90 provide limitation of three (3) years for any suit arising from an employment contract.
17. That the application be dismissed with costs.

Determination

18. The parties filed submissions and list of authorities which the court has carefully considered together with the depositions by the parties.
19. The question that the Court must decide is whether a recipient of an award of the Director of Occupational Safety and Health and is without a remedy simply because the *Work Injury Benefits Act, 2007* did not expressly make a provision for enforcement of the awards of the Director where



the employer and or the employee's insurer fails to compensate an injured employee pursuant to an assessment an award by the Director.

20. The Court has dealt with this issue variously. And whilst observing the need for the legislature to seal the lacuna went on to find that it would be inequitable for an employer to hide behind this lacuna to refuse to compensate an employee, awarded by the Director pursuant to an application, as in this case, filed by the employer itself on behalf of the employee and where the fact of Work Injury was not in dispute at all.
21. This application seeks to enforce an award of the Director and does not seek to commence a new suit. The issue of limitation under section 90 of the [Employment Act, 2007](#) does not arise. To the contrary, in terms of Section 4(4) of the [Limitation of Actions Act](#), cap 22 Laws of Kenya, Execution of judgments and/or decrees may happen within 12 years from the date the judgment or an award was issued. The decision of the Court of Appeal in the case of [Willis Onditi Odhiambo v Gateway Insurance Company Limited](#) [2014] is on point on this issue.
22. This matter is brought by way of miscellaneous application. Other persons who have come to this Court to enforce the awards of the Director Doshave come by of a Statement of Claim as was the case in Kisumu Employment and Labour Relations Court Cause No 296 of 2018 – [Jared Ingling Obuya v Handicap International](#) [2018] eKLR in which this Court stated:-

“The employment and Labour Relations Court being the Court with original and appellate jurisdiction to hear and determine disputes arising from Employer and Employee relationship and to administer statutory enactments dealing with Employment and Labour Relations matters in this Court's considered finding has jurisdiction to enforce awards by the Director pursuant to [Work Injury Benefits Act, 2007](#) where an employer willfully disregards and fails to enforce a decision and award of the Director pursuant to a Statutory assessment of compensation arising from an Occupational disease in terms of article 162(2) of the [Constitution](#) read with section 12(1) of the [Employment and Labour Relations Court Act](#) No 20 of 2014.”

23. The Court went ahead and directed the employer to pay the award of the Director.
24. In [Richard Akama Nyambane v ICG Maltauro Spa](#) [2020] eKLR Justice Mbaru J. considered a notice of motion application to enforce an award of the Director and observed that-

“The [Work Injury Benefits Act, 2007](#) (WIBA) does not provide for an enforcement mechanism in respect of awards of the Director and recourse was Section 87 of the [Employment Act, 2007](#) [the Act] as held in the case of Ruth Wambui Mwangi & another v Alfarah Wholesalers Limited [2017] eKLR.”

25. In that particular case, the employer contested the matter on the basis that the assessment by the Director and the award had already been paid by the employer and the claimant had executed a discharge voucher.
26. That case is distinguishable from the present one.
27. This court is of the view that since [WIBA](#) only provides for appeals to this court from the award of the Director, and the court lacks original jurisdiction to hear and determine [WIBA](#) claims, it is not appropriate to enforce an award of the Director by filing a claim under section 87 but rather the miscellaneous application suffice for that purpose. The court observes that article 259 of the [Constitution](#) obliges this court to render substantive justice without undue regard to technicalities.



28. Accordingly, the court finds the application for enforcement of uncontested award by the Director to the applicant against the 1st respondent to be with merit and is awarded accordingly as against the 1st respondent.
28. The court agrees with the submissions by the 2nd respondent that there was no privity of contract between the applicant and the 2nd respondent and the court does not issue orders against the 2nd respondent in this matter. It is up to the 1st respondent to ensure that the Insurance Company meets its obligations in terms of the Insurance Policy between the 1st and 2nd respondents.
29. It is so ordered.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 9TH DAY OF FEBRUARY, 2023.

MATHEWS N. NDUMA

JUDGE

Appearance

Mr. Maina for Applicant

M/s Arundo for 2nd respondent

Ekale – Court Assistant

