



Muriuki & another (Suing as the legal representatives of Patrick Kibiru Muriithi) v Isinya Roses Limited (Miscellaneous Application E006 of 2022) [2023] KEELRC 788 (KLR) (29 March 2023) (Ruling)

Neutral citation: [2023] KEELRC 788 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
MISCELLANEOUS APPLICATION E006 OF 2022
DN NDERITU, J
MARCH 29, 2023

BETWEEN

BEATRICE GATHONI MURIUKI 1ST APPLICANT

ALVIN WANJIKU KIBIRU 2ND APPLICANT

SUING AS THE LEGAL REPRESENTATIVES OF PATRICK KIBIRU MURIITHI

AND

ISINYA ROSES LIMITED RESPONDENT

RULING

I. Introduction

1. The Applicants herein are the legal representatives of Patrick Kibiru Muriithi (deceased) who was until his death on 9th June, 2016 an employee of the Respondent. They have presented to the court a Limited Grant of Letters of Administration ad litem issued by the High Court at Nyahururu on 27th July, 2017.
2. The deceased died as a result of fatal injuries sustained in the course of his employment with the Respondent and a claim was lodged with the Directorate of Occupational Safety and Health Services, Nakuru County.
3. Vide a notice dated 22nd September, 2016 the Occupational Safety and Health Officer, Nakuru, informed the Respondent that compensation for the deceased had been assessed at Kshs.5,230,392/= and demanded the Respondent to settle the same or to ostensibly appeal if not satisfied with the award.
4. The Respondent did not act on the award and as a result the Applicants commenced these proceedings through Munene Chege & Co Advocates by way of a Notice of Motion (the application) dated 14th February, 2022 and filed in court on 6th April, 2022.



5. The application is expressed to be brought under Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, and 3A of the Civil Procedure Act, and Sections 30, 36, 37, and 40 of the Work Injury Benefits Act (WIBA), among other enabling provisions of the law, seeking the following –
1. THAT this Honourable Court be pleased to adopt the award of the Directorate of Occupational health and Safety Services, Nakuru County under the Work Injury Benefits Act (WIBA) 2007 made in favour of the Applicant as a judgment of this Honourable Court.
 2. THAT this Honourable Court be pleased to enforce and enter judgment ordering the Respondent herein to pay the Applicant herein an award of Kshs.5,230,392.00 as assessed by the Directorate of Occupational health and safety Services, Nakuru County under the Work Injury Benefits Act (WIBA) 2007 within thirty(30) days and in default thereof execution to issue.
 3. THAT the Court be pleaded to award interest on the amount from the date of assessment until payment in full.
 4. THAT the cost of this cause be borne by the Respondent in any event.
6. The application is based on the grounds on the face of it and supported with the affidavit of BEATRICE GATHONI MURIUKI sworn on 18th March, 2022 with a copy of the Certificate of death, the letters of Limited grant, and the letter dated 22nd September, 2016 informing the Respondent of the award attached.
7. Upon service of the application, the Respondent appointed CM Advocates, LLP to act for it and filed a notice of Preliminary objection (PO) dated 16th September, 2022 received in court on 19th September, 2022 raising the following issues –
- a. The proceedings by the Applicant are fatally and incurably defective, for failure to properly invoke the Hon. Court’s jurisdiction. The Notice of motion offends the mandatory provisions of Section 90 of the Employment Act, 2007 and is statute barred; three (3) years having lapsed form the date of the award.
 - b. Further, the Employment and Labour Relations Court does not have jurisdiction to enforce awards made by the Directorate of occupational health and Safety Services and the application as filed offend Section 52(2) of the Work Injury Benefits Act.
 - c. Ergo, the instant application is an outright abuse of legal and judicial process, incompetent and fatally defective hence should be dismissed in limine with costs to the Respondents on a full indemnity basis.
8. When the application came up in court for hearing on 8th June, 2022 Miss Daye appeared for the Applicants and Mr Okoth appeared for the Respondent. It was by consent directed that the PO be heard first by way of written submissions. Counsel for both parties filed their respective written submissions on 21st October, 2022.

II. SUBMISSIONS BY RESPONDENT’S COUNSEL

9. On the issue of enforcement Counsel for the Respondent submits that this court (ELRC) has no jurisdiction to enforce the award from the Directorate of Occupational Safety and Health Services and



that this court can only interact with the award if a party is appealing against the award under Section 52(2) of WIBA.

10. To buttress that argument counsel has cited several decisions including Peter Mutua Kaloki V China State Construction & Engineering Corporation (Kenya) & Another (2022) eKLR wherein Rika J opined that if ELRC assumed the jurisdiction to enforce the award of the Director, an aggrieved party shall have no avenue to appeal.
11. Counsel has submitted that the law has not provided for the mechanism and procedure through which to enforce the award of the director made under Section 53 of the Act. Counsel has insisted that if the ELRC has in the past issued orders enforcing such awards the court has done so without jurisdiction. Reference has been made to Evans Kiganane Anyiti V Dunhill Building Constructor Limited & Another (2021) eKLR and Lameck Nyakundi Anyona V W.J.J. Kenya Construction Company Limited (2022) eKLR.
12. On the other issue, and without prejudice to submissions on the issue above, Counsel submits that the application and the cause of action is time barred. Counsel has relied on Sections 87 and 90 of the *Employment Act* to the effect that all matters or actions concerning employment and labour relations shall be filed and commenced within three years of the cause of action crystalizing. Counsel argues that the award in this matter was made and communicated by the director to the Respondent on 22nd September, 2016 and hence the period of three years within which the Applicants ought to have acted expired sometimes in 2019. Counsel has cited Richard Akama Nyambane V ICG Matauro Spa (2020) eKLR in support of his submission.
13. For the foregoing reasons, counsel for the Respondent insists that the PO is merited on the two fronts, one for lack of jurisdiction of this court, and two for the application being time barred and prays that the same be dismissed with costs.

III. SUBMISSIONS BY COUNSEL FOR THE APPLICANTS

14. The Applicants are opposed to the PO and their Counsel has submitted that this court has the jurisdiction to adopt and enforce the award of the director. Counsel has cited Bornface Indolo Luciva V Prime Qualifiers Construction Company Limited & Another (2021) eKLR and Jared Ingling Obuya V Handicap International (2021) eKLR wherein in both decisions Nduma J opined that ELRC has jurisdiction in enforcement of an award by the director based on the provisions of Section 12 of the *Employment and Labour Relations Court Act*.
15. Counsel has submitted that while WIBA has not provided for a mechanism and procedure through which an award by the director may be enforced, in case of an employer who fails, refuses, and or neglects to settle an award, it would be unfair and unjust to deny the employee so awarded the fruits of the award and let the employer get away with such blatant injustice. Counsel has cited Richard Akama Nyambane V ICG Maltauro SPA (2020) eKLR, Edwin Songoroh & Another V Amony Koech Yatich & Another (2021) eKLR, and Virginia Wangari Muita V Nyoro Construction Limited (2020) eKLR in advancing the argument that this court has the requisite jurisdiction in enforcing the awards made by the director based on the provisions of Section 87 of the *Employment Act*.
16. On the other issue on whether this application and action is time barred counsel has submitted that there is no time limitation within which the award by the director is to be enforced. It is submitted that Section 90 of the *Employment Act* does not apply.
17. Counsel argues that while time starts running once the Respondent is made aware of the award, the Respondent has not disclosed when it was notified or became aware of the award and as such it is not



possible to assess how much time has gone by since the award became enforceable. In support of this argument counsel has cited *Elijah Kisyanga Ndende V Manager Zakhem International Construction Ltd (2022) eKLR*.

18. On the basis of the foregoing, Counsel for the Applicants submits that the PO is not properly taken out and that the same should be dismissed with costs and have the application allowed with costs.

IV. ISSUES FOR DETERMINATION

19. The PO by the Respondent as argued by counsel raises two issues and Counsel on both sides agree that the issues for determination are –
- a. Does this court (ELRC) possess the requisite jurisdiction to enforce an award made by the director under the WIBA?
 - b. Is the application (action) by the Applicants herein time barred under Section 90 of the *Employment Act* or indeed any other law?
 - c. Is the PO as raised by the Respondent meritorious?
 - d. Who meets the costs?

V. JURISDICTION

20. No court has any business making or issuing orders in a matter over which it has no jurisdiction and such a court labours in vain and such orders are mere nullities – See *Owners of the Motor Vessel “Lilian S” V Caltex Oil (Kenya) Ltd (1989)*.
21. A proper PO raises matters or point(s) of law that if properly and successfully argued should dispose of a cause or the matters or issues in controversy or contest between the parties - See *Mukhisa Biscuits Manufacturing Limited V West End Distributors Ltd (1969) EA 696*, *Oraro V Mbaja (2005) eKLR* and, *JN & 5 Others V Board of Management of St. George School Nairobi & Another (2017) eKLR*.
22. The ELRC is created as a special court under Article 162(2) of *the Constitution* and established under the *Employment and Labour Relations Court Act*. The jurisdiction of the court is spelt out in Section 12 of that Act as follows –

12. Jurisdiction of the Court

- (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including –
 - (a) disputes relating to or arising out of employment between an employer and an employee;
 - (b) disputes between an employer and a trade union;
 - (c) disputes between employers’ organization and a trade union’s organization;
 - (d) disputes between trade unions;
 - (e) disputes between employer organisations;



- (f) disputes between an employer's organization and a trade union;
- (g) disputes between a trade union and a member thereof;
- (h) disputes between an employer's organization or a federation and a member thereof;
- (i) disputes concerning the registration and election of trade union officials; and
- (j) disputes relating to the registration and enforcement of collective agreements.

23. Further, Section 87 of the [Employment Act](#) provides as follows –

87. Complaint and jurisdiction in cases of dispute between employers and employees

(1) Subject to the provisions of this Act whenever—

- (a) an employer or employee neglects or refuses to fulfill a contract of service; or
- (b) any question, difference or dispute arises as to the rights or liabilities of either party; or
- (c) touching any misconduct, neglect or ill-treatment of either party or any injury to the person or property of either party, under any contract of service, the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Industrial Court.

(2) No court other than the Industrial Court shall determine any complaint or suit referred to in subsection (1).

(3) This section shall not apply in a suit where the dispute over a contract of service or any other matter referred to in subsection (1) is similar or secondary to the main issue in dispute.

24. The foregoing provisions of the law on the jurisdiction of this court are clear on the exclusive jurisdiction of this court on matters employment and labour relations. Article 165(5)(b) of [the Constitution](#) excludes the High Court, and indeed all other courts, from encroaching on the exclusive jurisdiction of this court. Parties aggrieved by the decisions from this court shall appeal to the Court of Appeal.

25. Section 52(2) of the WIBA gives this court the jurisdiction to hear and determine appeals against an award made by the director.

26. However, WIBA does not provide for the procedure or mechanism through which the award of the director shall be enforced in case the employer does not appeal to this court but fails, refuses, or neglects to settle the award. This aspect of the law has been a source of conflicting decisions from this court



- (ELRC) on whether the court has jurisdiction to enforce such an award. Some of the conflicting decisions have been cited above as availed by counsel for the parties.
27. Some of the Judges in this court have held that the court can only interact with the award if the decision of the director is challenged in court by way of an appeal, while others have held that this court has jurisdiction to entertain and indeed hear and determine a cause or action for enforcement of such an award. I deliberately adopt and subscribe to the latter view.
28. Essentially, an award made by the director is in resolution of an employment and labour dispute or claim. It is a process in settlement of an employment or labour dispute or issue between an employer and an employee. The director in making an award performs a quasi-judicial function and the parties to that process cannot approach the court without exhausting that process as such premature move would be in conflict with the doctrine of exhaustion and in contravention of Section 16 of the WIBA which is in the following terms –
16. Substitution of compensation for other legal remedies. No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.
29. While it is correct that WIBA does not provide for the procedure and or mechanism for enforcement of an award of the director, it is illogical and unjust to argue that an employee whose award has been neglected or denied by an employer, who has not appealed against the award, has no remedy in law. There can be no legal wrong without a legal remedy. Some courts have argued that the award by the director should be enforced in a lower court (magistracy) so that a dissatisfied party may appeal to this court (ELRC). As noted above, some courts, and this court takes this school of thought, have held that this court has jurisdiction to enforce the award.
30. There is no obscurity in this issue. An employer or an employee who is dissatisfied with the award of the director and who elects to pursue the issue beyond the director shall follow the procedure as provided for in Sections 51 and 52 of WIBA culminating in an appeal against the award to this court. Logically, such an appeal shall be attacking the legality of the award in as many ways as one can fathom including such aspects as to whether the Claimant was an employee, the nature and extent of injury, the quantum of the award, etc.
31. On appeal this court may either uphold the award or set it aside or give such orders as it may deem lawful in the circumstances. The crux of the matter then becomes, if the court upholds the award or varies it in whatever way or manner but nonetheless there is an award subsisting, is the court not clothed with the jurisdiction to enforce that decision? Would it make any legal or logical sense to return the award to the director and submit that the court has no jurisdiction in enforcing the award of the director that it has upheld or only varied? The answer to these rhetorical questions, in my considered view, is that the court would have jurisdiction to enforce the award.
32. Where the award is not appealed, as it happened in this matter, and the employer fails, refuses, and or neglects to settle the same, the employee has a right to approach the court for enforcement of the award by way of an application or a cause. The award, if not challenged and or appealed against as provided for by the law, becomes a debt due and payable arising from an employment relationship. I entertain no doubts in my mind that this court (ELRC) has jurisdiction to hear and determine such a cause based on Section 12 of the *Employment and Labour Relations Court Act* and Section 87 of the *Employment Act*.



33. The jurisdiction of this court to hear and determine an appeal challenging an award by the director should not be confused or married with the jurisdiction of this court to hear and determine matters and issues of employment and labour relations as provided for in the sections of the law cited in the preceding paragraph. For avoidance of doubt, a decision made by ELRC in its original and exclusive jurisdiction is appealable to the Court of Appeal and no prejudice would be suffered by a party who is dissatisfied with the judgment of the court in enforcement of an award which award has not been appealed against.
34. I find no merits in the argument advanced that the enforcement of awards made by the director should be filed in the Magistrates' Courts and only come to ELRC on appeal. An award that has not been appealed against becomes a debt founded on an employment relationship and this court has both original and exclusive jurisdiction over the same.
35. For all the foregoing reasons this court agrees with the holding by Nduma J in *Bornface Indolo Luciva V Prime Quantifiers Construction Company Limited* (2021) eKLR and Kitiku J in *Elijah Kisyanga Ndende V Manager Zakhem International Construction Ltd* (2022) eKLR among many other decisions. ELRC has jurisdiction to enforce the awards by the director where the award is not challenged by way of an appeal and the employer fails, refuses, and or neglects to settle the award after expiry of the time allowed for lodging such an appeal.
36. On the first issue on jurisdiction, therefore, the PO is declined.

VI. IS THE ACTION TIME-BARRED?

37. Section 90 of the [Employment Act](#) provides as follows –
 90. Notwithstanding the provisions of section 4(1) of the [Limitation of Actions Act](#) (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.
38. The above provision leaves no doubt that matters concerning employment and labour relations shall be filed within three years from the date that the cause of action arose. This is the law on time limitation in regard to all matters pertaining to the jurisdiction of this court as delineated under Article 162(5) of [the Constitution](#) and Section 12 of the [Employment and Labour Relations Court Act](#).
39. Counsel for the Respondent has vehemently argued that this claim is time-barred under Section 90 of the [Employment Act](#) and hence even if this court dismissed the PO on the first issue, this second issue should still deny the Applicants the audience to enforce the award in this court. On the other hand, Counsel for the Applicants has argued that there is no time limitation within which an award by the director shall be enforced.
40. The above argument by Counsel for the Applicants is legally flawed. There is no civil legal action that does not bear a time limit beyond which such action expires. While there is no limitation in time against criminal conduct, all civil actions expire upon lapse of some time as provided for by law. The [Limitation of Actions Act](#) and many other laws, including Section 90 of the [Employment Act](#), are some examples of laws that fix periods within which various legal actions based on various aspects of law shall be filed. Upon expiry of that limited period given, unless the same is legally expanded or extended, any action filed is bound to be time-barred.



41. Section 4(1) of the *Limitation of Actions Act* is ousted by Section 90 of the *Employment Act* in employment and labour relations matters. Hence, even if this court viewed this application as purely an application for enforcement of the award by the director the law is such that the action for enforcement of the award shall be filed within three years from the date that the cause of action arose.
42. The Applicants have not indicated in their pleadings as to when the Respondent became aware or was notified of the award by the director. On the other hand, the Respondent also has not availed any evidence as to when it became aware of the award. There is also no evidence of a formal demand from the Applicants to the Respondent demanding settlement of the award. However, there is filed on record by the Applicants a copy of a letter dated 22nd September, 2016 from the County Occupational Safety and Health Officer, Nakuru, on behalf of the director, addressed to the Respondent demanding the latter to settle the award. This court takes the view and holds that time started running from that date, 22nd September, 2016 and, therefore, the statutory period of three years lapsed on or about 21st September, 2019.
43. The application to enforce the award herein was filed in court on 6th April, 2022. This is way beyond the three years provided for in the law. There is no evidence whatsoever that the time within which to file the same was legally expanded and extended and, in any event, there is no law providing for such expansion or extension of the limited time. There is also no explanation as to why the application was not filed within the limited time notwithstanding that the Applicants were issued with Limited grant of Letters of Administration ad litem on 27th July, 2017 which legally enabled them to pursue the claim right away.
44. For all the foregoing reasons, this court comes to the sad but inevitable conclusion that the application herein was filed out of time and the same is improperly before the court for the action is time-barred. The second limb of the PO is hence upheld.
45. I wish to make the following comment. When an Applicant approaches this court (ELRC) for enforcement of the award of the director, such Applicant should not be asking this court to adopt the award as a judgment of the court as such a prayer is legally and logically flawed. Instead, once an award has been made by the director and an employer fails, refuses, and or neglects to settle the same, without lodging an appeal against such an award in accordance with the law afore-stated, and the period within which to lodge the appeal lapses, the amount in the award becomes due and payable as a civil debt arising from an employment relationship.
46. An Applicant should, therefore, pray that judgment be entered by the court based on the award and the recovery and enforcement of the resulting judgment of the court shall follow the usual execution process. Since there is no specific procedure provided for the same I opine that the action may be commenced by way of an ordinary cause or, as has been the practice, by way of a miscellaneous application.

VII. DETERMINATION

47. For all the foregoing reasons this court finds the application incompetent as the subject matter is statutorily time-barred under Section 90 of the *Employment Act*.
48. Consequently, the Notice of motion by the Applicants dated 14th February, 2022 is hereby dismissed with no order as to costs.
49. Probably, the Respondent may need to consider its moral and social responsibilities and obligations and feel obligated to settle the award which, were it not that this application is time-barred, is actually due and payable to the Applicants. I say no more on this.



VIII. ORDERS

50. This court issues the following orders –

- a. The preliminary objection by the Respondent succeeds partially on the ground that the application and the action herein is statutorily time-barred.
- b. The Notice of motion dated 14th February, 2022 by the Applicants is dismissed as the same was filed out of the time allowed in law.
- c. Each of the parties shall meet own costs.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 29TH DAY OF MARCH, 2023

DAVID NDERITU

JUDGE

RULING

