



REPUBLIC OF KENYA



**Ng'ang'a v County Government of Nakuru (Miscellaneous Civil Application
E007 of 2022) [2023] KEELRC 789 (KLR) (29 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 789 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
MISCELLANEOUS CIVIL APPLICATION E007 OF 2022**

DN NDERITU, J

MARCH 29, 2023

BETWEEN

GEORGE MWAURA NG'ANG'A APPLICANT

AND

COUNTY GOVERNMENT OF NAKURU RESPONDENT

RULING

I. Introduction

1. By way of a Notice of motion dated 30th March, 2022 (the application) the Applicant, through Oumo & Co Advocates, prays for the following –
 1. That for reasons to be recorded this Application be certified urgent, service be dispensed with in the first instance and the Application be heard on a priority basis.
 2. That this Honourable Court be pleased to adopt as a judgment of this court the award of Occupational Safety and Health Officer – Nakuru County as against the Respondent herein.
 3. That judgment be entered for the Applicant against the Respondent for Kshs.372,008/= (Three Hundred Seventy Two Thousand and Eight Shillings Only)being the amount assessed under the *Work Injury Benefits Act*.
 4. That this Honourable Court be pleased to award interest on the amount from the date of assessment until payment in full.
 5. That this Honourable court be pleased to grant any other relief this court may deem fit and just to grant.



6. That costs of this Application be awarded to the Applicant out of time seeking for compensation of injuries suffered by the Applicant in course of his work.
2. The application is expressed to be brought under Article 162(2)(a) of *the Constitution*, Section 12 of the *Employment and Labour Relations Court Act*, and all other enabling provisions of the law. The application is based on the grounds on the face of it and supported with the affidavit of George Mwaura Ng'ang'a, the Applicant, sworn on 30th March, 2022 with several annexures thereto.
 3. Upon receipt of the said application the Respondent, through the County Attorney, filed a notice of Preliminary objection (PO) dated 21st April, 2022 which was received in court on 25th April, 2022 raising the following preliminary issue –
 1. That the Applicant's application to enforce the Director's award of 4th July, 2017 is time-barred pursuant to section 90 of the *Employment Act*, 2007 and denies this court the requisite jurisdiction over the matter.
 4. On 19th April, 2022 this court ordered that the application be heard by way of written submissions and that the PO be subsumed in the said submissions in opposition to the application.
 5. Mr. Kihoro for the Respondent filed his submissions on 25th July, 2022 while Mr. Oumo for the Applicant filed on 11th October, 2022.
 6. As it turned out Counsel for both parties zeroed in on one and only issue raised by the Respondent on whether the claim as espoused in the application is statutorily time-barred. The Respondent did not file a replying affidavit to the application and hence the facts as alluded to by the Applicant remain unopposed and unchallenged.

II. Facts as per The Applicant

7. In the supporting affidavit, the Applicant states that he was an employee of the Respondent for over 38 years until about 7th April, 2015 when he was injured while at work and suffered several fractures of his 5th mandible and 4th and 5th fingers.
8. The Applicant reported the said injury at work to the Directorate of Occupational Safety and Health Services, Nakuru County, whereby upon assessment he was awarded a sum of Kshs.372,008/= in compensation.
9. The said award and a demand for settlement was communicated to the Respondent by the said Directorate *vide* a notice dated 4th July, 2017.
10. The Applicant states that the Respondent has failed, refused, and or neglected to settle the award even after a demand letter was addressed by the Applicant's counsel to the Respondent on 18th March, 2021.
11. The Applicant has among other documents availed to this court a copy of a letter by the Respondent dated 12th July, 2017 addressed to the Claims Manager, Disney Insurance Brokers Ltd, requesting the latter to settle the claim for and on behalf of the Respondent. This letter is an admission on the part of the Respondent that it received the demand notice from the Directorate alluded to above dated 4th July, 2017.
12. It is against the foregoing background that the Applicant has brought this application to court seeking for the prayers set out above, which application has been opposed by the Respondent via the PO alluded to above.



III. Submissions By Respondent's Counsel

13. Counsel for the Respondent submits that the application and the cause of action by the Applicant is statutorily time-barred. Counsel has relied on Section 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 Directorate to the Respondent on 4th July, 2017 and hence the period of three years within which the Applicant ought to have acted expired sometimes in 2020. Counsel has cited *Richard Akama Nyambane V ICG Matauro Spa* (2020) eKLR in support of his submission.
14. For the foregoing reason, Counsel for the Respondent insists that the PO is merited on the ground that the application is statutorily time-barred and prays that the same be dismissed with costs.

IV. Submissions By Counsel for The Applicant

15. The Applicant is opposed to the PO and his Counsel has submitted that this court has the jurisdiction to adopt and enforce the award of the director. Counsel has cited Section 4(1)(e) of the *Limitation of Actions Act* (Cap 22) as the law applicable to the claim by the Applicant and insisted that the Applicant had a period of six years within which to enforce the award from the date that the award was communicated to the Respondent on 4th July, 2017. Without elaboration, counsel argues that what the Applicant is seeking is an equitable relief.
16. On the basis of the foregoing, Counsel for the Applicant submits that the PO is not properly taken out and that the same should be dismissed with costs and have the application heard on merits. Notwithstanding that the court directed that Counsel submit both on the application and the PO Counsel has said nothing on the merits of the application except that the application should be heard on merits.

V. Issues for Determination

17. The application and PO by the Respondent as presented to court raise the following issues for determination –
 - 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 Applicant 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?

VI. Jurisdiction

18. 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].
19. A proper PO raises a matter(s) 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 *Mukbisa 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.



20. 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.

21. 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.
22. The foregoing provisions of the law on the jurisdiction of this court are clear on the exclusive and original 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 appeal to the Court of Appeal.
23. Section 52(2) of the WIBA gives this court the jurisdiction to hear and determine appeals against an award made by the director.
24. 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 an award.
25. 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 the award. I deliberately adopt the latter view.
26. Essentially, an award made by the director is in resolution of an employment or 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 employer'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.
27. 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. 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 such an award.



28. 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 in 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 whether the Claimant was an employee, the nature and extent of injury, the quantum of the award, etc.
29. On appeal this court may either uphold the award or set it aside or give such orders as it may be deemed 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 or modified? The answer to these rhetorical questions, in my considered view, is that the court would have jurisdiction to enforce the award.
30. 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 this 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.
31. 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 and alluded to 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.
32. I find no merits in the argument advanced in many causes of this nature that the enforcement of awards made by the director should be filed in the magistrate' courts and only come to ELRC on appeal. An award that has not been appealed becomes a debt founded on an employment relationship and this court has both original and exclusive jurisdiction over the same.
33. 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.

VII. Is The Action Time-barred?

34. 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 of or in the case



of continuing injury or damage within twelve months next after the cessation thereof.

35. 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*.
36. On the one hand, Counsel for the Respondent has vehemently argued that this claim is time-barred under Section 90 of the *Employment Act*. On the other hand, Counsel for the Applicant has argued that the time limitation within which an award by the director shall be enforced is to be found under Section 4(1)(e) of the *Limitation of Actions Act*. Counsel insists, without any elaboration or authenticity, that what the Applicant is seeking is an equitable relief. *Black's Law Dictionary* defines equitable relief or equitable remedy to mean "A remedy, usually a non-monetary one such as an injunction or specific performance, obtained when available legal remedies usually monetary damages, cannot adequately redress the injury". Clearly, what the Applicant is seeking is not an equitable remedy but enforcement of a monetary award.
37. The above argument by Counsel for the Applicant is legally flawed. Section 4(1) of the *Limitation of Actions Act* is ousted by Section 90 of the *Employment Act* as far as employment and labour relations matters are concerned. 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.
38. The Applicant has not indicated in his 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. However, there is filed on record by the Applicant a copy of a demand notice dated 4th July, 2017 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, 4th July, 2017 and therefore, the statutory period of three years lapsed on or about 3rd July, 2020.
39. The application to enforce the award herein was filed in court on 31st March, 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 or 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.
40. For all the foregoing reasons, this court comes to the sad but inevitable conclusion that the application herein and the cause of action was filed out of time and the same is improperly before the court for the action is time-barred. The PO is meritorious and hence upheld.
41. 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.
42. 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.

VIII.Determination

43. 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*.
44. Consequently, the Notice of motion by the Applicants dated 30th March, 2022 is hereby dismissed with no order as to costs.
45. 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 Applicant. I say no more on this.

IX. Orders

46. This court issues the following orders –
 - a. The preliminary objection by the Respondent succeeds on the ground that the application and the action herein is statutorily time-barred.
 - b. The Notice of motion dated 30th March, 2022 by the Applicant is dismissed as the same was filed out of the time allowed in law.
 - c. Each of the parties shall meet own costs.

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

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DAVID NDERITU

JUDGE

