



REPUBLIC OF KENYA



KENYA LAW
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**Kitoo v Apex Steel Limited (Cause E868 of 2021)
[2023] KEELRC 528 (KLR) (3 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 528 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E868 OF 2021
BOM MANANI, J
MARCH 3, 2023**

BETWEEN

NICHOLAS MBUVI KITOO CLAIMANT

AND

APEX STEEL LIMITED RESPONDENT

RULING

Introduction

1. The Claimant is an employee of the Respondent having been employed on 2nd May 2017 as a Tongsman. The Claimant alleges that on 22nd October 2019 he suffered injury whilst on duty when a steel rod hit his left hand.
2. It is the Claimant's case that the Respondent did not report the accident to the Director of Occupational Safety and Health (the Director) as required under the [Work Injury Benefits Act](#) (WIBA). The Claimant was thus forced to make a report of the accident through his Advocates' letter dated 8th January 2021. Despite this report, the Director has failed to act on the matter forcing the Claimant to institute these proceedings through which he seeks compensation for the injuries he sustained.
3. The Respondent has opposed the claim. Immediately upon being served with the pleading, the Respondent intimated its objection to the court's jurisdiction to hear the case.

Preliminary Objection

4. As stated above, the Respondent has filed a Notice of Preliminary Objection resisting the court's jurisdiction to entertain the claim. The objection is premised on the WIBA. It is the Respondent's case that the Claimant ought to have presented his claim before the Director under the WIBA. According to the Respondent, the court has no original jurisdiction to entertain the case. It can only entertain an appeal from the decision of the Director under section 52 (2) of the WIBA.



5. On his part, the Claimant argues that since the Respondent did not report the accident and the Director has failed to act on the Claimant's report about the suit accident, this court has power to intervene to ensure that justice is rendered to the parties. According to the Claimant non-action by the Director on the Claimant's report about the accident amounts to a decision that is capable of triggering an appeal to this court under section 52 (2) of the WIBA.

Analysis

6. It is not in doubt that under the WIBA, the first port of call whenever an employee seeks compensation for work injuries or occupational diseases is the Director's office. The Claimant avers that the Respondent failed to report the suit accident to the Director's office in order to trigger the Director's jurisdiction to process compensation. Consequently, the Claimant took up the matter and made the report. Unfortunately, the Director has failed to act on the report and hence the suit.
7. A reading of the WIBA leaves no doubt in my mind that the jurisdiction of this court to entertain work injury and occupational disease claims arises only after the Director has examined the claims and pronounced himself on them. The jurisdiction of the court, in the premises, is appellate in nature. The court has no original jurisdiction over these claims.
8. That the above is the legal position is self evident from the wording of sections 51 and 52 of the WIBA. Section 51 of the Act 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. And section 52 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. The above provisions set out in detail, the procedure to be followed in processing a challenge to the Director's award in an injury or occupational disease claim before an appeal is ultimately lodged with the court. First, the party aggrieved by the Director's decision must lodge with him an objection to the decision within sixty (60) days of the decision. The Director must then determine the objection and communicate his decision to the parties in writing within fourteen (14) days of receiving the objection. If any of the parties to the action is still aggrieved by the decision, he may lodge an appeal with the court within thirty (30) days of receipt of the Director's communication.
11. A reading of the entire WIBA suggests that work injury and occupational disease claims must first be lodged with the Director. There is no provision allowing a claimant to approach the court to adjudicate



on the claims in its original jurisdiction. The WIBA prohibits the processing of these claims in a manner not prescribed in the Act. This includes attempting to process the claims through the ordinary courts exercising their original jurisdiction. In particular, section 16 of the Act provides as follows:-

“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.”

12. The Claimant argues that what he has filed is an appeal against the Director’s decision. In the Claimant’s view, the Director’s silence in the face of the Claimant’s letter reporting the suit accident is in itself a decision that would trigger an appeal under section 52 (2) of the WIBA.
13. This court has had the opportunity to address a similar issue in Elrc Cause No E693 of 2021 Ezekiel Ombaso Onchieku China Communications Construction Company Limited (unreported). In the case, the court observed as follows on what constitutes a decision by the Director under the WIBA:-

“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.

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.

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.

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.”

14. As observed in the above decision and as rightly pointed out by counsel for the Respondent, the Director’s decision under the WIBA that is capable of triggering an appeal under section 52 (2) of the Act must be a positive pronouncement after evaluation of the objection lodged by one of the parties to the dispute. As such, the non-action by the Director on the Claimant’s Advocates’ letter cannot, in my humble view, be construed as a decision by the Director.
15. The above being the position, the court must come to the inevitable conclusion that the action by the Claimant has been filed without the benefit of a decision of the Director contrary to express directions under sections 51 and 52 of the WIBA. As was observed by the Supreme Court in *Law Society of Kenya v Attorney General & another* [2019] eKLR, the jurisdiction of the Employment and Labour Relations Court to entertain work injury and occupational disease claims under section 52 (2) of the WIBA is by way of appeal from the Director’s decision.
16. The Claimant suggests that if the court were to reach the conclusion that the claim is premature for want of a decision by the Director, this will render him remediless. I do not think so. As was pointed



out in the Law Society of Kenya v Attorney General & another [2019] eKLR, the court retains its supervisory jurisdiction over the office of the Director under the WIBA. Therefore, any party who feels aggrieved by the inaction of the Director is at liberty to take out Judicial Review proceedings to compel him to discharge his statutory mandate.

Determination

17. The upshot is that the court holds that this claim has been filed in contravention of sections 51 and 52 of the WIBA. The court's jurisdiction has been wrongly invoked. Accordingly, the claim is struck out with costs to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 3RD DAY OF MARCH, 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

