



**Mwooni (Suing as her own behalf and on behalf of the Estate of the Late  
Mwendwa Mwooni Mwanzia - Deceased) v Coast Bus Limited (Miscellaneous  
Application E072 of 2022) [2023] KEELRC 1266 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1266 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
MISCELLANEOUS APPLICATION E072 OF 2022**

**M MBARŪ, J  
APRIL 27, 2023**

**BETWEEN**

**BELTAN KAMENE MWOONI ..... APPLICANT  
SUING AS HER OWN BEHALF AND ON BEHALF OF THE ESTATE OF THE  
LATE MWENDWA MWOONI MWANZIA - DECEASED**

**AND**

**COAST BUS LIMITED ..... RESPONDENT**

**RULING**

1. The applicant filed the miscellaneous application herein on October 31, 2022 seeking to enforce the award of the Director of Occupational Safety and Health Services (the Director) made on November 2, 2016. The respondent, Coast Bus Limited filed notice of preliminary objections on November 24, 2022 on the grounds that;
  1. The instant application is bad in law, inept, pessimi exempli as it offends the mandatory provisions of section 90 of the *Employment Act*.
  2. The subject application is statutorily time barred and should thus be struck out in limine.
  3. The application should therefore be struck out with costs.
2. Both parties attended court and agreed to address the objections made by way of written submissions.
3. The respondent submitted that a preliminary objection on a point of law should be addressed instantly as held in the case of *Mukisa Biscuits Manufacturers Company Limited v West End Distributors* (1969) EA; *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited* (1989) and the instant objections are brought under the provisions of section 90 and 87 of the *Employment Act*, 2007 (the



- Act) which grants this court the jurisdiction to hear and determine disputes between employers and employees.
4. Section 90 of the Act is stated in mandatory terms that claims under the Act should be lodged within 3 years from the date the cause of action arose notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act* as held in *Richard Akama Nyambane v ICG Maltauro Spa* [2020] eKLR that under section 51 and 52 of the *Work Injury Benefits Act* (WIBA) upon the director making an injury assessment under the *Occupational Safety and health Act* there is no enforcement mechanism and the practice has been to apply the provisions of section 89 of the Act since WIBA has no set procedure. Hence pursuant to the provisions of section 87 of the Act, all claims premised on employment and labour relations are regulated under section 90 of the Act. section 87 and 90 read together, the cause of action herein being an award of the director rendered on August 11, 2015 is sought to be enforced after 7 years which is a period of over more than 3 years contemplated under section 90 of the Act.
  5. In the case of *Elijah Kisyanza Ndende v Manager Zabkem International Construction Limited* [2022] eKLR the court held that where a director's award is not objected to under section 51(1) of WIBA, without stating the date of the subject award, the court cannot tabulate the time so as to rely on the provisions of section 90 of the Act which is a crucial element of any claim in employment and labour relations. Before enforcing a director's award under WIBA, time starts running from the date of such award.
  6. In this case, the director's award was made on November 2, 2016 and since, the applicant did nothing to enforce the same until the instant application was filed on October 31, 2022 contrary to the provisions of section 90 of the Act and the application should be dismissed with costs.
  7. In response, the applicant submitted that on November 2, 2016 the director determined that the deceased was entitled to Kshs 1,080,000 and hence the suit was finalised as of such date. since WIBA has no enforcement mechanism, there is no limitation. Section 4(4) of the *Limitation of Actions Act* provides that judgment may be executed within 12 years from the date it was delivered and the ruling of the director is such judgment only pending enforcement as herein done. The 12 years' period has not lapsed.
  8. The respondent has not settled the award made by the director since the year 2016 and such amounts to continuing injury under the provisions of section 90 of the Act as held in *George Hiram Ndirangu v Equity Bank Limited* [2015] eKLR.
  9. The delay in filing the application herein was caused by the respondent who upon learning of the award by the director failed to pay until the applicant visited the labour office when she learnt that her deceased father had been awarded Kshs 1,080,000 but there was no payment. The respondent then asked the applicant to submit her certificate of dependency after which the insurers were notified but there has been no payment necessitating the instant application. The delay in not enforcing the director's award is explained and should not be visited against the applicant and the objections made should be dismissed with costs.

### **Determination**

- 10 Under section 90 of the Act, it is mandatory that any action or proceedings based or arising out of the Act or relating to a contract of service should be instituted in court within 3 years from the date the cause of action arose.
11. As correctly submitted by the respondent, the applicant herein is seeking to enforce the director's award dated November 2, 2016 which arose out of work injury and regulated under WIBA.



12. It is not in despite that the deceased was an employee of the respondent who suffered work injury and death which was assessed by the director and an award made on November 2, 2016 and the applicant identified as the dependant. The award was served upon the respondent by the director on June 29, 2022.
13. To the application, the applicant has also attached letter dated June 29, 2022 by the respondent forwarding the award notice to Nomura Insurance Brokers Limited and indicating that;
  - ... please find attached a letter ... from county occupational health and safety officer, together with copy certificate of dependency and Dosh/Wiba 5B form for execution. ...
14. The notice of the director to the respondent is dated October 5, 2022 requiring the respondent to pay the applicant within 90 days within the provisions of section 26(4) of WIBA.
15. The gist of section 26 is that, a work injury must be reported immediately to the director by an employer, and if there is no report, the employee or the dependant is at liberty to make/lodge a report with the director. Upon such a report, the director is required to within 12 months after the date of injury/accident or death address a claim for compensation. Such compensation should be based on an investigation of the accident or injury or death and the awarded compensation be paid within 90 days.
16. As demonstrated above, the respondent has knowledge of the accident and demise of its employee. In this regard, section 27 of WIBA requires that;
  27. Lapse of right to benefits
    - (1) A right to benefits in accordance with this Act shall lapse if the accident is not reported to the employer within twelve months after the date of such accident.
    - (2) Notwithstanding the provisions of subsection (1), the failure to report an accident to an employer as required in subsection (1) is not a bar to compensation if it is proved that the employer had knowledge of the accident from any other source.
    - (3) Subject to section 26, failure to report an accident to an employer as required in subsection (1), or any error or inaccuracy in such a notice, is not a bar to compensation if—
      - (a) the employer is not or would not be seriously prejudiced by such failure, error or inaccuracy if notice is then given or the error or inaccuracy is corrected; or
      - (b) if such failure, error or inaccuracy was unforeseeable or was caused by the employee's absence from Kenya. *emphasis and underline added*].
17. With the death of the employee on April 6, 2015 the director noted the report and an assessment was undertaken with an award of compensation on November 2, 2016 which was sent to the respondent through Post Office Box 82414 Mombasa.
18. The director's assessment was based on a report lodged by the respondent on April 7, 2015 and copied to Nomura Insurance Brokers indicating that Mwendwa Mwooni Mwanzia a loader of the respondent suffered work injury and death on April 6, 2015.
19. The respondent has therefore been aware of the matter and demise of its employee the late Mwendwa Mwooni Mwanzia since lodging the claim with the director, the assessment and compensation award was brought to the attention of the respondent by the director and this award has not been settled within the meaning of WIBA.



20. Such non-payment of an award by the director can therefore not be bound by the timelines under section 90 of the Act as the same should and ought to be addressed within the provisions of WIBA as the applicant has herein done. Such clarity with regard to payment of compensation for work injury or death is addressed under section 16 of WIBA that;
21. 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. [underline added].
22. The rationale in my view is aptly addressed by the Supreme Court in the case of *Law Society of Kenya v Attorney General and COTU* petition No 4 of 2019 that;
- ... this court should consider the *Constitution* 2010's provisions to help deduce whether or not the impugned provisions, when read alongside the purpose of WIBA would assist in bringing clarity and justice to the issues in contest. In doing so, a plain reading of section 16 of the Act would reveal that its intention is not to limit access to courts but to create a statutory mechanism where any claim by an employee under the Act is subjected, initially, to a process of dispute resolution starting with an investigation and award by the director ...
- 23 Accordingly, the objections that the application is time barred pursuant to the provisions of section 90 of the Act and that it should be struck out addressed above is without merit and is hereby dismissed. The court will hear the applicant's application dated October 26, 2022 on the merits.

Each party shall bear own costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 27TH DAY OF APRIL, 2023.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet Muthaine

