



**Mohammed v Dreamline Express Limited (Miscellaneous Application
70 of 2022) [2023] KEELRC 1368 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1368 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION 70 OF 2022**

**AK NZEI, J
MAY 31, 2023**

BETWEEN

FAIZ ABDALLA MOHAMMED APPLICANT

AND

DREAMLINE EXPRESS LIMITED RESPONDENT

RULING

1. The Application before me is the Applicant’s Notice of Motion dated October 21, 2022, expressed to be brought under Sections 87 and 90 of the Employment Act 2007 and Rule 17 of the Employment and Labour Relations Court (Procedure) Rules 2016. The Applicant prays:-
 - a. that this Court adopts as its judgment the award of the Director of Occupational Safety and Health Officer made on November 4, 2019.
 - b. that judgment be entered against Respondent for the sum of ksh 2,417,400 with interest at the rate of 14% per annum from November 4, 2019 until payment in full.
 - c. that costs of the application be provided for.
2. The application is predicated on the supporting affidavit of Faiz Abdalla Mohammed sworn on October 21, 2022. It is deponed in the said affidavit:-
 - a. that the Applicant was employed by the Respondent as a driver as from July 2012, earning ksh. 51,000 per month and that on December 29, 2016, the Applicant was involved in an accident which caused him severe injuries, as a result of which he was hospitalized until January 2017.
 - b. that the matter was reported to the Director of Occupational Safety and Health Services (DOSH) who gave Dosh Form 1 that was filled by the Respondent and the doctor.



- c. that on November 4, 2019, the Director of Occupational Safety and Health services assessed the Applicant's compensation at Ksh 2,417, 400.
 - d. that the Respondent did not object to or appeal against the decision of the Director of Occupational Safety and Health Services as required by the law, and that the award stands unchallenged.
3. Documents annexed to the Applicant's said supporting affidavit included Dosh Form 1, Dosh/Wiba 4 and letters by Mombasa County Occupational Safety and Health Officer dated September 29, 2021, November 12, 2021 and January 19, 2022 reminding the Respondent to pay the assessed award.
4. According to the Dosh/Wiba Form 4 annexed to the Applicant's Supporting affidavit as already stated in this Ruling, the Applicant's permanent incapacity was assessed at 40% while compensation payable was assessed at ksh. 2,417,400. The assessment is shown to have been done on November 4, 2019, and the Dosh/Wiba 4 is addressed to the Respondent herein. The letters (reminders) mentioned in paragraph 3 of this Ruling are shown to have been send to the Respondent subsequent to the Dosh/Wiba 4.
5. The application is shown to have been served on the Respondent on October 25, 2022, as there is an affidavit of service in that regard. The Court's record shows that November 15, 2022, the Firm of Nzamsa Sankale & Company Advocates filed a Notice of Appointment of Advocates as acting for the Respondent in this matter. On November 16, 2022, a second Notice of Appointment of Advocates was filed by Kokul, Fozah and Partners as acting for the Respondent. On January 17, 2023, the said Firm filed a Notice of Change of Advocate, taking over contact of the matter herein from Nzamsa Sankale and Company Advocates, and also filed a Notice of Preliminary Objection dated January 17, 2023 stating:-
 - a. that orders sought in the application dated October 21, 2022 to have the purported award adopted as judgment is not tenable in a miscellaneous application, that the same be struck out with costs in limine.
6. On November 16, 2022, Counsel for the Respondent sought, and was granted fourteen days by this Court to file the Respondent's response to the application. The Court further directed that the application be canvassed by way of written submissions, with the Applicant filing his submissions within ten days of being served with the Respondent's response to the application and the Respondent filing written submissions with ten days of being served with the Applicant's written submissions.
7. The Respondent did not file any response to the application, and on January 17, 2023, the Applicant filed his written submissions. On January 18, 2023, the Respondent was granted by this Court seven more days to file and serve response to the application and written submissions, but did not file either a response to the application or written submissions. An application by the Respondent on 6th February for seven more days to file documents as earlier directed by the Court was declined. The Court fixed the application for Ruling, with three days' leave to the Respondent to file written submissions. The Respondent did not file any submissions, either within the three days given or at all.
8. I will treat the Respondent's Preliminary Objection, which does not raise a pure point of law as set out in *Mukisa Biscuits Manufacturing Co Ltd vs West End Distributors Limited* [1969] EA 696, as the Respondent's ground of opposition to the application.
9. Before determining the Applicant's application, I deem it appropriate to address the issue of whether this Court has jurisdiction to entertain and to determine the Applicant's application.



10. This Court stated as follows in *Milicent Akinyi Odhiambo & Another vs Quale Holdings Ltd T/a Guyana Guest House* [2022] eKLR:-

“ 13. In interrogating the issue of whether this Court has jurisdiction to enforce the Director’s decision that was not objected to by the Respondent pursuant to Section 51 of *WIBA*, the provisions of Section 16 and 51 of the said Act must be considered.

Section 16 of the *Work Injury Benefits Act* provides as follows:-

“ no action shall lie by any 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.”

14. Section 23 of the said *Act* provides as follows:-

“(1) after having received notice of an accident or having learned that an employee has been injured in an accident, the director shall make such enquiries as are necessary to decide upon any claim or liability in accordance with this Act.

(2) an enquiry made under subsection (1) may be conducted concurrently with any other investigation.

(3) an employer or employee shall, at the request of the director, furnish such further particulars regarding the accident as the director may require.

(4) a person who fails to comply with the provisions of Subsection (3) commits an offence.

15. It is evidently clear from the foregoing Section of the *WIBA* that determination of liability and assessment of compensation payable thereon in work injury claims is the preserve of the Director of Occupational Safety and Health Services and that this Court does not have primary and/or original jurisdiction over these two issues.”

11. Section 23 of the Act is specific that the Director shall make such enquiries as are necessary to decide upon claim or liability in accordance with the Act. Determination of liability and assessment of damages payable in work injury claims is the preserve of the Director. The foregoing statute (*WIBA*) expressly takes away the Court’s jurisdiction to deal with the two years.

12. On whether this Court can enforce the Director’s award that has not been objected to and/or appealed against pursuant to Section 51 of the *Work Injury Benefits Act*, I recently stated as follows in *Amir Swaleh Omar Vs Mackenzie Maritime [ea] Limited* [2022] eKLR:-

“ 17. The Act (*WIBA*) is silent on how the awards of compensation made by the Director in favour of employees involved in occupational accidents or who suffer occupational diseases are to be enforced. At the same time, the Act



does not expressly divest this Court of jurisdiction to enforce such awards; and especially where the award of compensation by the Director has not been objected to and the employer has refused to pay the assessed compensation. Did parliament intend that an employee caught up in such a situation would be left at the mercy of an employer who may choose either to pay or not to pay the assessed sum? I do not think so.

18. What would be the purpose of the Director making or undertaking inquiries in order to determine the issue of liability and proceeding to assess the compensation payable if the compensation assessed by the Director was not meant to be paid to the injured employee? In my view, once the Director assesses the compensation payable and the same is not objected to pursuant to Section 51 of the *WIBA*, the assessed sum becomes the injured employee's right and entitlement regarding which the employee can move to Court and seek enforcement of that right by seeking entry of judgment in terms of the Director's assessment, and issuance of a decree which can then be executed to realize that right.
19. Indeed, failure by an employer to pay a demanded compensation that has been assessed by the Director and to which no objection has been lodged creates a dispute over a liquidated claim, which this Court can entertain and determine. Article 50(1) of the *Constitution* of Kenya 2010 provides:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court, or if appropriate, another independent and impartial tribunal or body.”

13. The foregoing position holds valid in the present case. This Court, in my view, has jurisdiction to enforce the Director's award. On the procedure to be adopted in moving this Court to enforce the Director's award, filing of an application by way of a miscellaneous cause would, in my view, be the most appropriate procedure as the Court's role is limited to enforcing an already determined award. This would accord with this Court's principal objective of facilitating the just, expeditious, efficient and proportionate resolution of disputes. Rule 38 of the *Employment and Labour Relations Court (Procedure) Rules* 2016 provides that this Court may, subject to the Rules, regulate its own procedure. A litigant who files a substantive claim seeking enforcement of the Director's award will, however, not be driven away from the seat of justice, as long as he or she is simply asking the Court to enforce the Director's valid award that has not been objected to and/or appealed against pursuant to Section 51 of the *Work Injury Benefits Act* (WIBA). This answers to the Respondent's ground of opposition.
14. This Court stated as follows in the Millicent Akinyi Odhiambo case (*supra*):-
 - “ 18 ...This Court has jurisdiction regarding enforcement of the Director's decision, but the Court cannot interrogate and/or determine any issues of liability between the employer and the employee which either of them may attempt to place before this Court for determination. Such matters ought to have been raised with the Director in accordance with the provisions of the *Work Injury Benefits Act*.”
15. Having said that, and having considered submissions filed by the Applicant, the Notice of Motion dated October 21, 2022 is hereby allowed in the following terms:-



- a. the award of the Director of Occupational Safety and Health Services dated November 4, 2019 is hereby adopted as a Judgment of this Court.
- b. accordingly, judgment is hereby entered for the Applicant against the Respondent for ksh 2,417,400 being the compensation assessed by the Director of Occupational Safety and Health Services. A decree shall issue accordingly.
- c. Interest on the judgment sum will be calculated at Court rates from the date of this Ruling.
- d. The Applicant is awarded costs of these proceedings.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 31ST MAY 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

..... for Applicant

..... for Respondent

