



**Injera v Tradewinds Aviation Services Limited (Miscellaneous Application  
E212 of 2022) [2023] KEELRC 1325 (KLR) (11 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1325 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
MISCELLANEOUS APPLICATION E212 OF 2022  
NZIOKI WA MAKAU, J  
MAY 11, 2023**

**BETWEEN**

**WILLYS INJERA ..... APPLICANT**

**AND**

**TRADEWINDS AVIATION SERVICES LIMITED ..... RESPONDENT**

**RULING**

1. The applicant seeks through the notice of motion application dated December 1, 2022 for the court to adopt as a judgment the award by the directorate of occupational safety and health officer of Kshs 448,984.62, interest and costs. The application is supported by the affidavit dated 1<sup>st</sup> December and a further affidavit dated March 21, 2023 of Mr Willys Injera the applicant. The applicant asserts that he is a former employee of the respondent and that he sustained injuries on May 5, 2020 while discharging his duties with the respondent.
2. The respondent is opposed and filed a replying affidavit dated February 6, 2023 and a further replying affidavit dated April 14, 2023 sworn by Mr Samwel O. Obindo. The respondent asserts the applicant was its former employee and that he was injured while on duty. The respondent and its insurer were not content with the 10% permanent disablement and subjected the applicant to a second medical examination. The second report indicated the permanent disability was 5% and issued a new DOSH Form dated October 12, 2022 with the new assessment. The respondent has since paid the sum of Kshs 136,000/- as assessed in the second DOSH Form.
3. The matter was disposed of by way of submissions.

**Applicant's Submissions**

4. The applicant submits that it is not disputed that his injuries were medically assessed to result to a 10% permanent disablement by the Director of Occupational Health and Safety (DOSHS) and a demand notice for payment of Kshs 448,984.62 dated August 23, 2021 was issued to the respondent, but was



yet to be paid when he filed the instant application. That section 26(4) and (6) of the Work Injury Benefits Act (hereinafter “the WIBA”) provides as follows:

- 26(4) An employer or insurer against whom a claim for compensation is lodged by the director under this section, shall settle the claim within ninety days of the lodging of the claim. (emphasis by applicant)
- (6) An employer or insurer who fails to pay the compensation claimed under this subsection commits an offence and shall on conviction be liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding one year or to both.
5. He submits that according to the Act, since the demand of payment was sent to the respondent on August 23, 2021, payment was supposed to be made on or before November 22, 2021. That the respondent having not paid is in violation of section 26(6) of the WIBA and should face the consequences for non-compliance. The applicant further submits that sections 51 and 52 of the WIBA provide as follows:
- 51(1) 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.
- (2) 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.
- 52(1) 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.
- (2) An objector may, within thirty days of the director’s reply being received by him, appeal to the industrial court against such decision. (emphasis by applicant)
6. It is the applicant’s submission that the respondent has not placed before this court any proof whatsoever to indicate that it lodged an objection in the prescribed format with the DOSH within sixty days from August 23, 2021. That in the absence of such proof, the respondent’s dissatisfaction with the decision of August 23, 2021 remains just that, a dissatisfaction that is unactionable. Consequently, the sum assessed by the DOSH became payable to the applicant herein upon the lapse of the sixty days. Furthermore, the respondent’s contention that it subjected the applicant to a second medical examination and was subsequently issued with a different demand dated October 12, 2022 is an illegal venture not backed up by any legal provisions, and should be treated with contempt. On these submissions, the applicant relies on the case of Stephen Wangusi Nyongesa v Dot.Com Bakery Limited [2022] eKLR wherein Nzei J. observed as follows in the ruling:

“The applicant annexed to the supporting affidavit referred to in paragraph 2 of this ruling a copy of form DOSH/WIBA4 containing the Director’s assessment and award. The said assessment is dated February 26, 2020. The respondent did not object to the assessment pursuant to section 51 of the WIBA. The sum assessed by the Director, Kshs 724,802 became payable to the applicant upon the lapse of sixty days from the date of the assessment. The same is payable, and must be paid by the respondent to the applicant unless the same is shown to have been paid to the applicant.

Any process outside of the statute that is shown to have been undertaken, either by the respondent or its agents and/or insurers to the disadvantage of the applicant regarding the



assessment and award made by the Director of Occupational Safety and Health Services was an outright illegality, which this court cannot sanction.” (emphasis by applicant)

7. It is the applicant’s submission that the second medical examination was done in contravention of section 25(1) of the WIBA as the medical practitioner designated by the employer was not approved by the DOSH to conduct such examination. Further, that the respondent’s allegation that it paid him periodical payments as under section 28 of the WIBA is inapplicable and misleading because the said provision only applies in cases where an employee suffers temporary total or partial disablement due to an accident. That having suffered 10% permanent disablement, section 28 of the WIBA does not apply to his case.
8. The applicant submits that it is apparent that the respondent must therefore pay him the correctly assessed compensation of Kshs 448,984.62 unless the same is shown to have been paid. He urges the court to uphold the doctrine of precedent and be guided by case law of similar facts by finding that the actions of both the respondent and the director in issuing a different demand dated October 12, 2022 is an outright illegality that will not be sanctioned by court. That it is in the interest of justice that this court adopts as a judgment the award of the DOSH dated August 23, 2021 as prayed.

### **Respondent’s Submissions**

9. The respondent submits that it has since paid Kshs 136,800/= being the only amount payable to the claimant as per the DOSH form 4 dated October 12, 2022, arising from the 5% permanent disablement assessed by the director in the second medical examination. It is the respondent’s submission that it directed the applicant to undergo a second examination pursuant to section 25(1) of the WIBA, which the claimant did on September 14, 2021. That it is noteworthy that the applicant has not refuted in his pleadings that he was subjected to a second medical examination. That section 25(1) of the WIBA provides as follows:

An employee who claims compensation or to whom compensation has been paid or is payable, shall when required by the director or the employer as the case may be, after reasonable notice, submit himself at the time and place mentioned in the notice to an examination by the medical practitioner designated by the director or the employer with the approval of the director.

10. The respondent submits that the applicant’s allegations that the new DOSH Form 4 was obtained irregularly, unprocedurally and illegally and that it should be disregarded is therefore misleading and stated in bad faith. This is because the same was obtained legally pursuant to the medical report dated September 15, 2022 and the applicant did not file any objection or appeal against the director’s decision. That the applicant should be estopped from raising issue with the issuance of the new form before this court due to lack of jurisdiction.
11. The respondent submits that the sum of Kshs 175,384.62 in respect of the temporary incapacity is unpayable by dint of section 28(4) of the WIBA which provides as follows:

An employee is not entitled to receive a periodical payment during any period in which the employee is receiving full pay, as provided for in the *Employment Act*, or any other law or contract of service. (emphasis by respondent)
12. It submits that it has adduced exhibits marked “SOO-3(1-24” being the applicant’s payslips that show he received full pay as per the employment agreement, meaning he was and is not entitled to receive periodical payment by dint of section 28(4) above. That if the said amount is awarded, it will amount



to double enrichment as the claimant was duly paid his full salary all through until his resignation. That this position was also communicated to the DOSH through the letter dated January 20, 2023. Furthermore, the claimant did not adduce any evidence showing that the alleged lung complication was associated with the injuries sustained from the accident as alleged in his affidavit.

13. Under the *Work Injury Benefits Act*, 2007 (hereafter 'WIBA') where a party disputes an assessment, the Director of Occupational Safety and Health must be involved. Section 25 of WIBA provides as follows:-

25. (1) An employee who claims compensation or to whom compensation has been paid or is payable, shall when required by the Director or the employer as the case may be, after reasonable notice, submit himself at the time and place mentioned in the notice to an examination by the medical practitioner designated by the director or the employer with the approval of the director. (emphasis by the court)

14. The second assessment does not seem to have followed this part of the law and as such is invalid for not according with the statutory provisions of WIBA. As there is a DOSH Work Injury Evaluation Panel or Clinic that the Director can avail at the industrial area, the applicant should present himself within the next two weeks for an evaluation by the doctors the director will empanel. The level of disability and the computation of the amount payable for said disability will be undertaken by the County Officer in charge of Nairobi at the DOSH offices in Nairobi. The report of the assessment shall be filed by both parties within 21 days of my ruling after which settlement of the sums due will run from the date of assessment. the filing will only be for purposes of completion of the record of the court. The respondent having failed to follow the law in obtaining the secondary assessment will meet the costs of this application which I assess at Kshs 30,000/- only.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 11<sup>TH</sup> DAY OF MAY 2023**

**NZIOKI WA MAKAU**

**JUDGE**

