



**Muchika v Al-Barakat Agency Ltd (Miscellaneous Application
E007 of 2023) [2023] KEELRC 1588 (KLR) (22 June 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1588 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E007 OF 2023**

**AK NZEI, J
JUNE 22, 2023**

BETWEEN

CAMELYNE AKHONYA MUCHIKA APPLICANT

AND

AL-BARAKAT AGENCY LTD RESPONDENT

RULING

1. Before me is the applicant's notice of motion dated February 6, 2023, expressed to be brought under article 50(1) of the [Constitution of Kenya](#) and sections 87 and 90 of the [Employment Act](#). The Applicant seeks the following orders:-
 - a. That this Court adopts as its judgment the award of the Director of Occupational Safety and Health services made on October 28, 2021.
 - b. That judgment be entered for the Applicant against the Respondent for the sum of Kshs 2,983,488 plus interest at Court rates.
 - c. That costs of the application be provided for.
2. The application sets out on its face the grounds upon which it is brought. These grounds are replicated in the Applicant's affidavit sworn on February 6, 2023 in support of the application. It is deponed in the said affidavit:-
 - a. That the Applicant is the widow and legal representative of the late Evans Juma Mukweyi (hereinafter referred to as the deceased), having been granted letters of administration ad litem for purposes of instituting the present application.
 - b. That the deceased died in the course of employment with the Respondent after sustaining severe injuries on October 20, 2021.



- c. That the Respondent reported the matter to the Director of Occupational Safety and Health Services (Director) vide a letter dated October 25, 2021.
 - d. That on October 28, 2021, the Director assessed the deceased's permanent incapacity at 100% and the amount of compensation payable to the Applicant at Kshs 2,983,488.
 - e. That the Respondent did not object to or appeal against the Director's decision as by law required, and has not paid the assessed compensation.
 - f. That this Court has unlimited original and appellate jurisdiction on disputes relating to employment and labour relations pursuant to Article 162(2) (a) of the [Constitution of Kenya](#).
3. Documents annexed to the said supporting affidavit include a death certificate, a certificate of dependency, limited grant of letters of administration ad litem, duly filled Dosh Form 1, the Respondent's letter dated October 25, 2021 forwarding Dosh Form 1 to the Director, Dosh/WIBA 4 dated October 28, 2021 duly filled and signed by the Director (assessing the deceased's decree of permanent incapacity at 100% and payable compensation at Kshs 2,983,488, and the Director's letter to the Respondent dated November 30, 2021 asking the Respondent to settle the assessed compensation.
 4. The application and a hearing notice are shown to have been served on the Respondent. The Respondent is not shown to have filed any documents in response to the application, which as a result is unopposed.
 5. It is crucial for this Court to first address the issue of whether or not it has jurisdiction to 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](#) (WIBA). I stated as follows in [Amir Swaleh Omar v Mackenzie Maritime \[E.A\] 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 intent 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.”

6. The foregoing position is similar to the situation in the application herein. It is my finding that this Court has jurisdiction to enforce the Director’s award. In Millicent Akinyi Odhiambo & Another v Quale Holding Limited T/a Guyana Guest House [2022] eKLR, I stated as follows:-

“ 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 23 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 inquiry 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 Sections 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.

16. Section 23 of the Act is specific that the Director shall make such enquiries as are necessary to decide upon any claim or liability in accordance with the Act. Determination of liability and assessment of damages payable in work injuries claims is therefore strictly within the statutory domain of the Director, as the statute expressly takes away the Court’s jurisdiction to deal with the same.”



7. I find merit in the Applicants application dated February 6, 2023, and I allow the same in the following terms:-
- a. The award of the Director of Occupational Safety and Health Services dated October 28, 2021 is hereby adopted as a judgment of this Court.
 - b. Accordingly, judgment is hereby entered for the Applicant against the Respondent for Kshs 2,983,488. A decree shall issue forthwith.
 - c. Interest on the judgment sum shall be calculated at Court rates from the date of this Ruling.
 - d. The Applicant is awarded costs of this application.
8. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 22ND JUNE, 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:

N/A for Applicant

N/A for Respondent

