



**Mwangi (Suing on Behalf of the Estate of James Gathendi Mwangi - Deceased)
v Sea-Link Logistics Contractors & Manpower Ltd (Miscellaneous Application
E049 of 2022) [2023] KEELRC 1443 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1443 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E049 OF 2022**

AK NZEI, J

JUNE 15, 2023

BETWEEN

**NANCY MUTHONI MWANGI (SUING ON BEHALF OF THE ESTATE OF
JAMES GATHENDI MWANGI - DECEASED) APPLICANT**

AND

SEA-LINK LOGISTICS CONTRACTORS & MANPOWER LTD RESPONDENT

RULING

1. The application before me is the applicant's notice of motion dated June 21, 2022, expressed to be brought under sections 87 and 90 of the *Employment Act* and rule 17 of the *Employment and Labour Relations Court (Procedure) Rules* 2016. 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 26/8/2020.
 - b. that judgment be entered for the applicant against the respondent for the sum of ksh. 2,304,000 plus interest at court rates.
 - c. that the costs of the application be provided for.
2. The application is based on the supporting affidavit of the applicant, Nancy Muthoni Mwangi, sworn on June 21, 2022. It is deponed in the said affidavit:-
 - a. that the applicant is the mother and legal representative of James Gathendi Mwangi (hereinafter referred to as the deceased), who died in the course of his employment with the Respondent.
 - b. that the deceased was employed by the Respondent until 31/7/2020 when a fertilizer hopper accidentally fell and hit him, causing his death.



- c. that on 26/8/2020, the Director of Occupational Safety and Health services assessed the deceased's injury at 100% incapacity and the compensation payable to the Applicant at ksh. 2,304,000.
 - d. that the Respondent did not object to or appeal the Director's decision within 90 days as by law required, and has not paid the assessed sum or any part thereof.
 - e. that the Director wrote several letters to the Respondent reminding them to pay the awarded sum, but the Respondent never responded to the said letters.
 - f. that this Court has unlimited original and appellate jurisdiction in disputes relating to employment and labour relations pursuant to article 162 (2) (a) of *the Constitution*, and has jurisdiction to adopt the Director's award (as its judgment) for purposes of execution.
 - g. that the claim has been brought within the three years' time frame set under section 90 of the *Employment Act*.
 - h. that refusal by the respondent to pay the sum awarded by the Director amounts to an injustice to the applicant, hence the application herein.
3. Documents annexed to the applicant's supporting affidavit include a certificate of death on the deceased, a limited grant of letters of administration ad litem issued to the Applicant by the Chief Magistrate's Court (Mombasa) on 14/6/2022, a filled Dosh Form 1 duly signed and stamped by the Respondent, Dosh/wiba 4 duly filled and signed by the Director on 26/8/2020 (assessing the deceased's decree of incapacity at 100% and payable compensation at ksh. 2,304,000), and the Director's letters to the Respondent dated 15/9/2020, 3/3/2021 and 23/6/2021 respectively.
 4. The application and subsequent court process are shown to have been served on the respondent by registered post pursuant to this court's ruling delivered on December 13, 2022. The respondent is not shown to have filed any response to the application, which stands unopposed.
 5. On whether this court 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 -vs- Mackenzie Maritime [e.a] Limited* [2022] eKLR:-

“ 17. 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.”

6. The foregoing position holds valid in the present application, and it is my finding that this court has jurisdiction to enforce the Director's award. I stated as follows in *Millicent Akinyi Odhiambo & Another -vs- Quale Holdings Limited T/a Guyana Guest House* [2022] eKLR:-

“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*.”

7. On the procedure to be adopted in moving the court to enforce the Director's award, I recently stated as follows in *Faiz Abadlla Mohamed -vs- Dreamline Express Limited* [2023] eKLR:-

“13....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 award that has not been objected to and/or appealed against pursuant to section 51 of the *Work Injury Benefits Act* (WIBA)...”

8. Consequently, and having considered written submissions filed by Counsel for the applicant, I find merit in the applicant's application dated June 21, 2022 and I allow the same in the following terms:-
- a. the award of the Director of Occupational Safety and Health Services dated 26/8/2020 is hereby adopted as a judgment of this Court.
 - b. accordingly, judgment is hereby entered for the Applicant against the Respondent for the sum of ksh. 2,304,000 being the compensation assessed by the Director of occupational Safety and Health Services on 26/8/2020. A decree shall issue accordingly.
 - 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 these proceedings.



DATED, SIGNED AND DELIVERED AT MOMBASA THIS 15TH 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

