



**Mwangi v Unilever Kenya Limited (Miscellaneous Application
E172 of 2022) [2023] KEELRC 1475 (KLR) (8 June 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1475 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E172 OF 2022**

BOM MANANI, J

JUNE 8, 2023

BETWEEN

JEREMIAH MWANGI APPLICANT

AND

UNILEVER KENYA LIMITED RESPONDENT

RULING

Introduction

1. The parties to this action had an employer-employee relation until January 31, 2019 when the applicant is said to have retired. During the currency of the relation, the applicant alleges that he suffered injury whilst on duty for which he seeks to be compensated. It would appear that the matter was taken up by the Director of Occupational Safety and Health Services (the director) who on April 16, 2019 made a tentative award of three million six hundred and six thousand and nine decimal six zero Kenya shillings (Ksh 3,606,009.60) to the applicant.
2. The record shows that despite notice of the tentative assessment, the respondent declined to remit the amount recommended to the applicant. The position taken by the respondent was that there was no accident at the workplace which occasioned the applicant the alleged injuries for which he was seeking compensation. As a result, the claim was not payable.

Enforcement Proceedings

3. Aggrieved by the respondent's reluctance to make good the tentative award, the applicant has moved this court through this miscellaneous application seeking to have the director's recommendation adopted as a judgment of the court. The intention is to enable him secure an executable order.
4. The respondent has opposed the application. Besides maintaining that there was no injury to the applicant to warrant the assessment, the respondent's counsel submits that the award is in any event



time barred in terms of section 90 of the Employment Act. Therefore, this court cannot grant the prayers sought.

Analysis

5. I have considered the contrasting positions by the parties to the action. Regarding whether the claim is time barred, I am of the view that it is not.
6. After the alleged injury to the applicant, the matter was lodged with the director. The director filled ML/Doshi/Wiba/Form 4 dated April 16, 2019 setting out the proposed compensation to the applicant.
7. The proposal was thereafter forwarded to the respondent who was to either accept or reject it to enable further evaluation of the matter. Indeed, the aforesaid form required the respondent to consider the proposal and if in agreement with it to sign Dosh/Wiba/5A/B. The latter form is indicative of the employer's agreement to settle the claim.
8. Apparently, the respondent did not accede to the proposal. By its letter dated July 24, 2019, the respondent expressed its objection to the tentative award. From the record, the main reason for the respondent's position was that there was no accident that would have entitled the applicant to claim compensation.
9. It appears from the record that in reaction to the respondent's aforesaid objection, the Director wrote a letter dated August 26, 2019 by which he asked for the respondent's response to certain issues on the claim. This response was to have been made within 14 days of the director's inquiry so that the matter could be processed further. There is no evidence that the respondent reacted to this letter.
10. The tentative proposal by the director having been rejected by the respondent never crystallized. The respondent did not sign Dosh/Wiba/5A/B to signify its concurrence with the director's award. Therefore, the matter remained pending awaiting finalization by the director. Indeed, this is evident from the director's letter of August 1, 2022 through which he indicated that he was yet to make a decision on the matter to warrant an appeal under sections 51 and 52 of the Work Injury Benefits Act (WIBA).
11. There being no final decision by the Director on the compensation payable, it cannot be argued that time for enforcement of the award began running from April 16, 2019 when the Director made his proposal to the respondent. The fact that the respondent objected to the proposal *vide* its letter of July 24, 2019 meant that the question of compensation remained unresolved by the Director. To close the assessment after receipt of the respondent's objection, the director was required under section 52(1) of WIBA to issue a new recommendation either upholding his initial proposal or varying it. To date, there is no evidence that this has been done. Therefore, there has not been a final director's award under section 52(1) of WIBA to enable time to start running for purposes of the law on limitation of actions.
12. The situation would have been different if the respondent had not lodged an objection to the director's proposal. such non-objection would have implied acceptance by the respondent of the director's tentative award whether or not the respondent signed Dosh/Wiba/5A/B. In the circumstances, time would have begun running from April 16, 2019 for purposes of the law on limitation of actions.
13. The second issue for consideration is whether there is an award that is capable of adoption by this court. As earlier pointed out, the respondent objected to the director's award of April 16, 2019. The objection is said to have been lodged on July 24, 2019.



14. Section 51 of the WIBA contemplates that objection to the director's tentative award be presented within sixty days of his decision. In my view, the sixty days period within which to lodge the objection begins to run from the date of communication of the director's initial decision to the parties. This is either the date of postage of the decision to the parties' last known postal or email address or the date it is physically delivered to them.
15. Although the director's tentative proposal is dated April 16, 2019, there is no indication when it was delivered to the respondent. Thus, the court cannot conclude that the objection by the respondent was lodged outside sixty days of the award as required by law. In the absence of evidence on the date the tentative award was served on the respondent, the court presumes that the objection of July 24, 2019 was lodged within sixty days of the respondent receiving the director's initial decision.
16. Under section 51 of WIBA, this objection re-opened the matter for further evaluation. Upon the objection being lodged, the Director was bound by section 52(1) of WIBA to pronounce himself afresh on the matter. It is this second pronouncement that would then be either the subject of an appeal under section 52(2) of the WIBA or enforcement proceedings under section 87 of the *Employment Act* as read with section 12 of the *Employment and Labour Relations Court Act*. From the record, it appears that the Director has not rendered his decision on the objection. This is evident from his letter to the applicant dated August 1, 2022.
17. The tentative award having been re-opened through the respondent's objection of July 24, 2019, it did not crystallize. It would only have crystallized upon the director's decision on the objection. Therefore, there is no final award that this court can adopt.

Determination

18. In view of the above findings, it is the court's view that the current application has been filed prematurely there being no final award by the director. In the premises, the tentative award of April 16, 2019 cannot be adopted by this court as yet. This can only happen after the director pronounces himself on the respondent's objection in terms of section 52(1) of the WIBA.
19. The court is cognizant of the timelines within which the director is required to act on the objection filed before him. However, the mere failure to observe these timelines cannot be a reason for the court to consider the tentative award as having matured for adoption. In view of the objection lodged to the initial award by the respondent, only the director's revised award under section 52(1) of the WIBA will be amenable to enforcement proceedings. The party aggrieved by the director's inaction in respect of the pending objection ought to move the court by way of judicial review motion to compel the director to discharge his statutory mandate.
20. I therefore terminate this matter and remit it back to the director to issue his determination on the respondent's pending objection of July 24, 2019 to enable the parties determine their next course of action. I direct that this decision be served on the director for his further action.
21. I make no order as to costs.

DATED, SIGNED AND DELIVERED ON THE 8TH DAY OF JUNE, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Applicant



.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

