



**Okupa v Welding Alloys Limited (Cause E501 of 2021)
[2023] KEELRC 1765 (KLR) (24 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1765 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E501 OF 2021**

JK GAKERI, J

JULY 24, 2023

BETWEEN

OFUYO JAIRO OKUPA CLAIMANT

AND

WELDING ALLOYS LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced the instant suit by a Statement of Claim filed on 24th June, 2021 stating that he was employed by the Respondent as a driver and was injured while off-loading oxygen gas cylinders and was treated.
2. The Claimant avers that he notified the Respondent who notified the Director of Occupational Safety and Health Services (DOSHS) on 1st April, 2019 and on 27th November, 2019, the DOSHS made an award of Kshs.2,924,757.04 which the Respondent did not challenge or appeal against and has refused to pay.
3. The Claimant seeks;
 - a. An order that the Award by the Director of Occupational Safety and Health of Occupational Safety and Health Services issued on 27th November, 2019 in favour of the Claimant in the sum of Kshs.2,924,757.04 be adopted as a judgement of this court against the Respondent.
 - b. Interest on (a) from 27th November, 2019 at court rates till payment in full.
 - c. Costs of this cause.
 - d. Such other relief as the Honourable Court may deem fit to grant.



Respondent's Case

4. In its Memorandum of Response, the Respondent avers that the claim herein is brought in bad faith, is false and was based on misrepresentation of facts. It avers that the Claimant was injured while acting outside the scope of his job description and was largely or solely to blame as he was careless.
5. The Respondent further avers that the DOSHS award is inordinately high and the Respondent shall make an application for another assessment.
6. That the Claimant did not serve the Respondent with the DOSHS/WIBA form after the assessment and it was thus impossible for it to raise any objection to the assessment.
7. That the Respondent shall make an application to challenge the award out of time.

Claimant's Evidence

8. In his written statement, the Claimant admits that he was injured while helping in the off-loading of gas cylinders as he was employed as a driver.
9. That he was treated in various hospitals and was awarded Kshs.2,924,755.04 and his incapacity was assessed at 58%.
10. On cross-examination, the witness confirmed that he was injured on 14th September, 2018 and was employed as a driver and notified the employer by word of mouth on 1st April, 2019.
11. The Respondent did not adduce any evidence. Counsel informed the court that he had no witnesses.

Claimant's Submissions

12. Counsel for the Claimant submitted that the Respondent was served with the award but did not challenge it.
13. Counsel did not provide the date of service of the award or how it was effected.
14. Counsel acknowledges that the *Work Injury Benefits Act*, 2007 (herein after *WIBA*, 2007) has no enforcement mechanism for awards made by the DOSHS as held in *Ruth Wambui Mwangi & another V Alfarah Wholesalers Ltd* (2017) eKLR.
15. Counsel relied on Section 87 of the *Employment Act* to urge that only the Employment and Labour Relations Court had the mandate to deal with a matter primary or secondary to the main issue and this applied to work-related injuries and the suit was not an appeal and none had been filed.
16. Reliance was also made on Rule 4 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* on the mode of commencement of suits.
17. The sentiments of the court in *Ruth Wambui Mwangi & another V Alfarah Wholesalers Ltd* (*Supra*) were relied upon to buttress the submission.

Respondent's Submissions

18. Counsel isolated a singular issue for determination, namely; whether the court has jurisdiction to enforce awards made by the DOSHS.
19. Counsel submitted that neither the *WIBA*, 2007 nor the *Employment and Labour Relations Court Act*, 2007 had a provision which allowed the court to enforce compensatory awards of the DOSHS,



- as Section 52 of *WIBA*, 2007 empowered the court to deal with appeals from the DOSHS hence the court had no jurisdiction to enforce awards of the DOSHS.
20. Counsel submitted that there was a lacuna on how awards made by the DOSHS should be enforced as *WIBA* does not vest jurisdiction on any court.
 21. Reliance was made on the sentiments of the Supreme Court in *Samuel Kamau Macharia & another V Kenya Commercial Bank Kenya Ltd & 2 others* (2012) eKLR that a court of law derives its jurisdiction from the Constitution or an Act of Parliament or both.
 22. Reliance as also made on the sentiments of the Supreme Court in Interim *Independent Electoral Commission (Applicant) Constitutional Application No. 2 of 2011* on the centrality of jurisdiction, as were the sentiments of Rika J. in *Lameck Nyakundi Anyona V W.I.J Kenya Construction Co. Ltd* (2022) eKLR to urge that the court had no jurisdiction to enforce awards made by the DOSHS.
 23. The sentiments of this court in *Benson Kungu V Uzuri Foods Ltd* were also relied upon. In that case, the court declined to adopt the assessment by the DOSHS on the premise that it had no jurisdiction under *WIBA*, 2007.
 24. Counsel concludes by underscoring the essence of jurisdiction as elucidated by Nyarangi JA in the *Owners of Motor Vessel "Lillian S" V Caltex Oil (Kenya) Ltd* (1989) eKLR.
 25. Counsel urged the court to dismiss the suit for want of jurisdiction.

Determination

26. It is common ground that the Claimant was an employee of the Respondent having been engaged as a driver and was injured while assisting his colleague(s) unload gas cylinders from a vehicle.
27. Documents on record reveal that the Claimant has been attended to at various hospitals including Kijabe, Bliss GS Health Care Ltd and Clinix Health Care on diverse dates from 18th February, 2018 to 18th December, 2019.
28. It is unclear as to where and when the Claimant received treatment before these dates.
29. Surprisingly, the Claimant did not attach a doctor's report other than prescriptions and copies of receipts.
30. The singular issue for determination is whether the court has jurisdiction to adopt as its judgement the award contained in the DOSHS FORM I dated 27th November, 2019.
31. The form is signed by one Sarah Lozi designated as Senior Occupational Safety and Health Officer, Machakos County.
32. In his submissions, counsel for the Claimant relied on Section 87 of the *Employment Act*, 2007 to urge that this court had jurisdiction to adopt the award of the DOSHS as its judgement. However, counsel cited no specific provision of law which confers jurisdiction on this court to enforce awards made by the DOSHS.
33. Indeed, counsel acknowledged that *WIBA* was reticent on the enforcement of awards made by the DOSHS.
34. In *Ruth Wambui Mwangi & another V Alfarab Wholesalers Ltd* (*Supra*) relied upon by the Claimant's counsel, the court relied on the material presented before it and the Respondent did not oppose the application for the order requiring it to pay the amount awarded by the DOSHS.



35. The court did not address the issue of jurisdiction as it was not raised but acknowledged that the [WIBA](#), 2007 was silent on how the court ought to be approached by a party seeking payment of the award by the DOSHS.
36. The jurisprudence emerging from the Employment and Labour Relations Court on the question of enforcement of awards made by the DOSHS is unsettled.
37. The court is aware of decisions of the court holding that it had jurisdiction to enforce awards made by the DOSHS and others holding that the court had no jurisdiction to do so and both holdings are exceedingly persuasive but dependent on the court's jurisprudential background.
38. It is common ground that the provisions of [WIBA](#), 2007 are silent on who and how awards made by the DOSHS are to be enforced.
39. Whereas under the now repealed *Workmens Compensation Act*, subordinate courts were accorded jurisdiction to determine applications on the compensation awarded, the [WIBA](#), 2007 vests such powers on the DOSHS created by Section 53(1) of the Act.
40. Indeed under Section 53(2)(e) of the [WIBA](#), 2007, one of the mandatory functions of the Director of Work Injury Benefits is to;
- “Ensure that employees who are injured are compensated in accordance with the provisions of the Act.”
41. Under Section 53(3) of the Act;
- The Director of Work Injury Benefits shall be assisted in the performance of the functions specified in sub-section (1) by such other officers as are necessary for the proper administration of the Act.
42. Evidently, the court has no jurisdiction over administrative functions of [WIBA](#), 2007.
43. In the Court's view, neither the drafts person of [WIBA](#), 2007 nor Parliament envisioned a court process in the enforcement of awards made by the DOSHS and none was provided for otherwise than appeals against decisions of the Director.
44. In [Lameck Anyona V W.J.J Construction Co. Ltd](#) (2022), RikaJ. held that;
- “... [Work Injury Benefits Act](#), 2007 read with the [Occupational Safety and Health Act](#), 2007 do not outline the enforcement mechanism and procedure save to address work place injury assessment and award by the Director. It follows therefore that there is no provision of the law in the [Work Injury Benefits Act](#), the [Employment Act](#) and [Labour Relations Court Act](#), or the Employment Act which allows the court to enforce the compensatory awards of the Director of Work Injury.”
45. Part III of the [WIBA](#), 2007 addresses appeals against decisions of the DOSHS after an objection has been made.
46. Section 52(2) of the Act provides that;
- “An objector may, within thirty days of the Directors reply being received by him, appeal to the Industrial Court against such decision.”



47. A plain reading of the provisions of Section 52 of the WIBA, 2007 reveals that only decisions of the DOSHS that have been objected to and a decision made by the Director may be appealed against.
48. The jurisdiction of the Employment and Labour Relations Court under WIBA, 2007 is restricted to appeals exclusively a fact the Court of Appeal acknowledged in Elizabeth Njeri Nderi and Sarah Wangithi Mwangi (suing as legal representatives of Peter Nderi Kinyua (Deceased) V Highway Carriers Ltd (2019) eKLR, an appeal from the High Court where neither the trial court nor the High Court had quantified the amount of compensation due to the appellant.
49. The matter was remitted to the Employment and Labour Relations Court as the appellate court under WIBA, 2007.
50. This reasoning finds support in the sentiments of Rika J. in Lameck Nyakundi Anyona V W.J.I Kenya Construction Co. (Supra) as follows;
- “The Employment and Labour Relations Court jurisdiction in Work Injury Benefits Act, is limited to appeals filed under Section 52(2). There is no other written law, which extends jurisdiction to this court in work injury. If courts exercise jurisdiction to bridge legislative gaps or failure, what prevents the Claimant and other employees coming from the Director with unenforced awards, from approaching the Chief Magistrates Court seized of Employment and Labour Relations jurisdiction for enforcement?”
51. Needless to emphasize and as eloquently put by Nyarangi J. in Owners of Motor Vessel “Lillian S” V Caltex Oil (Kenya) Ltd (Supra),
- “Jurisdiction is everything. Without it, a court has no power to make one more step. . . .”
A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction . . .”
52. Similarly in Samuel Kamau Macharia & another V Kenya Commercial Bank Ltd (Supra), the Supreme Court held;
- “A court’s jurisdiction flows either from or legislation or both. Such a court may not arrogate to itself jurisdiction through the craft of interpretation or by way of endeavours to discern or interpret the intentions of Parliament where the wording of legislation is clear and there is no ambiguity.”
53. The court is bound by and guided by these sentiments.
54. As expressed in Benson Kungu V Uzuri Foods Ltd Misc. Application No. E280 of 2021, this court has heard and determined appeals against decisions of the Director of Work Injury, filed pursuant to the provisions of Section 52(2) of the WIBA, 2007. (See Machini V Safaricom Ltd (2022) eKLR) thus exercising its appellate role as envisaged by the provisions of Section 52(2) of the Act. However, the court has been called upon to enforce the awards of the Director or as is in the instant suit to adopt the Director’s award as a judgement of this court against the Respondent, which would constitute the award a decision of this court for purposes of enforcement and appeal, if any, something analogous to the exercise of original jurisdiction which the provisions of WIBA, 2007 do not confer on the court.
55. For the foregoing reasons, it is the finding of the court that it has no jurisdiction to grant the orders sought and the suit herein is dismissed with no orders as to costs.

It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 24TH DAY OF JULY 2023

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the *Civil Procedure Rules*, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the *Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the *Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

