Muga v Sagala General Construction Limited (Miscellaneous Application E002 of 2023) [2023] KEELRC 1661 (KLR) (6 July 2023) (Ruling)

Neutral citation: [2023] KEELRC 1661 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

MISCELLANEOUS APPLICATION E002 OF 2023

M MBARŨ, J

JULY 6, 2023

BETWEEN

THOMAS ONYANGO MUGA ..... APPLICANT

AND

SAGALA GENERAL CONSTRUCTION LIMITED ..... RESPONDENT

RULING

1 The applicant filed application dated January 10, 2023 seeking for orders that;

1. The court be pleased to adopt as judgment the award of the Directorate of Occupational Safety and Health Officer.

2. This court be pleased to issue a decree in accordance with the assessment of the Directorate of Occupational Safety and Health Officer in the sum of Kshs. 1,248,000 with interests thereon from November 30, 2021 until payment in full.

2 The application is supported by the supporting affidavit of the applicant and on the grounds that on August 12, 2021 while working for the respondent he was injured and admitted at Kilifi County Referral Hospital and later discharged. On September 26, 2021 he reported the accident to the Director of Occupational Safety and health Officer (Director) who assessed his claim for Kshs 1,248,000 and the Director sent a demand to the respondent for payment but there is no payment.

3 In his affidavit, the applicant aver that the Director is allowed under section 26(6) of the *Work Injury Benefits Act*, 2007 (the Act) to direct an employer or insurer who fails to pay compensation claimed under the Act to pay the same together with a fine. An employer should settle a claim within 90 days after there is an assessment of the Director and upon the failure by the respondent, this application is necessary and justified and should be allowed with costs.

4 The respondent only entered appearance and did nothing else.

5 The applicant attended court and for brief oral submissions and confirmed that before filing the application herein, the Director did not serve the respondent, employer with notice.

Determination

6 Despite the respondent filing any responses to the instant application, as a court of record, it is necessary to address the application based on the law.

7 The practice of parties filing application as herein follows due to the Act lacking enforcement mechanisms. The practice has been to move the court as herein done but upon undertaking the due diligence that upon injury at the shop floor, the employee must report to the employer and who should issue notice of the injury to the Director, who then proceeds to assess the injury and an award is made. Where the employer fails to make a report of the work injury, the Act has mechanism on how to address such lapse.

8 Upon the assessment by the Director, notice must issue to the employer with a requirement to pay compensation within 90 days.

10 The gist of section 21 of the Act is to ensure the employee first reports work injury to the employer before proceeding to the Director;

> 21. Notice of accident by employee to employer
>
> Written or verbal notice of any accident provided for in section 22 which occurs during employment shall be given by or on behalf of the employee concerned to the employer and a copy of the written notice or a notice of the verbal notice shall be sent to the Director within twenty-four hours of its occurrence in the case of a fatal accident.

11 Upon compliance as above, this puts in motion the provisions of section 22 of the Act which requires the employer to report the injury through the prescribed forms to the Director; the Director in the prescribed manner within seven days after having received notice of an accident or having learned that an employee has been injured in an accident.

12 The basis of this report forms the core mandate of the director who must assess the injury and allocate the degree of injury and assess the compensation payable upon which, notice must issue to the employer from the Director. The assessment by the Director is based on the employee being subjected to a medical examination in terms of section 25 of the Act.

13 This medical examination is meant to ensure that report that guides the Director in assessing the compensation due to the employee is objective, fair, accurate and sound. This section consequently secures the interests of both employees and employers as held in *Law Society of Kenya v The Hon Attorney General & COTU* petition No 4 of 2019.

14 Before an employee can enforce the award, the employer must be notified in terms of section 26(4) so as to be able to comply with section 26(5) of the Act;

> (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.
>
> (5) The Director shall, within thirty days of receipt of the money claimed under subsection (1), pay the money to the employee who made the claim or his dependants.

15 In this case, the records filed by the applicant and attached to his supporting affidavit are the Directors form under section 24, the medical report and no notice issued in terms of section 26 of the Act. to issue

the orders sought as herein couched will circumvent a crucial step and requirement that the employer should be issued with notice and demand to settle the compensation assessed and if aggrieved, apply the motions of the Act.

16 Accordingly, the instant application is premature for want of addressing the laid down mechanisms under the *Work Injury Benefits Act*, 2007 and is hereby declined. The respondent did not oppose the application. Each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 6 DAY OF JULY, 2023.

M. MBARŨ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and .....