



**Langi v County Government of Nakuru (Miscellaneous Civil Application E038 of 2022) [2023] KEELRC 2155 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2155 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
MISCELLANEOUS CIVIL APPLICATION E038 OF 2022  
DN NDERITU, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**MOSES OUMA LANGI ..... APPLICANT**

**AND**

**COUNTY GOVERNMENT OF NAKURU ..... RESPONDENT**

**RULING**

**I. Introduction**

1. By way of a notice of motion dated 21<sup>st</sup> September, 2022 (the application) the Applicant, through J. Ndung'u Njuguna & Co Advocates, prays for the following –
  1. Spent
  2. That this Honourable Court be pleased to adopt as a judgment of this court the award of the Directorate of Occupation Health and Safety under the *Work Injury Benefits Act* (WIBA) 2007 dated 11<sup>th</sup> January, 2021 and consequently judgment be entered for the Applicant against the Respondent for a sum of Kshs.1,495,968.20/=.
  3. That this Honourable Court be pleased to award interest on the said judgment sum at the rate of 14% Per Annum from 11<sup>th</sup> January, 2021 until payment in full.
  4. That the costs of this Application be borne by the Respondent in any event.
  5. That this Honourable Court be pleased to grant any other orders as it may deem fit.
2. The application is expressed to be brought under Article 162(2)(a) of *the Constitution*, Section 12 of the *Employment and Labour Relations Court Act*, and all other enabling provisions of the law. The application is based on the grounds on the face of it and supported with the affidavit of MOSES OUMA LANGI, the Applicant, sworn on 21<sup>st</sup> September, 2022 with several annexures thereto.



3. Upon receipt of the said application the Respondent, through the County Attorney, filed a notice of preliminary objection (PO) dated 17<sup>th</sup> October, 2022 raising the following preliminary issues –
  1. That this court lacks jurisdiction under the law to hear the application.
  2. That this court’s jurisdiction in Work Injury Benefits Act, is limited to appeals filed under Section 52[2] of the Act only.
  3. That there is no provision in law, in the Work Injury Benefits Act, the Employment and Labour Relations Court Act, or the Employment Act, which allows the Court to enforce the compensatory awards of the Director of Work Injury.
  4. That this courts lacks jurisdiction owing to the pronouncement by the Employment and Labour Relations Court in Nairobi in Lameck Nyakundi Anyona v W.JJ Kenya Construction Company Limited [2022] eKLR.
  5. That the application is bad in law, fatally defective, and an abuse of the court process.
4. On 4<sup>th</sup> October, 2022 the court with the consent of the counsel for both the parties directed that the application be heard by way of written submissions and that the PO be subsumed in the said submissions in opposition to the application.
5. Mr. Kihoro for the Respondent filed his submissions on 17<sup>th</sup> October, 2022 alongside the PO while Mr. Njuguna for the Applicant filed on 26<sup>th</sup> October, 2022.
6. Except for the PO the Respondent did not file a replying affidavit and as such the facts as presented by the Applicant remain unchallenged and uncontroverted.

## **II. Facts As Per The Applicant**

7. In the supporting affidavit the Applicant states the he was an employee of the Respondent when he was injured while at work and suffered serious work-related injury.
8. The Applicant reported the injury to the Respondent and subsequently to the Directorate of Occupational Safety and Health Services (DOSHS), Nakuru County, whereby upon assessment he was awarded a sum of Kshs.1,495,968.20 in compensation and the said award was communicated to the Respondent by the DOSHS on 11<sup>th</sup> January, 2021.
9. The said award and a demand for settlement was communicated to the Respondent by DOSHS vide a notice dated 11<sup>th</sup> January, 2021 alluded to above.
10. The Applicant states that the Respondent has failed, refused, and or neglected to settle the award even after a demand letter was addressed by the Applicant’s counsel to the Respondent on 27<sup>th</sup> July, 2022.
11. It is against the foregoing background that the Applicant has brought this application to court seeking for the prayers set out above, which application has been opposed by the Respondent via the PO alluded to above.

## **III. Submissions By Respondent’s Counsel**

12. Counsel for the Respondent submits that the application should be dismissed for lack of jurisdiction. He submits on lack of jurisdiction as the only issue for determination by the court. Counsel submits that this court lacks the requisite jurisdiction citing Rika J. in Lameck Nyakundi Anyona V W.J.J. Kenya Construction Company Limited (2022) eKLR wherein the learned Judge held inter alia that



this court (ELRC) lacks jurisdiction in adopting and enforcing an award from the Director for there are no statutory or constitutional provisions that assign such jurisdiction to the court.

13. Counsel has submitted that no court should arrogate or grant unto itself jurisdiction that has not been provided for by either *the Constitution*, the statutes, or through established and applicable judicial precedents. In buttressing this argument counsel has cited Samuel Kamau Macharia & Another V Kenya Commercial Bank Limited & 2 Others (2012) eKLR and In the Matter of Advisory opinion No. 2 of 2011, both decisions from the Supreme Court.
14. It is on the basis of the foregoing that the Respondent seeks that this matter be dismissed with costs.

#### **IV. Submissions By Counsel For The Applicant**

15. The Applicant is opposed to the PO and his counsel has submitted that this court has the jurisdiction to adopt and enforce the award of the Director. Counsel has submitted that since the Respondent did not file a replying affidavit the facts as stated by the Applicant are unchallenged and uncontroverted and he has cited Kennedy Otieno Odiyo & 12 Others V Kenya Electricity Generating Company Limited (2010) eKLR.
16. Counsel submits that Article 162(2)(a) of *the Constitution* and Section 12 of the *Employment and Labour Relations Court Act* (ELRC Act) has clothed this court with the requisite jurisdiction to do justice in matters such as this one notwithstanding that the Work Injury Benefit Act (WIBA) has no specific provisions on how an award by the Director should be enforced.
17. Counsel has submitted that once an award by the Director is not challenged or appealed, yet the employer fails to satisfy the same, the employee has a legal right to enforce settlement as there can be wrong without a remedy. However, counsel submits that enforcement does not imply that there is a dispute between the parties as an award has already been made. Counsel submits that this court in its jurisdiction should enforce such settlement otherwise the awardee shall be without remedy and the award rendered otiose.
18. Counsel has cited Virginia Wangari Muita V Nyoro Construction Company Limited (2020) eKLR and Samson Chweya Mwendapole V Protective Custody Limited (2021) eKLR in support of the argument that this court has jurisdiction in adopting the award of the Director as its judgment for purposes of enforcement and or execution.
19. Counsel has distinguished the facts and circumstances of this matter from those that subsisted in Lameck Nyakundi Anyona V W.J.J. Kenya Construction Company Limited (2022) eKLR wherein the Judge referred the matter back to the Director for further deliberations and settlement.
20. It is on the basis of the foregoing that the Applicant prays that the PO be dismissed and that the application be allowed as prayed.

#### **V. Issues For Determination**

21. The application and the PO by the Respondent as argued through the written submissions by counsel for both parties raise the following issues for determination –
  - a. Does this court (ELRC) possess the requisite jurisdiction to enforce an award made by the director under the WIBA?
  - b. Is the PO as raised by the Respondent meritorious?
  - c. Who meets the costs?



## VI. Jurisdiction

22. A court has no business making or issuing orders in any matter over which it has no jurisdiction as such a court labours in vain and such orders are mere nullities – See Owners of the Motor Vessel “Lilian S” V Caltex Oil (Kenya) Ltd (1989).
23. A proper PO raises matters or point(s) of law that if properly and successfully argued should dispose of a cause or the matters or issues in controversy or contest between the parties – See Mukhisa Biscuits Manufacturing Limited V West End Distributors Ltd (1969) EA 696, Oraro V Mbaja (2005) eKLR and, JN & 5 Others V Board of Management of St. George School Nairobi & Another (2017) eKLR
24. The ELRC is created as a special court under Article 162(2) of *the Constitution* and established under the *Employment and Labour Relations Court Act*. The jurisdiction of the court is spelt out in Section 12 of that Act as follows –

### 12. Jurisdiction of the Court

- (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including –
    - (a) disputes relating to or arising out of employment between an employer and an employee;
    - (b) disputes between an employer and a trade union;
    - (c) disputes between employers’ organization and a trade union’s organization;
    - (d) disputes between trade unions;
    - (e) disputes between employer organisations;
    - (f) disputes between an employer’s organization and a trade union;
    - (g) disputes between a trade union and a member thereof;
    - (h) disputes between an employer’s organization or a federation and a member thereof;
    - (i) disputes concerning the registration and election of trade union officials; and
    - (j) disputes relating to the registration and enforcement of collective agreements.
25. Further, Section 87 of the *Employment Act* provides as follows -
    87. Complaint and jurisdiction in cases of dispute between employers and employees
      - (1) Subject to the provisions of this Act whenever—
        - (a) an employer or employee neglects or refuses to fulfill a contract of service; or
        - (b) any question, difference or dispute arises as to the rights or liabilities of either party; or
        - (c) touching any misconduct, neglect or ill-treatment of either party or any injury to the person or property of either party, under any contract of service, the



aggrieved party may complain to the labour officer or lodge a complaint or suit in the Industrial Court.

- (2) No court other than the Industrial Court shall determine any complaint or suit referred to in subsection (1).
  - (3) This section shall not apply in a suit where the dispute over a contract of service or any other matter referred to in subsection (1) is similar or secondary to the main issue in dispute.
26. The foregoing provisions of the law on the jurisdiction of this court are clear on the exclusive jurisdiction of this court on matters employment and labour relations. Article 165(5)(b) of *the Constitution* excludes the High Court, and indeed all other courts, from encroaching on the exclusive jurisdiction of this court. Parties aggrieved by the decisions from this court appeal to the Court of Appeal.
  27. Section 52(2) of the WIBA gives this court the jurisdiction to hear and determine appeals against an award made by the director. However, WIBA does not provide for the procedure or mechanism through which the award of the director shall be enforced in case the employer does not appeal to this court but fails, refuses, or neglects to settle the award. This aspect of the law has been a source of conflicting decisions from this court (ELRC) on whether the court has jurisdiction to enforce an award.
  28. Some of the Judges in this court have held that the court can only interact with the award if the decision of the director is challenged in court by way of an appeal, while others have held that this court has jurisdiction to entertain and indeed hear and determine a cause or action for enforcement of the award. I deliberately adopt the latter view.
  29. Essentially, an award made by the director is in resolution of an employment or labour dispute or claim. It is a process in settlement of an employment or labour dispute or issue between an employer and an employee. The director in making an award performs a quasi-judicial function and the parties to that process cannot approach the court without exhausting that process as such premature move would be in conflict with the doctrine of exhaustion and in contravention of Section 16 of the WIBA which is in the following terms –
    16. Substitution of compensation for other legal remedies

No action shall lie by an 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.
  30. While it is correct that WIBA does not provide for the procedure and or mechanism for enforcement of an award of the director, it is illogical and unjust to argue that an employee whose award has been neglected or denied by an employer, who has not appealed against the award, has no remedy in law. Some courts have argued that the award by the director should be enforced in a lower court (magistracy) so that a dissatisfied party may appeal to this court (ELRC). As noted above, some courts, and this court takes this school of thought, have held that this court has jurisdiction to enforce such an award.
  31. There is really no obscurity in this issue. An employer or an employee who is dissatisfied with the award of the director and who elects to pursue the issue beyond the director shall follow the procedure as provided for in Sections 51 and 52 of WIBA culminating in an appeal against the award in this court.



- Logically, such an appeal shall be attacking the legality of the award in as many ways as one can fathom including such aspects as whether the claimant was an employee, the nature and extent of injury, the quantum of the award, etc.
32. On appeal this court may either uphold the award or set it aside or give such orders as it may deem lawful in the circumstances. The crux of the matter then becomes, if the court upholds the award or varies it in whatever way or manner but nonetheless there is an award subsisting, is the court not clothed with the jurisdiction to enforce that decision? Would it make any legal or logical sense to return the award to the director and submit that the court has no jurisdiction in enforcing the award of the director that it has upheld or only varied? The answer to these rhetorical questions, in my considered view, is that the court would have jurisdiction to enforce the award.
  33. Where the award is not appealed, as it happened in this matter, and the employer fails, refuses, and or neglects to settle the same, the employee has a right to approach the court for enforcement of the award by way of an application or a cause. The award, if not challenged and or appealed against as provided for by the law, becomes a debt due and payable arising from an employment relationship. I entertain no doubts in my mind that this court (ELRC) has jurisdiction to hear and determine such a cause or matter based on Section 12 of the *Employment and Labour Relations Court Act* and Section 87 of the *Employment Act*.
  34. The jurisdiction of this court to hear and determine an appeal challenging an award by the director should not be confused or married with the jurisdiction of this court to hear and determine matters and issues of employment and labour relations as provided for in the sections of the law cited in the preceding paragraph. For avoidance of doubt, a decision made by ELRC in its original and exclusive jurisdiction is appealable to the Court of Appeal and no prejudice should be suffered by a party who is dissatisfied with the judgment of the court in enforcement of an award which award has not been appealed against.
  35. I find no merits in an argument advanced in many a cause of this nature that the enforcement of awards made by the director should be filed in the magistrate' courts and only come to ELRC on appeal. An award that has not been appealed against becomes a debt founded on an employment relationship and this court has both original and exclusive jurisdiction over the same.
  36. For all the foregoing reasons, this court agrees with the holding by Nduma J in *Bornface Indolo Luciva V Prime Quantifiers Construction Company Limited* (2021) eKLR and Kitiku J in *Elijah Kisyanga Ndende V Manager Zakhem International Construction Ltd* (2022) eKLR among many other decisions. ELRC has jurisdiction to enforce the awards by the director where the award is not challenged by way of an appeal and the employer fails, refuses, and or neglects to settle the award after expiry of the time allowed for lodging such an appeal.
  37. I wish to make the following comment. When an applicant approaches this court (ELRC) for enforcement of the award of the director, such applicant should not be asking this court to adopt the award as a judgment of the court as such a prayer is legally and logically flawed. Instead, once an award has been made by the director and an employer fails, refuses, and or neglects to settle the same, without lodging an appeal against such an award in accordance with the law afore-stated, and the period within which to lodge the appeal lapses, the amount in the award becomes due and payable as a civil debt arising from an employment relationship.
  38. An applicant should therefore pray that judgment be entered by the court based on the award and the recovery and enforcement of the resulting judgment of the court shall follow the usual execution process. Since there is no specific procedure provided for the same I opine that the action may be commenced by way of an ordinary cause or, as has been the practice, by way of a miscellaneous



application. The court should not pay undue regard to technicality but should rather be more concerned with the intention and substance rather than the form.

#### **VII. Determination**

39. For all the foregoing reasons this court finds that the notice of motion by the Applicant dated 21<sup>st</sup> September, 2022 is merited and the same is allowed with the orders hereunder. The PO by the Respondent is devoid of merits.

#### **VIII. Orders**

40. The Applicant's notice of motion dated 21<sup>st</sup> September, 2021 has merits and the same is allowed as follows –
- a. Judgment be and is hereby entered in favour of the Applicant as per the award of the Director in the sum of Kshs.1,495,968.20 together with interest thereon at 14% from the date when the award was communicated to the Respondent on 11<sup>th</sup> January, 2021 till payment in full.
  - b. The PO by the Respondent is devoid of merits and the same is hereby dismissed.
  - c. The Applicant is awarded costs of the application.

**DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2023**

.....

**DAVID NDERITU**

**JUDGE**

