



Wanyama v H Young & Co (East Africa) Limited & another (Miscellaneous Cause E121 of 2022) [2023] KEELRC 2183 (KLR) (21 September 2023) (Ruling)

Neutral citation: [2023] KEELRC 2183 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS CAUSE E121 OF 2022
MA ONYANGO, J
SEPTEMBER 21, 2023**

BETWEEN

PREMAS WAFULA WANYAMA APPLICANT

AND

JUBILEE INSURANCE CO LIMITED 1ST RESPONDENT

H YOUNG & CO (EAST AFRICA) LIMITED 2ND RESPONDENT

RULING

1. Vide a Notice of Motion dated 18th August 2022 filed under article 165 of the *Constitution* and rules 28 and 31 of the *Employment and Labour Relations Court Procedure Rules*, 2016, section 26 of the *Work Injury Benefits Act*, and all other enabling provisions of the law, the applicant seeks the following orders against the Respondents.-
 - a. That the honourable court adopts the assessment of the Director of Occupational Safety and Health Services as a judgment of the court.
 - b. That a decree for Kshs. 1,229,011.20 to issue in accordance with assessment of the Director of Occupational Safety and Health Services jointly and severally against the Respondents.
 - c. That a declaration to issue that the Respondents have committed an offence contrary to section 26 (6) of the *Work Injury Benefit Act* for failing to pay the Applicant.
 - d. That the court commits the Directors of the Respondents to one year in jail or fines them Kshs. 500,000 or both.
 - e. That the costs of this application be provided for.
2. The grounds in support of the application are that-
 - a. That the Applicant was an employee of H Young & Co (East Africa) Limited.



- b. That on the 28th of November 2020, the Applicant sustained an injury while working for the Respondent.
 - c. That the Respondent filled a Dosh Form 1 and reported the accident to the Director of Occupation Health and Safety.
 - d. That around 26th April 2022, the Director assessed the compensation due to the Applicant at Kshs. 1,229,011.20.
 - e. That the Applicant served the Respondents with the assessment of the Director of Occupation Health and Safety but no payment has been forthcoming.
 - f. That the Respondents have jointly and severally refused and or neglected to pay the compensation.
 - g. That section 26 (6) of the Work Injury Benefit Act provides that "An employer or an insurer who fails to pay the compensation claimed under this subsection commits an offence and shall on conviction be liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding one year or to both."
 - h. That this situation has necessitated the instant application.
 - i. That it is an equitable legal maxim that no person will suffer a wrong without a remedy.
 - j. That no wrong should be allowed to go without any compensation if it can be redressed by a court of law.
 - k. That article 159 (2) of the Constitution of Kenya provides that justice shall be done to all, irrespective of status.
 - l. That article 159 (2) of the Constitution of Kenya provides that justice shall not be delayed.
 - m. That justice shall be administered without undue regard to procedural technicalities.
 - n. That therefore it is in the interest of justice that this matter be heard expeditiously.
3. The application is further supported by the affidavit of Premas Wafula Wanyama, the applicant in which he depones that he was employed by the 1st Respondent as a driver to the Resident Engineer; that the 1st Respondent held a work injury insurance cover with the 2nd Respondent, that he was involved in an accident while in the cause of employment that resulted in his eye injury in early 2020.
 4. The Applicant depones states that the 1st Respondent reported the accident to the Director of Occupational Safety and Health Services and the injury was assessed at 30% permanent disablement. The Director awarded the Applicant compensation at Kshs. 1,229,011.20.
 5. The Applicant depones that the Respondents have refused or neglected to pay him the assessed sum and he is unable to enforce payment without a decree of this court.
 6. The Applicant avers that the Respondents have not preferred an appeal against the assessment and have at the same time failed to settle the same within the statutory period of 60 days, necessitating the instant application.
 7. Upon service by the Applicant, the 1st Respondent filed a Notice of Preliminary Objection in which it raises the following grounds.
 - a. This court does not have the jurisdiction to hear and determine the instant application/matter.



- b. There is no provision of the law, in the *Work Injury Benefits Act*, the *Employment and Labour Relations Court Act*, or the *Employment Act*, which allows this Court to enforce the compensatory awards of the Director of Work Injury.
 - c. The Appellate Court under section 52 of the *Work Injury Benefits Act*, cannot be the same Court which enforces, the award of Director.
 - d. The only enforcement the Court can exercise its jurisdiction upon, is on Judgments arising out of appeals received by the Court, pursuant to section 52 (2) of the *Work Injury Benefits Act*.
8. The application was disposed of by way of written submissions. Directions were given that the application and the preliminary objection be disposed of together.
 9. The Respondents were granted leave to file response to the application before parties filed submissions. I have not seen any response to the application on record. All the parties however filed submissions.
 10. I will first consider the preliminary objection as it impugns the jurisdiction of the court.
 11. The Respondents contend that this court has no jurisdiction to enforce an award of the Director of Occupational Safety and Health as it's jurisdiction under section 52 of the *Work Injury Benefits Act* is limited to the adjudication of appeals.
 12. Section 52 of the *Work Injury Benefits Act* provides as follows:-
 1. The Director shall within fourteen days after the receipt of an objection in the prescribed form, give a written answer to the objection, varying or upholding his decision and giving reasons for the decision objected to, and shall within the same period send a copy of the statement to any other person affected by the decision.
 2. An objector may, within thirty days of the Director's reply being received by him, appeal to the Industrial Court against such decision.
 13. On the other hand, section 26 of the *Act* provides as follows:
 1. A claim for compensation in accordance with this Act shall be lodged by or on behalf of the claimant in the prescribed manner within twelve months after the date of the accident or, in the case of death, within twelve months after the date of death.
 2. If a claim for compensation is not lodged in accordance with subsection (1), the claim for compensation may not be considered under this *Act*, except where the accident concerned has been reported in accordance with section 21.
 3. If an employer fails to report an accident or to provide information requested by the Director as specified in the request, the Director may—
 - a. conduct an investigation and recover the cost of the investigation from the employer as a debt due from the employer; or
 - b. levy a penalty on the employer. cap. 236 [Rev. 2012] Work Injury Benefits [Issue 1] 14
 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.



6. An employer or an insurer who fails to pay the compensation claimed under this subsection commits an offence and shall on conviction be liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding one year or to both.
14. The fact that the *Work Injury Benefits Act* does not provide for enforcement of the awards of the Director of Occupational Safety and Health Services is evident from the Act. This has been noted by this court in almost every decision where the issue of enforcement of the Director's award has been considered.
15. In *Jared Ingling Obuya v Handicap International* [2021] eKLR the court observed as follow at paragraph 24, 25 and 26 of the Judgment.
24. The *Work Injury Benefits Act* is silent on the manner of enforcement of the decisions by Director DOSH. It is however this Court's finding that it could not have been the intention of the Legislator that beneficiaries of compensation by Director DOSH remain without a remedy in the event an employer does not implement the decision of the Director awarding an employee compensation. The court must bridge the lacuna bring to effect the objects and purpose of the Act as captured in the preamble as follows:
- “ An Act of parliament to provide for compensation to employees for work related injuries and diseases contracted in the course of their employment and for connected purposes”
16. Again in *Samuel Wambua Mbituka v Metro Concepts East Africa Limited & Another* [2021] eKLR, the court observed as follows:-
5. These decisions demonstrate this Court has authority to enforce a decision of the Director which has not been objected to nor appealed against and therefore the Applicant herein is entitled to the reliefs sought in the motion. If I were to find otherwise the import would drive the Applicant from the seat of justice and leave said Applicant with nowhere to turn given that the Latin maxim holds *Ubi jus ibi remedium* meaning 'where there is a right, there is a remedy'. This is a principle that postulates where the law establishes a right there should be a corresponding remedy for its breach. Put another way the principle is simply that no wrong should be allowed to go without any remedy. The fact there is lacunae is the precision of the enforcement of the latter part of the assessment of the Director of Occupational Safety and Health sans the punitive sanctions which ideally should be visited on the 2 Respondents before the Court, there is some modicum of relief the Court can grant to the Applicant which is to allow the application in terms of prayers 1 and 2 of the notice of motion application dated 9th July 2021. The Respondents to jointly and severally meet the award of the Director Occupational Safety and Health as well as the costs for the motion as their refusal to settle the award is what has led to this suit.
17. In *Boniface Indolo Luciva v Prime Quantifiers Construction Company Limited & Another* [2021]eKLR the court heed-
15. The Court is satisfied that the applicant has placed before Court a competent Work Injury claim assessment in the sum of Kshs 1,198,080 done by Director DOSH pursuant to Section 26 of the Work Injury Benefits Act, 2007. The Court is satisfied that the compensation was made in favour of the applicant against the respondents.
18. At paragraph 23 the court heed-



23. In the final analysis, the Court finds that the conduct by the respondents is merely dilatory and aimed at delaying the applicant from enjoying the fruits of the Decision by Director DOSH.
19. In *Ruth Wambui Mwangi & Another Alfarah Wholesalers Limited*, the court observed-
40. This Court also notes that although the *Work Injury Benefits Act* does not provide for the manner in which the Court should be moved to enforce an assessment of compensation by the Director of Occupational Health and Safety, the appropriate Court is the Employment and Labour Relations Court in terms of section 52(2).
41. The provisions of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 are therefore implicated.
42. That the applicants did not file a Statement of Claim/Memorandum of Claim is not in dispute as they approached the Court through a Notice of Motion.
43. Now, despite faulting the manner the applicants moved Court, the Respondent did not in any clear way disclose what the appropriate mode of approaching the Court ought to have been used by the applicants.
44. With the lack of clarity within the statutory framework, the Court is of the view that such an enforcement claim should be commenced through a Statement of Claim/Memorandum of Claim.
45. Despite the manner of instituting claims before the Court being Statement of Claim/Memorandum of Claim, the Court is of the view that in the present case, the major consideration should be whether the mode used by the applicants allowed them and the Respondent an avenue to bring forth the issues in dispute properly and fully.
46. The Respondent did not suggest that it was prejudiced or occasioned injustice by the manner the applicants moved Court.
20. From the foregoing, it is clear that the objection raised by the 1st Respondent are not novel as the same have been raised and addressed by this court on numerous occasions.
21. That there is a lacuna in the law is also not an isolated occurrence nor is it a matter that has not been litigated before. In a paper titled *Filling Lacunae by Judicial Engagements With Constitutional values and Comparative Methods*, Francois Venter writes.

“In most jurisdictions, courts have the function of applying the law in various forums in matters brought before it, very often requiring the court to find the applicable rules and then interpret their meaning and effect on the particular case that is being adjudicated. In this process a court may be confronted with a situation where fair resolution of the case is called for, but the situation is not covered by a pre-existing legal rule....

For present proposes we will assume that a legal lacuna exists where an appropriate legal rule to be applied by a court to the situation before it is not evident, is uncertain, unclear or does not (yet) exist. Such a problem is usually solvable (as opposed to being an insoluble dilemma) provided the court concerned is endowed with the jurisdiction to fill the crack.”



22. Justice Sachs of the South African Constitutional Court in 2005 in *Minister of Health v New Clicks* 2006 (2) SA 311 CC remarked as follows.
- “While the Constitution, like nature, abhors a vacuum, it does have what may appear to be lacunae. One of the tasks of the Judiciary is, when called upon, to fill in these apparent gaps. It does so not by process of invention but by one of completion.
23. In the instant case section 26 expressly provides for compensation to an injured employee and succinctly sets out the procedure for making such claims for compensation by the employer or the insurance company.
24. The 1st Respondent herein dutifully complied with the provisions of section 26 by reporting the accident whereupon an assessment and award was made. It did not file any objection to the award or appeal against the same to this court. It however failed to settle the claim as required by the Act which also criminalizes such non-compliance.
25. The law leaves no doubt as to who should pay on the timelines within which such payment should be made. The only thing the law does not prescribe is how to enforce such an award other than the criminal way. Is that what the 1st Respondent desires the Applicant to resort to? Is the 1st Respondent daring the court saying, I know I am liable to pay but I am not going to pay because the law does not allow you to order me to pay?
26. Under article 162 (2)(a) of the Constitution and section 12 of the Employment and Labour Relations Court Act, this court has exclusive jurisdiction to deal with employment disputes between an employer and an employee, which no doubt, this case is.
27. This court therefore has jurisdiction to hear and determine disputes arising out of work injury matters. The fact that section 52 gives the Court special jurisdiction to hear appeals from the decision of the Director of Occupational Safety and Health does not mean that the court is stripped of its inherent jurisdiction under the Constitution and the Employment and Labour Relations Court Act.
28. This argument is fortified by the fact that Article 165 of the Constitution prohibits the High Court, which is the only court with unlimited original and appellate jurisdiction from hearing matter that fall under the jurisdiction of this court.
29. Further, the Magistrate’s court, which would ordinarily have prematurely jurisdiction to determine matters, such as this only has donated jurisdiction to hear employment matters that does not extend to work injury disputes. As was stated by my brother Nzioki Makau J. in Samuel Wambua Mbitihika case (supra) the latin maxim ubi jus ibi remedium states that there can be no wrong without a remedy.
30. It is for the foregoing reasons that I find that this court has jurisdiction to hear and determine the instant application.
31. As was stated by my brother Radido J. in Ruth Wambui Mwangi & Another v Alfarah Wholesalers Limited (supra), despite the manner of instituting claims before this court being a statement of claim/ Memorandum of claim, the major consideration should be whether the mode used by the applicant allows the parties an avenue to bring forth the issues in dispute properly and fully.
32. I would add that in view of the fact that the law is silent on the manner in which award of the Director of Occupational Safety and Health are to be enforced, the only consideration of the court should be prejudice that the Respondents would be subjected to. The Respondents have not stated the prejudice they would suffer by the manner in which the Applicant has approached the court.



33. I accordingly find no merit in the preliminary objection by the 1st Respondent. I would add that in any view, the preliminary objection by the 1st Respondent was in bad faith, and deliberately intended to delay the payment of the compensation to the Applicant, which it knows it is by law obligated to pay.
34. Having disposed of the preliminary objection the applicant is entitled to the orders sought.
35. As already pointed out above, section 26 of the Work Injury Benefits Act provides the manner in which compensation is to be assessed and paid. The employer and insurance company are required to pay within 90 days of assessment. In the instant case the assessment was on 26th April, 2022 and was therefore long overdue by the time the applicant approached this court on 18th August 2022.
36. The Respondents having not filed any objection or appeal against the decision of the Director, are under obligation to settle the claim.
37. The 2nd Respondent objected to its joinder arguing that the Applicant is a stranger to the contract between it and the 1st Respondent.
38. It further argued that the 1st Respondent failed to comply with the terms of the contract between them and therefore it is under no obligation to pay.
39. On the first objection, section 7 of the Act requires employers to take out insurance policies against work injury claims. Section 26(4) and (6) expressly provide that payment of compensation is due from either the employer or the insurer. This is a statutory exemption to the doctrine of privity of contract as was elaborately discussed by the Court of Appeal in its ruling in Aineah Likuyani Njirah v Aga Khan Health Services [2013] eKLR. If there are any private issues between the 1st and 2nd Respondents, such issues do not concern the Applicant as he is entitled to payment either from his employer or the insurer.
40. For the foregoing reasons, the application herein succeeds in terms of prayers 1 and 2.
41. I accordingly make the following orders
 - i. The assessment of the Director of Occupational Safety and Health Services is hereby adopted as a judgment of this court.
 - ii. Judgment be and is hereby entered for the Applicant against the Respondents jointly and severally in the sum of Ksh.1,229,011.20.
42. The court declines to grant prayers (3) and (4) of the application as they are criminal in nature and the application herein is brought in the nature of a civil claim.
43. The respondents shall jointly and severally pay the Applicants costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 21ST DAY OF SEPTEMBER, 2023

MAUREEN ONYANGO

JUDGE

