



**Kapila v Als Limited (Miscellaneous Application E046 of 2023)
[2023] KEELRC 2563 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2563 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E046 OF 2023
NJ ABUODHA, J
OCTOBER 19, 2023**

BETWEEN

JAI RAJ KAPILA APPLICANT

AND

ALS LIMITED RESPONDENT

RULING

1. The Applicant filed application dated 27th February, 2023 seeking for orders of this court to adopt the Director of Occupational Safety and Health Services (hereinafter DOSH) Award of Kshs 3,888,000/= made on 9th July, 2022 as the judgment of this Honourable Court and consequently enforce the same as a decree of the court. The applicant further sought costs and interest to be awarded.
2. The application was supported by the affidavit of Jai Raj Kapila the applicant herein who averred that he entered in to contract of employment dated 26th September, 2016 with the Respondent where he was retained as a pilot and because of he was subjected to loud noise, this led to a deterioration of his hearing.
3. The Applicant averred that on 10th August, 2021 he saw an Ear, Nose and Throat surgeon one Dr. Mujahid F. Din and he was assessed to suffer from bilateral sensori neural hearing loss together with tinnitus which were caused by prolonged exposure to Noise and he finally resigned after supplying the Respondent's HR with the said report.
4. The Applicant further averred that the HR manager submitted the DOSH form 1 to the Director of Occupational Safety and Health services of which the Applicant's copy is dated 19th September, 2021 but it appears to have been submitted to director on 9th July,2022.
5. The Applicant averred that the director assessed the compensation due to him at Kshs 3,888,000/= on 9th July,2022 notified and the Respondent but the respondent never notified him. He came to know of it when his advocate was furnished with a copy of the same on 19th December,2022 dated the same day.



6. The Applicant averred that the Respondent did not lodge any objection to the Director's award and has not paid the assessed amount to the Director within 90 days as required. On 19th December, 2022 a demand was issued to the respondent but it has since failed, neglected or refused to pay the assessed amount.
7. In reply the Respondent also filed its reply sworn on 6th April, 2023 and opposed the Claimant's application and averred that they have never received the Director's Award Notice until 19th December, 2022 when the Applicant's Advocate served them with the demand letter and that they filed their objection on 10th January, 2023 within the prescribed time of 60 days under section 51 of the WIBA Act and objected to the assessment.
8. In response the Applicant filed its further affidavit stating that their advocate wrote the DOSH when the Respondent received the decision. According to they received the decision on 7th September, 2022 and further that the objection had not been done out time since the Respondent could challenge the assessment decision at this point as it was not an appeal but just the adoption of the DOSH Award.
9. Further the Respondent filed its supplementary affidavit on 13th July, 2023 with the leave of the court reiterating that they did not receive the said DOSH decision until 19th December, 2022.
10. The Application was dispensed with by way of written submissions with each party submitting in support of their respective pleadings.
11. It was not in dispute that the Claimant/Applicant was employed by the Respondent and that he got injured while at work where he suffered hearing loss. The Director of Occupational Health and Safety assessed the compensation payable at Kshs 3,888,000/=.
12. The Respondent acknowledged that it was them who reported the injury to the Director as per requirements of section 21 and 22 of WIBA although the form is dated 21st September, 2021 the same was not lodged within the prescribed time of 7 days after reporting the accident.
13. Whereas the Respondent had denied receiving the Director's award until 19th December, 2022 when the Applicant's Advocates served them with their demand letter, the Applicant wrote to the DOSH enquiring when the Respondent received the decision and it was clear that the Respondent received this decision on 7th September, 2022 and their objection of 10th January, 2023 was out of time since section 51 of the WIBA dictates that the objection be filed within 60 days.
14. In addition assuming the Respondent filed its objection within time the Director was bound to reply to the objection within 14 days and notify all affected parties and that by the time the Applicant filed this application on 27th February, 2023 the 14 days had already lapsed hence the Applicant could not indefinitely wait to enforce his award.
15. The Respondent averred that the parties herein were invited for meeting at DOSH on 28th March, 2023 where the Applicant refused to attend. This was however a month after the applicant had filed the present application.
16. The Respondent also challenged the assessment of the award. It is however noteworthy that this was not an appeal to the court. If the respondent felt dissatisfied with the award there was room for objection within time and if still not satisfied to appeal to the court. Since no step was taken, the respondent could not challenge the award at this stage.



17. The *WIBA Act* seems silent on the enforcement of the awards of DOSH. In case of *Joash Shisia Cheto v Thepot Patrick Charles* [2022] eKLR held as follows;

The general position established by a majority of these decisions is as follows: -

- a. The law does not provide for mechanisms of enforcing the Director's award against a reluctant employer.
 - b. In the face of this lacuna, the holder of the award can move the court to seek for enforcement of the award. A majority of the decisions favour the view that the ELRC can be moved for this purpose pursuant to its jurisdiction under article 162 of *the Constitution* as read with section 12 of the *ELRC Act*. Only one decision holds the view that the ELRC cannot be moved for this purpose. A few share the view that the Magistrate's court may be moved where pecuniary jurisdiction allows.
 - c. The proceedings for enforcement may be in summary form by way of miscellaneous causes or in the form of ordinary causes but confined to matters of enforcement only.
 - d. Unless by way of appeal under section 52 of the *WIBA*, it is not open to the court to consider the merits of the Director's award or indeed go on a fact finding mission. This jurisdiction is the preserve of the Director.
18. The Applicant has therefore rightly approached this court through a Miscellaneous Application and since the Respondent has raised its objection out of time and raises an issue of the assessment which is not within the purview of this court as it is not sitting as an appeal court or judicial review to quash the award, the Court will grant the orders sought.
19. In conclusion the Applicant's Application dated 27th February, 2023 is found merited and the court adopts the director's award of 19th December, 2022 at Kshs 3,888,000/= as decree of the court and interest at court rates until payment in full. Costs are awarded to the Applicant.
20. It is so ordered.

DATED AT NAIROBI THIS 19TH DAY OF OCTOBER, 2023 DELIVERED VIRTUALLY THIS 19TH DAY OF OCTOBER, 2023

ABUODHA JORUM NELSON

JUDGE

