



**Bosibori (Suing as administrator of the Estate of Samuel Onyancha Kinanga (Deceased) v Dock Workers Union Limited (Miscellaneous Application E031 of 2023) [2023] KEELRC 3169 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3169 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**  
**MISCELLANEOUS APPLICATION E031 OF 2023**  
**M MBARŪ, J**  
**NOVEMBER 30, 2023**

**BETWEEN**

**MARGARET BOSIBORI (SUING AS ADMINISTRATOR OF THE ESTATE OF SAMUEL ONYANCHA KINANGA (DECEASED) ..... APPLICANT**

**AND**

**THE DOCK WORKERS UNION LIMITED ..... RESPONDENT**

**RULING**

1. These proceedings were ex parte after the respondent was served but failed to enter appearance or reply to the application. On 9 November 2023, Ochieng Advocate appeared and intimated that he was representing the respondent but no notice had been filed to this effect and no effort was taken to do so after his attendance.

The applicant, Margaret Bosibori, suing as the Administrator of the Estate of Samuel Onyancha Kinanga (Deceased) filed application dated 7 August 2023 under the provisions of article 47, 48 and 50(1) of *the Constitution*, section 87 and 90 of the *Employment Act*, and rule 17 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 and seeking for orders that;

1. spent.
2. The Court be pleased to adopt as judgment of this court the award of the Director of Occupational Safety and Health Services made on 11.3.2022.
3. judgment be entered for the applicant against the respondent for the sum of Ksh. 16,482,336.00/= plus interest at court rates.
4. costs of the application be provided for.



2. The application is supported by the affidavit of Eliud Nyongesa, Advocate for the applicant and the Supporting affidavit of the applicant on the grounds that the applicant is the widow of the late Samuel Onyancha Kinanga, the deceased who died in the course of his employment with the respondent. The deceased was employed as the Chief Accountant.

The applicant was granted Letters of Administration for purposes of filing these proceedings to recover the sum awarded for the Estate of the deceased by the Director of Occupational Safety and Health with costs and interests.

3. On 29 January 2020 the deceased sustained severe injuries due to gunshots while in the course of his employment as chief accountant and which led to his death. The matter was reported to the Director, Occupational Safety and Health Services (Director) via DOSH form. The respondent reported the matter to the Director who assessed the claim and awarded compensation of Ksh. 16,482,336 as the injury led to 100% permanent incapacity while the deceased was earning Ksh. 271,691 per month.

In her supporting affidavit, the applicant avers that following the decision and award of the Director, the respondent did not file any objections or any appeal and has since refused to make payment leading to these proceedings. The decision of the Director assessing compensation at Ksh. 16,482,336 is not challenged and should be confirmed as the judgment of this court.

The applicant attached the DOSH Form, Letters of Administration and demand notices upon the respondent dated 11 March 2022 and 16 November 2022.

#### **Determination**

4. Under the *Work Injury Benefits Act, 2007* (WIBA), upon occurrence of an accident at work, the employer should issue notice to the Director. Where the work injury results in a fatality, notice to the Director should issue in terms of section 21 and 22 of WIBA. The mandate of the Director is to investigate the accident in terms of section 23 of WIBA and for a fatality, the assessment of the benefits due to the deceased in terms of section 30 of WIBA.

The Director assessed the compensation due to the Estate of the deceased, and through notice dated 11 March 2022, directed the respondent to pay Ksh. 16,482,336 in terms of Section 28 and 30 of WIBA.

5. Through notice dated 16 November 2022 the Director issued notice to the respondent to pay compensation due to the Estate of the deceased within 21 days in terms of section 26(4) of WIBA having failed to make payment within the initial 90 days following notice dated 11 March 2022. The Director further advised the respondent to make any submissions as to why payments had not been settled. There was no response, leading to these proceedings.

However, under WIBA, where there is a fatality, the Director is required under section 6 of the Act to pay the dependents in accordance with the Third Schedule to the Act. A Certificate of Dependency must hence issue before payment is effected.

6. Unlike the case of a non-fatal work injury, any payments thereof must give context to section 6 read together with section 34 of WIBA.

Therefore, before issuing notice to the employer to make payments, the Director must ascertain the dependents of a deceased employee. In awarding compensation, put into account the Third Schedule to WIBA. It is not sufficient that the applicant has obtained Limited Grant of Letters of Administration ad litem. Allowed to commence these proceedings, the Director is bound to act within the provisions of section 6 and 34 of WIBA.



7. The assessment of the Director was on 9 March 2022 and the applicant obtained Limited Grant of Letters of Administration ad litem on 3 August 2023. The provisions of section 6 and 34 of WIBA should be taken into account before allocating the due compensation based on the Certificate of Dependency.

These proceedings are premature. Parties shall revert back to the Director in terms of sections 6 and 34 of WIBA read together with the Third Schedule thereof.

8. As noted above, a representative of the respondent attended court on 9 November 2023. Aware of these proceedings, the respondent has not taken any action to respond or settle payments in compensation of the Estate of the deceased and its former employee.

No costs shall issue.

Accordingly, proceedings herein are premature and are hereby struck out. Parties shall revert back to the Director. No orders on costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 30<sup>TH</sup> DAY OF NOVEMBER 2023.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet Muthaine

..... and .....

