



Katumbi & another (Suing as the Administrators and Personal Representatives of the Estate of Boniface Kyungu Nzioka Deceased) v Kinyanjui (Miscellaneous Application E077 of 2023) [2023] KEELRC 3062 (KLR) (24 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 3062 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E077 OF 2023
NJ ABUODHA, J
NOVEMBER 24, 2023

BETWEEN

NORAH KATUMBI & MALANIA SYOMBUA NZIOKA (SUING AS THE ADMINISTRATORS AND PERSONAL REPRESENTATIVES OF THE ESTATE OF BONIFACE KYUNGU NZIOKA DECEASED) APPLICANT

AND

PATRICK MUNGA KINYANJUI RESPONDENT

RULING

1. The Respondent filed application dated 3rd April, 2023 seeking orders inter alia:
 - i. That the honourable court adopts the award of the DOSH as a judgment of the Court for purposes of execution.
 - ii. That a decree be issued in accordance with the award of the DOSH against the respondent in the sum of Kshs. 2,880,000/-
2. The application was supported by the affidavit of Norah Katumbi Mutuku and on the grounds that the deceased was an employee of the respondent and that on 20th June, 2018 he sustained a fatal injuries while in the course of his work.
3. In the affidavit in support of the application the affiant stated that she was one of the administrators of the deceased's estate and that the deceased was her spouse. The deceased received fatal injuries while at work for the respondent on 20th June, 2018. The accident was reported by her to DOSH and after a lot of resistance the respondent filled DOSH-1 form. The director assessed the compensation on 6th July, 2022 and awarded Kshs. 2,880,000 as compensation but the respondent adamantly refused to settle the assessed amount despite demand from her advocates.



4. The respondent filed a replying affidavit in which he stated among others that he received an email from the DOSH Nairobi on 14th June, 2022 forwarding the decision dated 6th July, 2022 where he was required to pay the deceased estate Kshs. 2,880,000/-. He instructed his advocate to appeal the decision and pursuant to section 51 of the WIBA he objected to the decision. This according to the respondent was done on 15th August, 2023.
5. The grounds of the objection were among others that:
 - a. His right to fair administrative action was fundamentally breached contrary to article 47 of *the Constitution*
 - b. Boniface Kungu, the deceased was never his employee but an independent contractor.
 - c. The director erred in determining the issue of liability and in finding that he was 100% liable for the injuries sustained by the deceased.
 - d. The sum awarded was unjust and manifestly excessive.
6. The respondent further stated that since 15th August, 2022 neither his advocates nor himself have received communication from the Director as required under section 52 of the WIBA Act.
7. In his submissions in support of the application Ms. Mutuku for the applicant submitted among others the accident was reported after the 12 months period stipulated in the Act however the director had the discretion to hear the matter hence did not act outside jurisdiction in determining the matter. In support Counsel relied on the case of *Kamande & another vs. Ace Freight Limited [2022]*eKLR. Counsel further submitted that the Director being aware an accident had taken place summoned the respondent who appeared and filled DOSH-1 form and using the information the director made the assessment due to the deceased dependants. The respondent was served with the completed DOSH-1 form through the email he provided in the form demanding payment of the assessed amount. The respondent had 60 days thereafter to respond or raise objection against the award. The respondent did not send any objection to the email provided but to a different email after the required 60 days. Counsel therefore submitted that the respondent was given an opportunity to be heard but never utilized the same. The award of the DOSH was therefore valid and enforceable. In this respect Counsel relied on the case of *Samson Chweya Mwendabole v. Protective Custody Limited*.
8. Concerning the substantive issues raised by the respondent in his affidavit such as the issue whether the deceased was his employee, Counsel submitted that these should have been raised within the 60 days given to the respondent when the assessment was sent to him. In this regard the applicant relied on the case of *Edwin Songoh & Another vs. Amony Yatich & Another [2021]*eKLR.
9. The respondent relying on section 51(1) of the WIBA, section 57 of the Interpretation and General Provisions Act, Order 50 rule 3 of the *Civil Procedure Rules* submitted that he received the assessment of DOSH through email doshnairobioffice@doshwiba.com on 14th June, 2022. The sixty day period within which to lodge the objection to the assessment therefore began to run from 15th June, 2022. The respondent therefore had until 15th August, 2022 to lodge the objection. Accordingly the respondent filed an objection to the Director's decision on 15th August, 2023 which was well within the prescribed time. Further the objection was filed through the email that was shared by DOSH. The respondent never received any email failure hence assumed the same was delivered. It was thus the responsibility of the DOSH to consider the objection and communicate the answer.
10. According to the respondent, it was not disputed that the Director had not given a written answer to the respondent's objection sent on 15th August, 2022 and pursuant to section 52 of the WIBA. The



answer ought to have been communicated within 14 days. Counsel submitted that the timeliness were mandatory and could not be waived. The respondent's objection was therefore deemed to have been allowed by operation of law. In this respect Counsel relied on the case of *Equity Group Holdings Ltd vs. Commissioner of Domestic Taxes [2021]* eKLR. The respondent had a legitimate expectation that the director would comply with its statutory duty of communicating his decision within the prescribed timelines. Having failed to do so the Court could not substitute the lack of communication with enforcement of the impugned decision. The Court therefore lacked the jurisdiction to enforce the award since there was no final decision of the director on the matter.

11. The Court has reviewed and considered the application herein and has become of the view that the DOSH duly assessed the compensation payable to the deceased estate and forwarded the same to the respondent via email provided on the DOSH-1 by the respondent. The respondent responded by objecting to the assessment. It is not clear whether the DOSH responded to the objection within 14 days as stipulated under section 52 of WIBA or at all. This could only be explained by the DOSH unfortunately it was not a party to these proceedings.
12. The orders sought by the applicant if granted will have the consequence of compelling the respondent to pay the assessed amount. This would amount to parting with property. *The Constitution* protects the right to property. That right can only be surrendered or lost through a due process. In this particular case both parties are in agreement that the DOSH never responded to the objection filed by the respondent. It however cannot be assumed that because the DOSH never responded to the assessment within the prescribed time, it was allowed as argued by the respondent. The same reasoning could be applied by the applicant to say the objection was dismissed.
13. In the circumstances and to do justice the matter, the Court hereby orders that the matter be resubmitted to DOSH to make a decision on the objection lodged by the respondent before the Court can assume jurisdiction over the same.
14. The application is therefore disallowed for the above reasons. Each party shall bear their own costs
15. It is ordered.

DATED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2023

DELIVERED VIRTUALLY THIS 24TH DAY OF NOVEMBER, 2023

ABUODHA NELSON JORUM

JUDGE

