



David v Kenya Suitcase Manufacturers Ltd (Miscellaneous Case E013 of 2023) [2023] KEELRC 3114 (KLR) (23 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 3114 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS CASE E013 OF 2023**

**AK NZEI, J
NOVEMBER 23, 2023**

BETWEEN

MAZERAS CHARLES DAVID APPLICANT

AND

KENYA SUITCASE MANUFACTURERS LTD RESPONDENT

RULING

1. Before me is the Applicant's Notice of Motion dated 17/4/2023, expressed to be brought under Section 87 and 90 of the *Employment Act* and rule 17 of the *Employment and Labour Relations Court (Procedure) Rules* 2016. The Applicant seeks the following orders:-
 - a. that the Court be pleased to adopt the award of the Director of Occupational Safety dated 25/7/2022 as a Judgment of this Court.
 - b. that judgment be entered for the Applicant against the Respondent for the sum of ksh. 996,001.44 with interest at 14% per annum from 22/7/2022.
 - c. that a decree be issued in accordance with assessment of the Director of Occupational Health and Safety for the sum of ksh. 996,001.44 with interest at 14% per annual from 22/7/2022.
 - d. that costs of the application be assessed and awarded by the Court.
2. The application sets out on its face the grounds upon which it is founded, and is supported by the Applicant's supporting affidavit sworn on 13/4/2023. It is deponed in the said affidavit:-
 - a. that the Applicant worked for the Respondent as a Machine Operator since the year 2003, and that while in the course of his employment on 26/11/2018, the Applicant was involved in an accident; whereupon the Respondent duly filled and signed a statutory notice by an employer on occupational accident/disease of an employee to the Directorate of Occupational Safety and Health Service.



- b. that the Director of Occupational Safety and Health Service assessed compensation on the work injury at ksh. 996,001.44; but the Respondent refused and neglected to pay, though no objection or appeal had been lodged within the 60 days prescribed by the law.
 - c. that the Respondent has committed an offence pursuant to Section 26(6) of the [Work Injury Benefits Act](#) by refusing to pay the compensation.
 - d. that under Section 26(4) of [Work Injury Benefits Act](#) (WIBA), an employer or insurer against whom a claim for compensation is lodged by the Director under the said Section shall settle the same within 90 days of the lodging of the claim.
 - e. That it is in the interest of justice that the Court adopts the Director's assessment and issues a decree as prayed.
3. The application is opposed by the Respondent vide a replying affidavit sworn by one Joseph Muriuki on 22/5/2023. It is deponed in the said replying affidavit:-
- a. that the application is baseless and a gross abuse of the Court's process, is vexatious and is brought in bad faith.
 - b. that the application offends the doctrine of "Res subjudice" under Section 6 of the [Civil Procedure Act](#) since there is another suit on the same subject matter in the subordinate Court between the same parties pending determination under Mombasa CMCC NO. 1079 of 2019 (Mazeras Charles David -vs- Kenya Suit Case Manufacturers Limited).
 - c. that in the light of the foregoing, this Court is without jurisdiction to grant the prayers sought.
 - d. that this Court's jurisdiction is expressly ousted by statute; and that the application herein is a nullity.
 - e. that in the light of practice directions issued by the Chief Justice relating to pending Court claims on work injury compensation instituted prior to the Supreme Court's decision in Law Society of Kenya -vs- Attorney General & Another [2019] eKLR, matters filed before the Chief Magistrate's Court before the said decision should proceed in those Courts.
4. The Applicant responded to matters deponed to in the Respondent's aforesaid replying affidavit vide a further affidavit sworn by himself on 30/6/2023, and deponed, inter alia;
- a. that the subject in the application herein is substantially different from that in the civil claim pending in the subordinate Court as the application herein is premised on an award made by the Director after adherence to all WIBA procedures.
 - b. that the Supreme Court in Petition No. 4 of 2019, *Law Society of Kenya -vs- the Attorney General & Cotu* upheld the Court of Appeal's decision which confirmed that Courts never had jurisdiction over Work Injury matters filed after (enactment) of the [Work Injury Benefits Act](#) 2007 (WIBA) which commenced on 2/6/2008 vide Gazette Notice No. 60 of 23rd May 2008.
 - c. that the Chief Justice in the Circular dated 15th September 2020 made it clear that only matters pending in Court filed before WIBA came into force were to be concluded in those Courts.
5. Documents annexed to the Applicant's supporting affidavit include Form DOSH1 (notice by employer of an occupational accident/disease of an employee) duly issued by the Respondent on 17/1/2019 regarding the Applicant's injuries in issue, DOSH/WIBA4 issued by Mombasa County Directorate of Occupational Safety and Health Service on 25/7/2022 assessing the Applicant's



permanent incapacity at 47% and compensation payable to him at ksh. 996,001.44, and the Director's letter to the Respondent dated 14/12/2022 calling for payment of the assessed compensation which had remained unpaid despite earlier communication in that regard.

6. Documents annexed to the Respondent's replying affidavit are a copy of a plaint filed in Mombasa CMCC No. 1079 of 2019 and Kenya Gazette Vol. CXXV No. 99 dated 28/4/2023.
7. It is to be noted that the application herein was filed on 24/4/2023, days before gazettelement of the practice directions issued by the Hon. Chief Justice. Further, the subject matter in the application is enforcement of a compensation award made by the Director of Occupational Safety and Health Service (Director) under the *Work Injury Benefits Act* (WIBA). Section 23 of WIBA mandates the Director to make such inquiries as are necessary to decide upon any claim or liability in accordance with the Act, while Section 28 provides for assessment of compensation by the Director. The summary of all this is that the issues of liability and compensation payable stand determined by the Director pursuant to the provisions of WIBA, and it has not been stated and/or demonstrated that the Director's assessment of compensation payable was objected to and/or appealed against pursuant to provisions of the WIBA. Indeed, this Court has only been moved to enforce the Director's award, and the only issue for determination by this Court is whether the Court has jurisdiction to enforce the award.
8. The *Work Injury Benefits Act* (WIBA) is silent on how awards of compensation made by the Director of Occupational Safety and Health Services to employees who suffer work injuries or occupational diseases are to be enforced. At the same time, the Act does not expressly divest this Court of jurisdiction to enforce such awards; and especially where the award of compensation by the Director has not been objected to and the employer has refused to pay the assessed compensation upon demand by the Director.
9. I stated as follows in *Amir Swaleh Omar -vs- Mackenzie Maritime [e.a] Limtied* [2022] eKLR:-

“17. The Act (WIBA) is silent on how the awards of compensation made by the Director in favour of employees involved in occupational accidents or who suffer occupational diseases are to be enforced. At the same time, the Act does not expressly divest this Court of jurisdiction to enforce such awards; and especially where the award of compensation by the Director has not been objected to and the employer has refused to pay the assessed compensation. Did parliament intent that an employee caught up in such a situation would be left at the mercy of an employer who may choose either to pay or not to pay the assessed sum? I do not think so.

18. What would be the purpose of the Director making or undertaking inquiries in order to determine the issue of liability and proceeding to assess the compensation payable if the compensation assessed by the Director was not meant to be paid to the injured employee? In my view, once the Director assesses the compensation payable and the same is not objected to pursuant to Section 51 of the WIBA, the assessed sum becomes the injured employee's right and entitlement regarding which the employee can move to Court and seek enforcement of that right by seeking entry of judgment in terms of the Director's assessment, and issuance of a decree which can then be executed to realize that right.

19. Indeed, failure by an employer to pay a demanded compensation that has been assessed by the Director and to which no objection has been lodged creates a



dispute over a liquidated claim, which this Court can entertain and determine.
Article 50(1) of *the Constitution* of Kenya 2010 provides:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court, or if appropriate, another independent and impartial tribunal or body.”

10. Pursuant to Article 162(2) (a) of *the Constitution* of Kenya 2010, this Court has inherent jurisdiction over all employment and labour relations matters/disputes, except where that jurisdiction has been expressly ousted by the statute over particular matters specified in that statute. A good example of such ousting statute is Section 16 of the *Work Injury Benefits Act* which provides as follows:-

“No action shall lie by any 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.”

11. The foregoing Section of WIBA is clear on the fact that Courts have no jurisdiction to determine issues of liability and assessment of compensation in cases involving work injuries or occupational diseases. Under Section 23 of the Act, determination of liability and compensation fall within the exclusive province of the Director.

12. In view of all the foregoing, there is absolutely no reason why orders sought in the application herein should not be allowed. If allowing the application herein will mean that there will be nothing for the subordinate Court to try, so be it. The Respondent has not in any way denied having participated in the process before the Director which ended with the assessment of the compensation in issue. It has not denied having issued the notice referred in paragraph 5 of this Ruling, and having provided the information contained therein to the Director. The Respondent did so during the pendency of the suit said to have been pending in the Chief Magistrate’s Court, of which the Respondent has not denied having been aware. Justice system should never be taken round in circles, and the wheels of justice must come to a halt at some point, having delivered justice as by law provided.

13. Consequently, and having considered submissions filed by Counsel, the Notice of Motion dated 17/4/2023 is hereby allowed in the following terms:-

- a. the award by the Director of Occupational Safety and Health Service dated 25/7/2022 is hereby adopted as a judgment of this Court and, accordingly, judgment is hereby entered for the Applicant against the Respondent for ksh. 996,001.44.
- b. a decree shall issue, and interest on the decreed sum shall be calculated at Court rates from the date of this Ruling.
- c. the Applicant is awarded costs of the application, to be taxed as by law provided.

14. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23RD NOVEMBER 2023

AGNES KITIKU NZEI

JUDGE

