



**Murithi v P.N. Mashru Limited (Miscellaneous Application
E032 of 2023) [2023] KEELRC 2825 (KLR) (9 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2825 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E032 OF 2023**

**AK NZEI, J
NOVEMBER 9, 2023**

BETWEEN

JOSEPH GATIMU MURITHI APPLICANT

AND

P.N. MASHRU LIMITED RESPONDENT

RULING

1. Before me is a notice of motion dated 2/8/2023 and expressed to be brought under article 162(2) (a) of the Constitution of Kenya, 2010, section 87 of the Employment Act, section 12 of the Employment and Labour Relations Court Act, rules 28 and 31 of the Employment and Labour Relations Court (Procedure) Rules 2016, sections 1A, 3 and 3A of the Civil Procedure Act and order 51 rule 1 of the Civil Procedure Rules. The Applicant seeks the following orders:-
 - a. that this Court be pleased to adopt as a judgment of the Court the award of the Director of Occupational Safety and Health services.
 - b. that a decree do issue in accordance with the assessment of the Director of Occupational Safety and Health Services for the sum of ksh. 1,152,000 (Kenya shillings, one million one hundred and fifty-two thousand only).
 - c. that the Court be pleased to award interest on the said amount from the date of assessment until payment in full.
 - d. that the Court be pleased to grant any other relief that it may deem fit and just to grant.
 - e. that costs of the application be awarded to the Applicant.
2. The application sets out on its face the grounds on which it is founded, and is premised on the Applicant's supporting affidavit sworn on 2/8/2023. It is deponed in the said affidavit:-



- a. that the applicant was employed by the respondent as a heavy commercial truck driver in October 2020, earning a monthly salary of ksh. 40,000.
 - b. that while in the lawful cause of employment on 28/2/2021, the Applicant was involved in a road traffic accident along Nairobi-Mombasa road, as a result of which he sustained grievous injuries.
 - c. that the Applicant was treated and the matter was reported to the Director of Occupational Safety and Health Services and FORM DOSH 1 was duly filled by the Respondent and submitted to the County Director of Occupational Safety and Health Services; whereupon the Applicant's permanent incapacity was assessed at 30% and compensation payable to him was assessed at ksh. 1,152,000 subsequent to which DOSH/WIBA FORM 4 was issued.
 - d. that the Respondent was notified of the Director's decision in May 2022, and that no objection or appeal against the Director's decision was preferred by either party within the time set by the law, or at all.
 - e. that despite request by the Director that the Respondent settles the claim, the Respondent has adamantly refused and/or neglected to make good the claim.
 - f. that a demand was sent to the Respondent by the Applicant's Advocates demanding that the Respondent settles the claim, but the letter never elicited any response to date.
 - g. that the Respondent has subjected the Applicant to untold suffering as it has become challenging for him to get proper medical attention as advised due to lack of funds as the Respondent terminated the Applicant's service due to his condition.
3. The Respondent did not file any response to the application, although it is shown to have been served with both the application and a hearing notice thereon on 19/9/2023. There is on record an affidavit of service of one Musyoka Samuel, a Court process server, sworn and filed on 29/9/2023. The application is unopposed.
 4. Documents annexed to the Applicant's said supporting affidavit include a letter dated 30/3/2022 by the County Director of Occupational Safety and Health Services calling upon the Respondent to submit to his office DOSH1, ML/DOSH FORM 1 duly filled by the Respondent on 27/9/2022, DOSH/WIBA 4 duly issued by the County Director of Occupational Safety and Health Services (Kilifi, Lamu and Tana River) on 29/9/2022 whereon the Applicant's incapacity is assessed at 30% and compensation payable to him at ksh. 1,152,000, and a letter (final reminder) dated 24/4/2023 by the County Director to the Respondent calling for payment of the assessed compensation.
 5. As I have previously stated in several other decisions, the *Work Injury Benefits Act* (WIBA) is silent on how awards of compensation made by the Director of Occupational Safety and Health Services (DOSHS) 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 particularly where the award of compensation by the DOSHS has not been objected to, and the employer has refused to pay the assessed compensation upon demand.
 6. I stated as follows in the case of *Amir Swaleh Omar v Mackenzie Maritime [E.A] Limited* [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 intend 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.”

7. Further, I stated as follows in the case of Mary Wangari Ngugi v Robinson Investment Ltd [2022] eKLR:-

- “7. Indeed, Pursuant to article 162(2) (a) of the Constitution of Kenya 2010, this Court has inherent jurisdiction over all employment and labour relations disputes except where that jurisdiction has been expressly ousted by the statute over particular matters specified in that statute. A good example of such statute is Section 16 of the Work Injuries 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.”

8. It is clear from the foregoing statutory provision that this court, and indeed other courts, have no jurisdiction to determine issues of liability and compensation in cases involving work injuries or occupational diseases. Section 23 of the WIBA mandates the Director to make such inquiries as are necessary to decide upon any claim or liability in accordance with the Act;



while Sections 28 and 30 of the Act provide for assessment of compensation by the Director.”

8. Having stated that, I am satisfied that the application before me is merited, and I allow the same in the following terms:-
 - a. the award made by the Director on 29/9/2022 is hereby adopted as a judgment of this Court, and, accordingly, judgment is hereby entered for the Applicant against the respondent for ksh. 1,152,000 being the amount of compensation assessed by the Director.
 - b. the applicant is awarded costs of these proceedings and interest at court rates.
 - c. Interest shall be calculated from the date of this Ruling until payment in full.
9. It is so ordered

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9th NOVEMBER 2023.

AGNES KITIKU NZEI

JUDGE

Order

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

Agnes Kitiku Nzei

Judge

