



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION NUMBER E125 OF 2021

BETWEEN

PETER MUTUA KALOKI.....APPLICANT

VERSUS

- 1. CHINA STATE CONSTRUCTION & ENGINEERING CORP [KENYA]**
- 2. RESOLUTION INSURANCE COMPANY LIMITED RESPONDENTS**

FURTHER ORDERS

- 1. In the Ruling delivered on 28th January 2022, the date of delivery was erroneously indicated as 28th January 2021.
- 2. The date of delivery is corrected under Rule 34 of the Employment and Labour Relations Court Rules, 2016, to read 28th January 2022.
- 3. Further Orders to be availed by the Court to respective Parties and to the KLR.

Dated, signed and released to the Parties electronically, at Nairobi, under the Ministry of Health and Judiciary Covid-19 Guidelines, this 3rd day of February 2022.

James Rika

Judge

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1. CHINA STATE CONSTRUCTION & ENGINEERING CORP [KENYA]

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RULING

1. The Applicant was an Employee of the 1st Respondent. He was injured while working for the 1st Respondent. He lodged a claim for work injury benefit with the Director of Occupational Safety and Health. Compensation was awarded at Kshs. 524,160.
2. There was no Appeal lodged against the award by the 1st Respondent in terms of Section 51 of the Work Injury Benefits Act.
3. The time prescribed for Objections and Appeals under Section 51 and 52 of the Act has lapsed. The Applicant therefore seeks to have the award adopted as Judgment of this Court for purposes of execution.
4. He has joined the 2nd Respondent, on the ground that the 2nd Respondent insured 1st Respondent's Employees against work injury. He cites Section 26 [6] of the Act, which stipulates that an Employer and an Insurer who fails to pay compensation awarded under the Act, commits an offence.
5. The Application is based on the Affidavit of the Applicant sworn on 6th July 2021.
6. There is no Response filed by the 1st Respondent.
7. Parties agreed on 16th September 2021 to proceed by way of written submissions.
8. They, with the exception of the 1st Respondent, confirmed filing of their submissions, at the last mention on 23rd November 2021.
9. The Applicant restates the factual background to this dispute, emphasizing that there was no Appeal filed by the Respondents against the award of the Director.
10. The 2nd Respondent submits that it is a stranger to the Application. It only became aware of the matter on service of the Application. It was not a party to the proceedings before the Director. It would be condemned unheard if the Application is allowed. Section 26[4] of the Act cannot be applied to penalize the 2nd Respondent unheard. The 2nd Respondent urges the Court to dismiss the Application against the 2nd Respondent.

The Court Finds: -

11. There is a fundamental flaw in the Work Injury Benefits Act, on enforcement of compensation awarded by the Director.
12. Section 53 creates the office of Director of Work Injury Benefits, who shall be responsible for management of the Act. This includes ensuring that Employees who are compensated, receive their compensation.
13. Section 2 of the Act however refers to the Director of Occupational Safety and Health Services. It does not define Director of Work Injury Benefits.
14. The Act is intended to be an entirely independent legal regime for work injury compensation, where the Court has a minimal role. This role is under Section 52 [2] which states: -

 ‘‘ An Objector may, within thirty days of the Director's reply being received by him, appeal to the Industrial Court [E&LRC] against such decision.’’
15. The Superior Courts have held that the E&LRC does not have primary jurisdiction under the Act. Its role is confined to Appeals arising from the awards of the Director. Decrees of the E&LRC under the Act, are appellate decrees.
16. There is no provision for enforcement of the Director's award, where no Appeal or Objection has been made.
17. There is no provision for E&LRC to adopt award of the Director as its Judgment. Such adoption ultimately leads to a Judgment and Decree issued by the E&LRC, which Court does not have primary jurisdiction in work injury compensation. If the Court adopts the award as its own Judgment, to which Court shall such a Judgment be appealable?
18. The Applicant relies on unbinding decisions of this Court in asking the Court to enter Judgment. These include **Richard Akama Nyambane v Icg Maltauro Spa, Nakuru E&LRC**, where it was observed that in the absence of an enforcement mechanism under the Act, the Court should rely on Section 87 [1] of the Employment Act. Award under the Work Injury Benefits Act, can only be enforced by filing of a suit in Court. In **E&LRC Cause No. 296 of 2018, Jared Ingling Obuya v. Handicap International**, the Court adopted a purposive interpretation of the Act, Article 162 [2] of the Constitution, and Section 12[1] of the Employment and Labour Relations Court Act, concluding that the E&LRC has jurisdiction to enforce awards of the Director. In **Richard Wambui Mwangi & Another v. Alfarah**

Wholesalers Limited [2017], the Court again found that there was no enforcement mechanism under the Act, but that the E&LRC is mandated to address employment and labour relations Claims and connected purposes.

19. The Court has clearly identified that there is no enforcement mechanism for awards of the Director, by the Court, under the Act. All the other laws the Court has cited in assuming jurisdiction in the decisions above, in the respectful view of this Court, fall within what the Supreme Court of Kenya, in **Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 others [2012] e-KLR**, characterized as judicial craft or innovation.

20. There is no jurisdiction given to the E&LRC under the Work Injury Benefits Act, to enforce awards of the Director, other than on Appeal. There is no other written law, extending jurisdiction to the E&LRC, in enforcement of awards by the Director. There is no provision for enforcement through adoption of these awards as Judgments of the E&LRC. Such adoption results in Judgments and Decrees on work injury given by the E&LRC without jurisdiction.

21. It is understandable that the E&LRC has bent backwards to assist injured Employees in actualizing their awards. But in so doing, the Court has engaged in matters it plainly lacks jurisdiction to entertain. The problem is one for Legislators to resolve. The Court cannot continue to bend backwards and offer a solution to a problem it has not created. The authors of the Work Injury Benefits Act, only intended the Court to be involved, in a limited way, under Section 52[2] of the Act.

22. There is no reason to join an Insurance Company in the enforcement of an award, resulting from a process the Insurance Company was not involved in. Such joinder would violate basic tenets on the right to be heard, and not be condemned unheard. The 2nd Respondent was not a party to the compensation process at the Directorate, and is not shown to have been availed by the Director, the award and supportive documents leading to that award.

23. Section 26 [6] of the Work Injury Benefits Act addresses criminal liability of Employers and Insurance Companies, who fail to pay Employees compensation for work injury, made by the Director. It is not a civil mechanism of enforcement, allowing the Court to bring in the Insurance Company for purposes of execution. The Applicant could move authorized Labour Officers, for prosecution of the Respondents under this provision, but certainly cannot base his Application for execution of the award, on this provision of the law.

24. The Court is persuaded that it does not have jurisdiction to grant the orders sought by the Applicant. If the Court has held in the past, that it has such jurisdiction, such a position is erroneous, consisting judicial craft or innovation, and must be departed from.

IT IS ORDERED: -

a. The Application dated 6th July 2021 is declined.

b. No order on the costs.

Dated, signed and released to the Parties electronically, at Nairobi, under the Ministry of Health and Judiciary Covid-19 Guidelines, this 28th day of January 2022.

James Rika

Judge