



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT MOMBASA
MISC. APPLICATION NO. E040 OF 2021

ELIJAH KISYANGA NDENDE.....CLAIMANT

VERSUS

THE MANAGER ZAHKEM INTERNATIONAL

CONSTRUCTION LTD.....RESPONDENT

R U L I N G

1. The Application before me is the Applicant's Notice of Motion dated 16th August 2021. The Applicant seeks the following orders:-

- a) that the Court adopt the assessment of the Director of Occupational Health and Safety (sic) as an order of the Court.
- b) that a decree be issued in accordance with the assessment of the Director of Occupational Health and Safety (sic) for the sum of Kenya shillings seventy eight thousand only (ksh.78,000).
- c) that costs of the application be paid by the Respondent.

2. The application is based on the Applicant's supporting affidavit sworn on 16th August 2021. The Applicant deposes as follows:-

- a) that the Applicant was an employee of the Respondent, and was injured on 6/5/2015 while working for the Respondent; and was treated in different hospitals and later examined by Dr. Mutunga who prepared a medical report confirming the injuries.
- b) that the Applicant reported the accident to the Director of Occupational Safety and Health Services Mombasa and a DOSH/WIBA 4 Form (was) duly filled.
- c) that the Director made an assessment of ksh.78,000 (DOSHS/WIBA 4 Form was exhibited by the Claimant as annexure ENK3)
- d) that the Director send a demand for payment, but the Respondent adamantly refused and/or neglected to pay the assessed sum.
- e) that failure to pay an assessment by the Director of Occupational Safety and Health Services is an offence under Section 26(6) of the Work Injury Benefits Act which provides that an employer or an insurer who fails to pay the compensation claimed under the sub-section commits an offence and shall on conviction be liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding one year or both.
- f) that under Section 26(4) of the Work Injury Benefits Act, an employer or Insurer against whom a claim for compensation is lodged by the Director under the Section shall settle the same within ninety days of the lodging of the claim.
- g) that ninety days have lapsed since the demand was done and the Respondent has not preferred an appeal against the Director's assessment.

That in the circumstances, the Respondent has committed an offence by failing to pay the compensation due to the applicant, which has necessitated the application to protect the applicant's rights.

h) That it is in the interest of justice that the Court adopts the Director's assessment and issues a decree as prayed.

3. On 20th September 2021, the Respondent filed a Memorandum of Appearance through the firm of Gachiri Kariuki & Company Advocates. The Respondent did not, however, file any reply to the application.

4. When the application came up for hearing before me on 20th September 2021, counsel for the Respondent told the Court that he had just been instructed and that he needed fourteen days to file a reply to the application. I granted counsel fourteen days to file response to the application and gave corresponding leave to the Applicant to file a further affidavit within seven days of service, if need be. I further directed parties to thereupon file and exchange written submissions before 14th October 2021 when the matter would be mentioned in Court for purposes of reserving a Ruling date. Submissions were never filed.

5. On 14th October 2021, however, Counsel for the Respondent informed the Court that the Respondent would not be responding to the application as the Respondent was keen on settling the Applicant's claim and had, indeed, invited the Applicant to tabulate his costs. Counsel asked the Court to mention the matter in thirty days to record settlement.

6. No consent was recorded, and Counsel for the Respondent did not attend Court on 18th January 2022, a date fixed by the Court for hearing of the Application, though shown to have been duly served. Counsel for the Applicant asked the Court to allow the application as prayed, and I reserved a date for Ruling.

7. The Work Injury Benefits Act is silent on the procedure to be followed in enforcing the Director's decision made on assessment of compensation payable to an employee for work injuries. In my view, the legislature never intended that an employee whose employer fails and/or refuses to pay the amount of compensation assessed by the Director of Occupational Safety and Health Services under WIBA would be without civil remedy, and particularly so where the employer never objected to the Director's decision on assessment of compensation payable to the employee.

8. It was held in the case of SAMSON CHWEYA MWANDABOLE –VS- PROTECTIVE CUSTODY LIMITED [2021] eKLR as follows:-

“...However, this Court being endowed with unlimited original and appellate jurisdiction in disputes related to employment and labour relations pursuant to Article 162(2) of the Constitution and Section 12 of the Employment and Labour Relations Court Act, the Court has inherent jurisdiction to adopt as judgment the Director's award for purposes of execution. This jurisdiction should not be confused with appellate jurisdiction which is expressly donated under Section 52(2) of the WIBA in respect of the director's reply to objection made under Section 51(1) of WIBA. It would appear that the former jurisdiction, which I now invoke, can be exercised by the Court where there is no challenge mounted against the Director's award by any party by way of objection or appeal under Sections 51(1) and 52(2) of the WIBA respectively. In this case, it is common ground that the Respondent did not object to the award under Section 51(1) of the WIBA...”

9. In the present case, the Director's award (decision) is contained in a DOSH/WIBA 4 Form dated 24th June 2016 and annexed to the Applicant's supporting affidavit. The assessment is not shown to have been subjected to any objection by the Respondent or by any other party under Section 51(1) of the Work Injury Benefits Act.

10. The applicant did not, however, state the date when the Director's aforesaid decision (dated 24th June 2016) was received by the Respondent. Both the application filed herein and the affidavit sworn in support thereof are silent on this crucial issue.

11. Section 90 of the Employment Act provides:-

“Notwithstanding the provisions of Section 4(1) of the Limitation of Action Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.”

12. For purposes of suits and/or applications for enforcement of decisions and/or assessments made by the Director of Occupational Safety and Health Services under the Work Injury Benefits Act, time in my view starts running from the date the Director's decision is received by the employer. An applicant avoiding to address the Court on the issue, therefore, does so at the risk of their application and/or suit being dismissed for being statute barred.

13. The Applicant's application herein was filed in Court on 19th August 2021; over six years from the date of the Director's decision. However, as stated in paragraph 5 of this Ruling, counsel for the Respondent told the Court that the Respondent was keen on settling the matter and would not be responding to the application. The Respondent, just like the Applicant, did not tell the Court when the Director's decision (assessment) was received by the Respondent.

14. For the foregoing reason only, I will not hold the issue of uncertainty over the issue of lapse of time against the Applicant, and I allow the Notice of Motion dated 16th August 2021 in the following terms:-

a) the assessment made by the Director of Occupational Safety and Health Services on the Applicant herein on 24th June 2016 is hereby adopted as a Judgment of this Court.

b) a decree is hereby issued for ksh.78,000(seventy eight thousand Kenya Shillings) in accordance with the assessment of the Director of Occupational Safety and Health Services dated 24th June 2016.

c) costs of the application are awarded to the Applicant.

15. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 24TH DAY OF MARCH 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. Watuka for Applicant

No appearance for Respondent