



REPUBLIC OF KENYA



**Etindi v Classico Builders (K) Limited (Miscellaneous Application
E237 of 2021) [2022] KEELRC 4138 (KLR) (12 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 4138 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E237 OF 2021**

M MBARŪ, J

MAY 12, 2022

BETWEEN

WILSON OKWAYO ETINDI APPLICANT

AND

CLASSICO BUILDERS (K) LIMITED RESPONDENT

RULING

1. The applicant filed notice of motion dated December 17, 2021 and seeking for orders that;
 - a. Judgement be entered in favour of the applicant against the respondent for Ksh 345, 600 being the sum assessed by the county occupational safety and health officer under the [Work Injury Benefits Act](#) claim reference No WIBA/NBI/1326/2020.
 - b. The court be pleased to award interests on the amount from the date of assessment until payment in full
 - c. Costs of the applicant.
2. The application is supported by the affidavit of the applicant and on the grounds that on August 22, 2020 he sustained injuries while at work and an employee of the respondent. on October 13, 2020 the county occupational safety and health officer assessed compensation due to the applicant under the [Work Injury Benefits Act](#) at Ksh 345, 600 and issued the applicant with a demand for payment of work injury benefit but the respondent has refused to pay despite being served with the demand and should be directed by the court to pay together with interests and cots due from the date of the award on October 13, 2020.
3. In reply, the respondent filed the replying affidavit of Naran Hirani the director and avers that the award the applicant is seeking to enforce has not been attached to his application. Save for the demand



for payment, the attendant award is not attached. The application is wanting in form and should be struck out.

4. The respondent was never invited or called to participate in the proceedings leading to the demand letter and requirements to pay the applicant or be allowed to carry out an independent medical examination of the applicant on the degree of disability suffered and the instant application is premature and should be dismissed.

Determination

5. The applicant filed his application dated December 11, 2021 under the provisions of section 12 of the *Employment and Labour Relations Court Act*, 2011 and seeking judgement for the sum of Ksh 345,600 being the sum assessed by the county occupational safety and health officer on October 13, 2020 following alleged injury while at work with the respondent.
6. To support the claim and judgement the application has attached the demand for payment of work injury pursuant to the provisions of sections 28, 30, 32 and 34 of the *Work Injury Benefits Act*, 2007.
7. Whereas the *Work Injury Benefits Act*, 2007 (the act) has no enforcement mechanism and parties are now forced to file miscellaneous application with the court for enforcement of any award, assessed and issued by the director pursuant to section 23 of the act.

23. Inquiry by director

- (1) After having received notice of an accident or having learned that an employee has been injured in an accident the director shall make such inquiries as are necessary to decide upon any claim or liability in accordance with this act
- (2) An inquiry made under subsection (1) may be conducted concurrently with any other investigation.
- (3) An employer or employee shall, at the request of the director, furnish such further particulars regarding the accident as the director may require.
- (4) A person who fails to comply with the provisions of subsection (3) commits an offence.

The director must receive notice of the accident and make enquiries and decide upon any claim or liability based on an investigation. An award must issue from the director.

8. The director responsible for the issuance of the award is defined under the act under section 2 as being;
director' means the director of occupational safety and health services (Cap. 253);
9. Compensation due to an employee who has suffered work injury must follow the award of the director under the act. before a demand for payment of work injury can issue to an employer pursuant to section 33 of the act and the amounts to be paid be ascertained pursuant to section 34 thereof, the director must receive a report, make enquiries and determine the claim or liability based on an investigation.
10. In moving the court, an applicant must therefore be possessed of the director's award.
11. This is aptly addressed by the Supreme Court in *Law Society of Kenya v Attorney General & COTU (2019) eKLR* that;

... a plain reading of section 16 of the act would reveal that its intention is not to limit access to courts but to create a statutory mechanism where any claim by an employee under the act is subjected, initially, to a process of dispute resolution starting with an investigation and



award by the director aforesaid and thereafter, under section 52 an appeal mechanism to the then Industrial Court. ...

Section 16 cannot be read in isolation because if read with section 23 and 52 of the act, the act provides for legal redress to the Industrial Court (now the Employment and Labour Relations Court) and therefore judicial assistance can be sought by aggrieved parties from decisions of the director and the court can make a determination with respect to all relevant matters arising from those decisions. ...

12. Such mandate of the director is to ensure that upon receipt of any notice of injury, the officer is able to address at the first instance and have the parties address and upon an award, allow for objections by the employee or the employer pursuant to section 52 of the act;

52 (1) The director shall within fourteen days after the receipt of an objection in the prescribed form, give a written answer to the objection, varying or upholding his decision and giving reasons for the decision objected to, and shall within the same period send a copy of the statement to any other person affected by the decision.

(2) An objector may, within thirty days of the director's reply being received by him, appeal to the Industrial Court against such decision.

13. The rationale is that, where the law bestows upon a body, person, entity the mandate to address a matter, such organ must be secured from any interference and be insulated to undertake its lawful functions.

14. in *Sammy Ndungu Waity v IEBC and 3 others [2019] eKLR* the court held that;

Where the *Constitution* or any other law establishes an organ, with a clear mandate for the resolution of a given genre of disputes, no other body can lawfully usurp such power, nor can it append such organ from the pedestal of execution of its mandate. To hold otherwise, would be to render the constitutional provision inoperable, a territory into which no judicial tribunal, however daring, would dare to fly.

15. In this case, work injury claims under the act should be first addressed by the director as defined under the act. such office should issue an award. Upon such award, an objection is allowed and before the court can be moved.

16. The Supreme Court in the Law Society of Kenya, case cited above, further held that;

17. There is also the added benefit that inquiries by the director inevitably means that work injuries and accidents are well captured and understood by his office. He can for example take measures or instruct his officers to hasten remedial administrative measures to avoid further occurrence of similar incidents.

18. For the applicant to move the court as herein done holding the demand for payment of work injury benefit and without the award of the director, such is premature. A key element of the applicable law is ignored.

19. Accordingly, application dated December 11, 2021 being premature is hereby struck out. Costs to the respondent.

DELIVERED IN COURT AT NAIROBI THIS 12TH DAY OF MAY, 2022.

M. MBARŪ

JUDGE



In the presence of:

Court Assistant: Okodoi

..... and

