



**Makumbi v Shengli Engineering Constructions (Group) Company Limited (Appeal E052 of 2021) [2022] KEELRC 12764 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12764 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E052 OF 2021  
MA ONYANGO, J  
SEPTEMBER 22, 2022**

**BETWEEN**

**JANUARIES MULINGE MAKUMBI ..... APPELLANT**

**AND**

**SHENGLI ENGINEERING CONSTRUCTIONS (GROUP) COMPANY LIMITED ..... RESPONDENT**

*(Being an appeal from the orders/directions of the Senior Resident Magistrate, Hon. P. Muholi at Milimani Commercial Courts, Nairobi in MCELRC/E0641/2020 delivered on 14th September 2021)*

**JUDGMENT**

1. The appellant herein filed an appeal against the orders and/or directions of the Principal Magistrate Hon P Muholi in Milimani MCELRC/E0641 of 2020 delivered on April 14, 2021.
2. The appellant seeks to set aside the orders on the following grounds as set out in his amended memorandum of appeal: -
  - a. The learned Principal Magistrate erred in law and fact by failing to distinguish between a work injury claim seeking assessment of damages following an injury at work and an enforcement suit such as was filed by the appellant seeking to enforce an already assessed award by the Director Occupational Safety and Health Services when an employer fails to pay an already assessed award and consequently declining to adopt and enforce the award as prayed.
  - b. The learned Principal Magistrate erred in law by failing to appreciate and find that as an Employment and Labour Relations Court, the court had the prerequisite jurisdiction to adopt and enforce a statutory decision/award made on August 31, 2018 by the Director of Occupational Safety and Health under the provisions of the *Work Injury Benefits Act* in complete disregard of Gazette Notice Number 6024 of June 22, 2018 that designated



Magistrates of the rank of Senior Resident Magistrate and above as competent Employment and Labour Relations Courts with jurisdiction to hear disputes arising out of employment contracts subject to pecuniary jurisdiction of Kshs 80,000/- in salary and below.

- c. The learned Principal Magistrate erred in law and fact in departing from the binding precedents cited in the claimant's submissions to the court and/or misconstruing the authorities and therefore issuing erroneous directions.
  - d. The learned Principal Magistrate erred in law and in fact by directing that an enforcement suit for an award already made by the Director Occupational Safety and Health Services ought to be in the form of an appeal under section 52(2) of the [Work Injury Benefits Act](#).
3. The appellant seeks the following orders: -
- a. That the appeal is allowed;
  - b. That the orders/directions issued on April 14, 2021 by Hon P Muholi be set aside;
  - c. That the appellant's statement of claim dated August 17, 2020 be allowed and the orders sought therein granted and the statutory decision of the Director Occupational Safety and Health Services made on August 31, 2018 be and is hereby adopted as a judgment of the court and execution to proceed in the unusual manner;
  - d. That the respondent does pay costs of this appeal and costs at the subordinate court in MCELRC/E641/2020;
  - e. That interest on both prayers (c) and (d) at court rates from the date of the award (32/8/2018) until payment in full be awarded;
  - f. Any other orders and directions the honourable court deems fit to issue to meet the ends of justice.
4. The appellant did not participate in the proceedings. The court directed that the appeal is disposed of by way of written submissions.

### **Appellant's Submissions**

5. In his submissions the appellant states that he approached the lower court following failure by the respondent to enforce an award of the Director Occupational Safety and Health in the sum of Kshs 234,032/- as general damages for injuries he sustained in the course of his employment with the respondent and a further Kshs 53,100/- as special damages in respect of medical expenses incurred.
6. The appellant had filed a claim in the lower court being MCELRC E641/2020 seeking adoption for purposes of enforcement of the directions and/or orders of the Director Occupational Safety and Health.
7. The appellant submits that the learned Trial Magistrate erred in law and in fact in finding that he lacks jurisdiction to enforce the award issued by the Director of Occupational Safety and Health contrary to the provisions of the gazette notice number 6024 of June 22, 2018.
8. He submits that the learned Trial Magistrate failed to take into consideration his submissions and authorities relied upon and thus arrived at a wrong determination.
9. He further submits that the Trial Magistrate failed to distinguish between an appeal and an application for enforcement of the orders of the Director of Occupational Safety and Health. To buttress this argument the appellant relies on the provisions of section 52(2) of the [Work Injury Benefits Act](#), 2007



and the findings in the case of *Bedford Micheni Bundi v Peritus Logistics Limited* (2020) eKLR where the court observed that an enforcement suit is not an objection and/or appeal against the decision of the director.

10. The appellant urged this court to find his appeal with merit and to allow it in terms of the reliefs sought therein.

### **Analysis and Determination**

11. As a first appellate court, this court has a duty to re-evaluate the entire case and come up with my own findings in the matter this is as was set out in the case of *Selle v Assorted Motor Boat Company* 1968 EA company 1968 EA 123-126 where the court stated as follows:

“Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial. Judge’s findings of fact appear earlier that he has clearly failed on some part to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

13. I have considered the appeal filed, the submissions and authorities relied upon by the appellant. The issue for determination is whether or not the Magistrates Court has jurisdiction to adopt the award of the Director, Occupational Safety and Health Services under WIBA for purposes of enforcement.

14. It is not in dispute that this court exercises appellate jurisdiction in relation to awards of the director, under sections 51 and 52 of *WIBA*.

15. Section 52(1) and (2) of the *Work Injury Benefits Act*, 2007 provides as follows: -

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.

16. Upon hearing the appellant, Hon P H Muholi held as follows:

“Directions:

I have looked at the prayers being sought and it is an award arising out of a work related injury to which this court lacks jurisdiction and consequently I am not in a position to write the judgment. File be returned to the registry awaiting directions on work injury related cases.

Hon P Muholi (mr)

Principal Magistrate

24/2/2021

Further, section 52 (2) of the *WIBA Act* 2007 provides that any person who is aggrieved ought to appeal to the Industrial Court against such decision. Following the Supreme Court judgment, this court lacks jurisdiction and-as such downs its tools.



Hon P Muholi (mr)

Principal Magistrate

14/4/2021

17. It is evident from the directions given by the Trial Magistrate that he misapprehended and therefore misdirected himself as to the nature of the matter that was before him for determination which was adoption of the award of the director, WIBA. Based on the misapprehension, the trial court reached a wrong determination, that the court did not have jurisdiction to grant the prayers sought by the appellant.
18. From the provisions of section 52 of *WIBA* it is clear that appeals flow directly to this court from the award of the director. It is therefore my view that the director in such circumstances would be exercising quasi-judicial powers in his or her determination as donated under the provisions of section 51 of the *Work Injury Benefits Act*, 2007 which provides:
  51. Objections and appeals against decisions of the director
    1. Any person aggrieved by a decision of the director on any matter under this Act, may within sixty days of such decision, lodge an objection with the director against such decision.
    2. The objection shall be in writing in the prescribed form accompanied by particulars containing a concise statement of the circumstances in which the objection is made and the relief or order which the objector claims, or the question which he desires to have determined.
19. WIBA Act is silent on the mode of enforcement of the director's award where there is no objection warranting appeal to this court.
20. I would therefore treat such a matter as a normal claim under the Employment and Labour Relations Court Act where the subject matter of such a claim falls under the donated jurisdiction of the *Magistrates Act* pursuant to Legal Notice No 6024 of 2018, the Magistrates Courts would have jurisdiction in terms of the legal notices.
21. In this respect, I would agree with of the decision of Radido J in *Ruth Wambui Mwangi & another v Alfarah Wholesalers Limited* [2017] eKLR where he stated:
  40. This court also notes that although the Work Injury Benefits Act does not provide for the manner in which the court should be moved to enforce an assessment of compensation by the Director of Occupational Health and Safety, the appropriate court is the Employment and Labour Relations Court in terms of section 52(2).
  41. The provisions of the Employment and Labour Relations Court (Procedure) Rules, 2016 are therefore implicated.
  42. That the applicants did not file a statement of claim/memorandum of claim is not in dispute as they approached the court through a notice of motion.
  43. Now, despite faulting the manner the applicants moved court, the respondent did not in any clear way disclose what the appropriate mode of approaching the court ought to have been used by the applicants.



44. With the lack of clarity within the statutory framework, the court is of the view that such an enforcement claim should be commenced through a statement of claim/memorandum of claim.
45. Despite the manner of instituting claims before the court being statement of claim/memorandum of claim, the court is of the view that in the present case, the major consideration should be whether the mode used by the applicants allowed them and the respondent an avenue to bring forth the issues in dispute properly and fully.
46. The respondent did not suggest that it was prejudiced or occasioned injustice by the manner the applicants moved court.
47. On that ground, the court would let substance triumph over form.”

22. For the foregoing reasons, the appeal succeeds. The decision of Hon P Muhohi is hereby set aside. The court directs that the decision of the director be adopted as an order of the court by the Chief Magistrates Court for purposes of execution.

23. The respondent shall pay the appellant’s costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2022.**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**

