



Osiri v Onda Mechanical EA Limited & another; County Director of Occupational Safety and Health Services (Interested Party) (Miscellaneous Application E231 of 2021) [2022] KEELRC 3958 (KLR) (22 September 2022) (Ruling)

Neutral citation: [2022] KEELRC 3958 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E231 OF 2021
MA ONYANGO, J
SEPTEMBER 22, 2022**

BETWEEN

GEOFFREY NYAKERIGA OSIRI APPLICANT

AND

ONDA MECHANICAL EA LIMITED 1ST RESPONDENT

FIRST ASSURANCE COMPANY LIMITED 2ND RESPONDENT

AND

COUNTY DIRECTOR OF OCCUPATIONAL SAFETY AND HEALTH SERVICES INTERESTED PARTY

RULING

1. Before me for determination is the notice of motion application dated December 7, 2021 filed under certificate of urgency in which the applicant herein seeks the following reliefs:
 - a) Spent.
 - b) That this honourable court be and is hereby pleased and grants leave of extension of time for lodging of the notice of appeal against the objection decision of the director of Occupational Safety and Health Services.
 - c) That this honourable court be and is hereby pleased to direct the Director of Occupational Safety and Health Services to produce before this honourable court a copy of the objection lodged by the respondents and the decision thereof.
 - d) That costs of this suit be provided for.
2. The application is premised on the grounds that: -



- a) The delay in lodging the appeal was purely inadvertent and excusable
 - b) There is a good explanation for the failure to file within the prescribed time
 - c) The delay was not inordinate
 - d) The intended appeal has merit and has high chances of success
 - e) It is in the interest of justice that the orders sought herein are granted.
 - f) It is in the interest of justice that the applicant is granted leave to lodge his notice of appeal out of time.
3. The application is further supported by the affidavit sworn by Geoffrey Nyakeriga Osiri, the applicant herein, on December 7, 2021 in which he depones that he was injured on September 19, 2020 while in the course of employment of the respondent as is evident from the Dosh Form 1 annexed as appendix GNO1 of the affidavit. His injury was thereafter assessed and he was awarded Kshs 1,122,000.00 as compensation as is evident from his annexure GNO2 (WIBA FORM 4 dated February 9, 2021).
 4. From the accident, he suffered a fracture of the right acetabular, internal bleeding, a burst spleen and a right hip haematoma.
 5. The 2nd respondent was dissatisfied with the decision of the director and filed an objection which was however not served upon the applicant.
 6. He was thereafter directed by the 1st respondent to report to the Labour Office for a second medical examination. He complied and was examined by a Dr Kowino and went home to wait for the results. The said doctor prepared a medical report which reduced the initial assessment of 15% disability to 0%.
 7. He was informed about the result of the second medical report but was not served with a copy thereof. When he visited the Labour Office to obtain a copy of the report he was denied a copy. He however took photos of the report from the Labour Office's file which he has appended to his application as annexure "GN03".
 8. The applicant states that he visited the Labour Officer to seek copies of the objection filed in respect of his case and a copy of the decision of the director but was verbally informed that no such decision existed.
 9. That it is only after he instructed his advocates in August 2020 that he learned of his right to appeal against the decision of the director. He was thereafter only able to raise the advocates' fees in November 2021, by which time the 30 days provided in the Act for filing appeals had lapsed, hence his application for extension of time for lodging the notice of appeal.
 10. The application is filed under section 52(2) of the *Work Injury Benefits Act*, Rule 8 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* and all other enabling provisions of the law.
 11. In response to the application the 1st and 2nd respondents filed a replying affidavit deponed by Victor Kiminja, the 2nd respondent's Assistant Legal Manager, on April 16, 2022 in which he avers that the Application herein is misconceived, fundamentally flawed and incompetent and as a result urged this court to dismiss it with costs to the respondents.
 12. The affiant further avers that this court lacks the requisite jurisdiction to hear and determine the instant application and should therefore down its tools.



13. The affiant maintains that the application dated December 7, 2021 is unmerited, hopelessly frivolous and an outright abuse to this court's processes. He further maintains that no sufficient reason has been given to warrant this court to exercise its discretion by allowing the instant application.
14. Mr Kiminja further asserts that there is no provision in the *Work Injuries Benefits Act* that requires the service of an objection upon a claimant and that the claimant himself admits to having been re-examined by Dr Kowino and a report prepared which varied his permanent disability from 15% to zero.
15. The respondents contend that there is no avenue for appeal against the decision of the Director of Occupational Safety and Health under the invoked provision of section 52(2) of the *Work Injury Benefits Act*.
16. The respondents aver that there is inordinate delay in filing of the application for extension of time to file the appeal against the decision of the Director of Occupational Safety and Health, the Director having rendered his decision on April 22, 2021. The respondents maintained that the delay is inexcusable and has not been explained.
17. The respondents further fault the applicant herein for failing to avail to this court a copy of the decision he wishes to appeal against to enable this court gauge whether or not the appeal is arguable.
18. The respondents further aver that there is enough material in support of the decision of the Director of Occupational Safety and Health as the claimant was also examined by Dr Nathan W Khamala who confirmed that the claimant did not suffer any permanent incapacity. It is on this basis that the respondents argue that the claimant is not entitled to any compensation and the appeal lacks basis.
19. The 1st and 2nd respondent maintain that they will be greatly prejudiced should this court allow the instant application as the decision sought to be appealed against has not been shown to be extant.
20. The 2nd respondent avers that it did not participate in the proceedings before the Director of Occupational Safety and Health in complete contravention of the provisions of section 26(4) of the *Work Injury Benefit Act* and that no basis has been laid by the applicant for its joinder to these proceedings at this juncture.
21. In conclusion, the respondents urged this court to dismiss the application dated December 7, 2021 with costs to the respondents.
22. Parties were directed to dispose of the application by way of written submissions.
23. The issues arising for determination are whether this court has jurisdiction to grant the orders sought, and whether the applicant has satisfied the conditions for grant of the said orders.
24. Sections 51 and 52 of the *Work Injury Benefits Act* (WIBA) provide as follows -
 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.
 52. Director's reply



- (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.
25. It is therefore clear from the said provisions that this court is clothed with jurisdiction to determine the issues in the instant application.
 26. The second issue is whether the applicant is entitled to the orders sought. The respondents contend that there was unreasonable delay, that there is no copy of the decision appealed against produced by the applicant and that the applicant has not demonstrated the arguability of the appeal.
 27. To support its argument on unreasonable delay, the respondents rely on the decisions in *Joseph Maina Njoroge & 2 others v Paul Chege Mubahi* [2007] eKLR, *Festus Ngolua Miburi v Abdalla Chullu & Another* [2007] eKLR.
 28. On the ground that there is no arguable appeal, the respondents rely on the decisions in *Stephen Gitau & another v Muraguri Ndugire* [2010] eKLR and Joseph Maina Noroge (supra).
 29. The applicant on the other hand has contended that he was never served with either the objection or the decision of the director. He was thus not able to file the appeal in time.
 30. In the Supreme Court decision in *Salome Maina v Chief Officer Dept. of Education, Laikipia County Government* [2018] eKLR, the court held that extension of time is not a right of a party but an equitable remedy that is only available to a deserving party at the discretion of the court.
 31. The same position is echoed in the decision of Odunga J in *Francis Mwanza Mulwa v Kanji Vagjiani & 2 others* [2019] eKLR. Both these decisions have been adduced by the respondents.
 32. The Court of Appeal in the case of *Edith Gichugu Koine v Stephen Njagi Thoithi* [2014] eKLR stated that whenever an application for extension of time is before a court, the court ought to take into account several factors specifically, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.
 33. In the case of *Paul Musili Wambua v Attorney General & 2 others* [2015] eKLR, the Court of Appeal was faced with the situation where the appellant was not served with notice of the trial court's judgement date and while allowing an application for extension of time and leave to file notice of appeal out of time stated as follows:

“... it is now well settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general, the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”



34. In *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR where the Court of Appeal stated thus:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

35. Delay must be construed on a case by case basis. In some cases, delay of a month may be inordinate while in others a delay of one year may be reasonable, each depending on the circumstances of the case.

36. In the instant case, it is clear that the reasons for delay have been adequately explained. The applicant has decried the failure of the director to issue a copy of the decision varying the original assessment for compensation award to him from 15% to 0%. He has further explained that he was never served with a copy of the objection, a fact that is confirmed by the respondents who at paragraph 8 of the replying affidavit of Victor Kiminja states –

“8. That there is no provision in the Work Injuries Benefits Act requiring service of an objection upon a claimant.”

37. I am satisfied that the delay in filing the appeal against the decision of the director has been sufficiently explained as stated by the applicant. He has never been served with the decision of the director. The respondents, if they have a copy of the same, have not submitted it to court. It is therefore doubtful whether there was any objection in terms of section 51(2) of the WIBA, or a response thereto in terms of section 52(1) of the Act.

38. These are justifications for both the delay, as well as the arguability of the appeal.

39. For the foregoing reasons I find merit in the application by the applicant herein and make the following orders:

- (i) That leave be and is hereby granted for extension of time for lodging of the notice of appeal against the Objection Decision of the Director of Occupational Safety and Health Services.
- (ii) That the Director of Occupational Safety and Health Services is hereby directed to produce before this court a copy of the objection lodged by the Respondents and the decision thereof within 30 days from the date of this ruling.

40. The appeal to be filed within 30 days from today.

41. The costs of this application shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 22ND 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 15th March 2020 and subsequent directions of 21st 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

