



REPUBLIC OF KENYA



KENYA LAW
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**Ngugi v Robinson Investment Ltd (Miscellaneous Application
E007 of 2022) [2022] KEELRC 12946 (KLR) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12946 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E007 OF 2022**

**AK NZEI, J
OCTOBER 27, 2022**

BETWEEN

MARY WANGARI NGUGI APPLICANT

AND

ROBINSON INVESTMENT LTD RESPONDENT

RULING

1. The application before me is a notice of motion dated February 16, 2022. The application is expressed to be brought under section 87 and 90 of the [Employment Act](#) and rule 17 of the [Employment and Labour Relations Court \(Procedure\) Rules 2016](#). The applicant seeks the following orders:-
 - a) That the court do adopt as a judgment of the court the award of the Directorate of Occupational Safety and Health Officer made on May 30, 2019.
 - b) That judgment be entered for the applicant against the respondent for the sum of Kshs 432,000 with interest at 14% per annum from May 30, 2019 until payment in full.
 - c) That costs of the application be assessed and awarded by the court.
2. The application is based on a supporting affidavit sworn by the applicant on February 16, 2022. It is deponed in the said affidavit:-
 - a) That the applicant was employed by the respondent as a secretary from July 2016 until November 13, 2016 earning Kshs 20,000 per month.
 - b) That while in the course of her employment, the applicant was on November 13, 2016 shot by thugs who had the intention of stealing from the company; and sustained serious bone fractures that rendered her unable to walk, and to date relies on crutches to support herself.



- c) That the matter was reported to the Director of Occupational Safety and Health Services who on May 30, 2019 assessed compensation payable to the applicant at Kshs 432,000.
 - d) That the respondent did not object to the director's decision within the prescribed period but instead proceeded to engage its insurers over the matter who made another assessment, alleging that the applicant is entitled to Kshs 178,000 instead of the amount assessed by the director.
 - e) That the amount assessed by the director continues to earn interest at the rate of 14% per annum.
3. The application is opposed by the respondent, whose managing director, one Jim Joe, swore a replying affidavit on May 20, 2022 which was subsequently filed in court on May 26, 2022. It is deponed in the said affidavit:-
- a) That the applicant was on November 13, 2016 shot by thugs who had gone to raid Shell Petrol Station, Nyali Mombasa and was shot when the applicant and the company driver decided to chase after the thugs outside the fuel station; which was not the applicant's mandate.
 - b) That despite the applicant sustaining injuries while not at her duty station, the respondent took care of her medical expenses and incurred medical expenses of Kshs 493,272.
 - c) That the respondent engaged its insurers in order to recover the sum used on the applicant's treatment, and the insurers gave an offer of Kshs 178,250 only.
 - d) That the respondent has todate never received the director's decision, hence failure to appeal.
4. Documents annexed to the applicant's supporting affidavit included a duly filled Dosh form 1, Dosh WIBA 4 dated May 30, 2019 addressed to the respondent and a letter dated July 14, 2020 by Mombasa County Occupational Safety and Health Officer asking the respondent to settle the sum of Kshs 432,000 stated in Dosh/WIBA 4 dated May 30, 2019, which the respondent had not yet settled. The validity of these documents has not been disputed by the respondent.
5. The *Work Injury Benefits Act* (WIBA) is silent on how awards of compensation made by the Director of Occupational Safety and Health Services to employees who suffer work injuries or occupational deceases are to be enforced. At the same time, the Act does not expressly divest this court of jurisdiction to enforce such awards; and especially where the award of compensation by the director has not been objected to and the employer has refused to pay the assessed compensation upon demand.
6. As I recently stated in the case of *Amir Swaleh Omar -vs- Mackenzie Maritime [EA] Limited* [2022] eKLR:-

“ 17. The Act (WIBA) is silent on how the awards of compensation made by the director in favour of employees involved in occupational accidents or who suffer occupational diseases are to be enforced. At the same time, the Act does not expressly divest this court of jurisdiction to enforce such awards; and especially where the award of compensation by the director has not been objected to and the employer has refused to pay the assessed compensation. Did parliament intent that an employee caught up in such a situation would be left at the mercy of an employer who may choose either to pay or not to pay the assessed sum? I do not think so.

18. What would be the purpose of the director making or undertaking inquiries in order to determine the issue of liability and proceeding to assess the



compensation payable if the compensation assessed by the director was not meant to be paid to the injured employee? In my view, once the director assesses the compensation payable and the same is not objected to pursuant to section 51 of the WIBA, the assessed sum becomes the injured employee's right and entitlement regarding which the employee can move to court and seek enforcement of that right by seeking entry of judgment in terms of the director's assessment, and issuance of a decree which can then be executed to realize that right.

19. Indeed, failure by an employer to pay a demanded compensation that has been assessed by the director and to which no objection has been lodged creates a dispute over a liquidated claim, which this court can entertain and determine. Article 50(1) of the Constitution of Kenya 2010 provides:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court, or if appropriate, another independent and impartial tribunal or body.”

7. Indeed, pursuant to article 162(2) (a) of the *Constitution of Kenya 2010*, this court has inherent jurisdiction over all employment and labour relations disputes except where that jurisdiction has been expressly ousted by the statute over particular matters specified in that statute. A good example of such statute is section 16 of the *Work Injuries Benefits Act* which provides as follows:-

“No action shall lie by any employee or any dependant of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.”

8. It is clear from the foregoing statutory provision that this court, and indeed other courts, have no jurisdiction to determine issues of liability and compensation in cases involving work injuries or occupational diseases. Section 23 of the *WIBA* mandates the director to make such inquiries as are necessary to decide upon any claim or liability in accordance with the Act; while sections 28 and 30 of the Act provide for assessment of compensation by the director.

9. Having said that, I am satisfied that the application before me is merited; and the same is hereby allowed in the following terms:-

- a) The award made by the director on May 30, 2019 is hereby adopted as a judgment of this court and, accordingly, judgment is hereby entered for the applicant against the respondent for Kshs 432,000 being the amount of compensation assessed by the director.
- b) The applicant is awarded costs of these proceedings and interest at court rates.
- c) Interest shall be calculated from the date of this ruling until payment in full.

10. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF OCTOBER 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:

..... for Applicant

..... for Respondent

