



Kungu v Uzuri Foods Limited (Employment and Labour Relations Cause E250 of 2021) [2022] KEELRC 12734 (KLR) (4 October 2022) (Ruling)

Neutral citation: [2022] KEELRC 12734 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E250 OF 2021**

**JK GAKERI, J
OCTOBER 4, 2022**

BETWEEN

BENSON KUNGU APPLICANT

AND

UZURI FOODS LIMITED RESPONDENT

RULING

1. The Applicant in this Notice of Motion Application seeks Orders that;
 - i. Spent.
 - ii. The decision by the Director Occupational Safety and Health Services (herein after DOSHS) rendered on September 8, 2021 awarding the Applicant Kshs 323,500.52 as against the Respondent be adopted as judgement of this court.
 - iii. Interest on a sum of Kshs 323,500.52 be awarded at the rate of 14% per annum from September 17, 2021.
 - iv. The Applicant be awarded costs of this application.
2. The application filed under certificate of urgency is expressed under the inherent powers of the court and all other enabling provisions of the law is premised on the grounds therein outlined and the Supporting Affidavit sworn by Benson Kungu, the Applicant, who avers that he was employed by the Respondent in March, 2019 as a truck driver at a monthly salary of Kshs 35,222/=.
3. The Affiant states that on September 6, 2020, he was involved in an accident and sustained bimalleolar ankle fracture on the left foot and was treated at Ladnan and Mama Lucy Hospitals and has been undergoing physiotherapy at the Metropolitan Hospital.



4. It is the Affiant's case that despite notifying the Respondent of the accident, the Respondent took no action and he had to seek the assistance of the counsel on record and the accident was reported to the Director of Occupational Safety and Health Services (DOSHS) and registered as Claim No WIBA/NBI/1066/2021.
5. That the DOSHS assessed the compensation at Kshs 323,500.52 and the Respondent was notified on September 17, 2021 but did not pay the sum or object or appeal the DOSHS assessment.
6. That attempts by the Commission on Administrative Justice to have the amount paid fell through as well.
7. The Affiant finally states that metal implants on his left leg require urgent removal by surgery but lacks finances to do so.

Respondent's case

8. By its Replying Affidavit sworn by Douglas Nyagaka, the Respondent states that it received the Applicant's application herein sometime in 2021.
9. The Affiant states that the Respondent's vehicles were well maintained and the Applicant was duty bound to ensure that the vehicle assigned to him was in a sound mechanical condition before departure. That the Applicant had not complained about the mechanical condition of the motor vehicle.
10. The affiant further states that the Claimant has tendered no evidence of the Respondent's negligence or breach of statutory duty.
11. That the Applicant risked his life willingly by failing to inspect the motor vehicle before departure and the Respondent did not contribute to the accident.
12. The affiant further states its insurer reported that no claim had been made to it.
13. That the Claimant did not notify the Respondent about the accident and is therefore unaware of any claim for compensation and was not privy to the proceedings before the DOSHS and was therefore not heard.
14. That it is untrue that the Respondent had refused, failed or neglected to pay the sum awarded by the DOSHS.
15. That the Claimant neither reported the accident to the employer nor notify the Respondent of the award by DOSHS.
16. That the Respondent be granted time to file an objection to the award by the DOSHS.

Applicant's submissions

17. The Applicant raises two issues for determination including costs. The salient issue is whether the court has authority to adopt and enforce a decision of the Director of Occupational Safety and Health Services (DOSHS).
18. To urge his case that the court has jurisdiction, the Applicant relies on many decisions including [*Juma Nyamawi Bagala V Dosbi & Co \(Hardware\) Ltd \(2021\) eKLR*](#) to urge that the court has jurisdiction over injury disputes between employers and employee under WIBA but acknowledges that there is a lacuna as regards enforcements of awards made by the DOSHS.



19. Other decisions relied upon include [*Virginia Wangari Muita \(suing as the Legal representative of the Estate of Philip Maina Mwangi \(deceased\) on behalf and on behalf of the Dependants of the Estates\) V Nyoro Construction Co Ltd*](#) where Ongaya J invoked the unlimited and inherent jurisdiction of the court over employment and labour relations matters and adopted the award. Similar reasoning was adopted in [*Edwin Sangoro and Edison Conveyors Ltd V Amony Koech Yatich & Moran Auctioneers \(2021\) eKLR*](#), [*Samson Chweya Mwandole V Protective Custody Ltd \(2021\) eKLR*](#), [*Felix Makori Omosa V Manji Food Industries Ltd \(2021\) eKLR*](#) and many others to justify invocation of this courts jurisdiction to adopt an award by DOSHS as its judgement.
20. On purposive interpretation, reliance is made on the decision of Nduma J in [*Jared Ingling Obuya V Handicap International \(2021\) eKLR*](#) to urge that a purposive construction of the provisions of the [*Work Injury Benefits Act, 2007*](#), Article 162(2) of the [*Constitution*](#) of Kenya, 2010 and section 12 of the [*Employment and Labour Relations Court Act, 2011*](#), shows that the court has jurisdiction to adopt the awards by the DOSHS as its judgements for purposes of enforcement.
21. Other decisions relied upon include [*Samuel Wambua Mbituka V Metro Concepts East Africa Ltd & Keindia Insurance Co Ltd \(2021\) eKLR*](#) by Nzioki Wa Makau J, [*Union Insurance Co of Kenya V Ramzan Abdul Dhanji CA Civil App No 179 of 1998*](#), [*The Estate of Kombu Mulinge \(2021\) eKLR*](#).
22. On costs, it is urged that the Respondent should be held liable for the costs consistent with the general principle that costs follow the event.
23. The Respondent's submissions identifies two issues for determination, namely; whether the court has jurisdiction to hear and determine matters relating to enforcement of awards made by the DOSHS, and whether the Applicant's application will be prejudicial to the Respondent.
24. The Respondent submits that section 52 of the Work Injuries Benefit Act, 2007 confers jurisdictions on the court to hear appeals from decisions made by the DOSHS and is within the contemplation of section 12(1) of the [*Employment and Labour Relations Court Act, 2011*](#). Reliance is specifically made on section 52(2) of WIBA.
25. It is the Respondent's case that matters germane to compensation of employees for injuries and diseases contracted in the course of employment should only be litigated before this court on appeal. That the provisions of WIBA do not confer original jurisdiction on this court on disputes on decisions made by the DOSHS.
26. The Supreme Court's decision in [*Samuel Kamau Macharia and another V Kenya Commercial Bank Ltd & 2 others \(2012\) eKLR*](#) is relied upon to urge that a court cannot assume jurisdiction through judicial craft and innovation.
27. Reliance is also made in [*Owners of the Motor Vessel 'Lillian S' V Caltex Oil \(Kenya\) Ltd \(1989\) KLR*](#) to urge that when a court's jurisdiction is challenged and the court had no jurisdiction in the first instance, it must down its tools.
28. Also relied upon are the sentiments of Rika J in [*Lameck Nyakundi Anyona V WJI Kenya Construction Co Ltd \(2022\) eKLR*](#) where the court asserted its jurisdiction as an appellate court on WIBA matters as is the decision in [*Peter Mutua Kaloki V China Construction and Engineering Corp \(Kenya\) and another \(2022\) eKLR*](#).
29. The Respondent submits that as no appeal has been filed under section 52(2) of WIBA and the court lacks jurisdiction to entertain the present application.
30. The court is urged to uphold the holdings in these decisions.



31. That the matter herein should have been filed by way of a statement of claim not a Miscellaneous Application.
32. The court is urged to hold that the appropriate way to approach the court is by way of a statement of claim.
33. As to whether allowing the Applicant's application will prejudice the Respondent, it is submitted that it will in that the Applicant failed to effect proper service of the WIBA notification/compensation form upon the Respondent for its participation in the proceedings before the DOSHS and only learnt of the award when served with the Applicant's Application herein and had not been notified of the accident before.
34. The Respondent further asserts that the Applicant alleges that the accident occurred on September 6, 2020 and was treated at the Mama Lucy Hospital on September 8, 2020 after two (2) days. That this is a plot by the Applicant to prejudice the Respondent.
35. That the accident was marked as non-fatal and permanent incapacity was assessed at 5%.
36. It is urged that the assessed sum of Kshs 323,500.52 is unreasonably high as it was assessed at 96 months.
37. It is submitted that the Directors decision was haphazard.
38. The court is urged not to usurp the powers of the DOSHS under WIBA.

Determination

39. The singular issue for determination is whether the court has jurisdiction to make the orders sought.
40. It is trite law that jurisdiction is everything and without it the court must down its tools. (See Owners of the Motor Vessel 'Lilian S' V Caltex Oil (Kenya) Ltd (Supra).
41. In Samuel Kamau Macharia and another V Kenya Commercial Bank Ltd and 2 others (Supra), the Supreme Court was categorical that a court of law derives its jurisdiction from the Constitution or legislation or both.
42. On this issues and typically, the parties have adopted diametrically opposed positions and supported their respective positions with several judicial authorities.
43. The Applicant relies on Richard Akama Nyambane V ICG Maituro SPA (Supra) and Jared Ingling Obuya V Handicap International (Supra) among many others to urge that a purposive construction of Article 162(2) of the Constitution and section 12(1) of the Employment and Labour Relations Court, 2011 demonstrates that the court has jurisdiction to adopt awards by DOSHS as its judgment for purposes of enforcement by the Applicant.
44. The Respondent on the other hand maintains that the court has no jurisdiction on WIBA matters otherwise than on appeal as ordained by section 52(2) of the Work Injury Benefits Act.
45. The Supreme Court decision in Samuel Kamau Macharia & another V Kenya Commercial Bank Ltd & another (Supra) is cited extensively as are the decisions of Rika J referred to above.
46. It is not in dispute that the provisions of the Work Injury Benefits Act, 2007 are silent on enforcement mechanisms of awards made by the DOSHS and the court has been assuming jurisdiction to fill in the gaps in the legislative framework founded on the Construction of Articles of the Constitution and provisions of the Employment and Labour Relations Court Act, 2011.



47. Section 51 of the *Work Injury Benefits Act*, 2007 provides as follows;
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 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.
48. Further, Section 52 provides;
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 Directors reply being received by him appeal to the Industrial Court against such decision.
49. A plain reading of the provisions of the *Work Injury Benefits Act*, 2007 reveals that section 52(2) is the only provision which makes reference to this courts jurisdiction, which is exclusively appellate.
50. Be that as it may, the court is in agreement with the sentiments of Rika J in *Peter Mutua Kaloki V China State Construction & Engineering Corp (Kenya) & another (Supra)* that;
- ' It is understandable that the Employment and Labour Relations Court has been bending backwards to assist injured employees in actualizing their awards. But in doing, the court has engaged in matters it plainly lacks jurisdiction to entertain. The problem is one for legislators to resolve. The court cannot continue bending backwards and offer a solution to a problem it has not created. The authors of the *Work Injury Benefits Act* only intended the court to be involved in a limited way, under section 52(2) of the Act.'
51. The court is further guided by the sentiments of Rika J. in *Lameck Nyakundi Anyona V WJJ Kenya Construction Co Ltd (Supra)* as follows;
- ' There is no provision of the law, in the *Work Injury Benefits Act*, the *Employment and Labour Relations Act* or the *Employment Act* which allows the court to enforce the compensatory awards of the Director of Work Injury.
- Section 52(2) of the *Work Injury Benefits Act*, invoked by the Claimant in pursuit of enforcement only allows the court to deal with Appeals arising out of the award of the Director.
- In a leading decision on *Work Injury Benefits Act, Attorney General V Law Society of Kenya & another (2017) eKLR*, the Court of Appeal held that sections 51 and 52 of the Act, provide for an appellate system. An objector is allowed to appeal the decision of the Director in the Employment and Labour Relations Court. Jurisdiction of the Employment and Labour Relations Court under the law above, does not comprise enforcement of the Director's award.
- The Appellate court under the *Work Injury Benefits Act*, cannot be the same court which enforces the award of Director.



In the view of the court, the only enforcement the court can exercise its jurisdiction upon, is on judgments arising out of appeals received by the court pursuant to section 52(2) of the [Work Injury Benefits Act.](#)

52. The court is in agreement with these sentiments and shares the learned judge's concern that
- ' If courts exercise jurisdiction to bridge legislative gaps or failures, what prevents the claimant and other employees coming from the Director with unenforced award, from approaching the Chief Magistrates Court seized of employment and labour relations jurisdiction for enforcement?'
53. The foregoing fears are well founded.
54. Having heard and determined appeals against decisions and awards of the DOSHS, the court finds it puzzling when it is also invited to exercise additional jurisdiction to adopt decisions of the DOSHS as its judgement for purposes of enforcement.
55. This court is not persuaded that it has jurisdiction under the [Work Injury Benefits Act, 2007](#) other than appellate as conferred by section 52(2) of the Act.
56. For the foregoing reasons, it is the finding of the court that it has no jurisdiction to grant the orders sought herein.
57. The Application is declined with no orders as to costs.
58. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 4TH DAY OF OCTOBER 2022

DR. JACOB GAKERI

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.

DR. JACOB GAKERI

JUDGE

