



**Abubakar v Modern Coast Builders and Contractors Ltd (Miscellaneous Application  
15 of 2022) [2022] KEELRC 13245 (KLR) (17 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13245 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
MISCELLANEOUS APPLICATION 15 OF 2022**

**AK NZEI, J  
NOVEMBER 17, 2022**

**BETWEEN**

**FIRDAUS ATHAMN ABUBAKAR ..... APPLICANT**

**AND**

**MODERN COAST BUILDERS AND CONTRACTORS LTD ..... RESPONDENT**

**RULING**

1. The application before me is the applicant's Notice of Motion dated March 17, 2022. The applicant seeks the following orders:-
  - a. that the court be pleased to adopt as a judgment of this court the award of the Director of Occupational Safety and Health Services made on November 11, 2019.
  - b. that judgment be entered for the Applicant against the respondent for the sum of Ksh. 9,349,344 awarded, with interest at 14% per annum as from November 11, 2019.
  - c. costs of the application be assessed and awarded by the court.
2. the application is based on the supporting affidavit of the Applicant, Firdaus Athman Abubakar, sworn on March 17, 2022. The Applicant, who is a personal representative of the estate of Mohidin Abdulmahid Mohidin (deceased) deponed:-
  - a. that the deceased was employed by the respondent from 2006 to October 25, 2019 as a Transport Supervisor in the Department of Fuel Management, Logistics and IT earning ksh. 97,389 per month.
  - b. that on October 25, 2019 the deceased, while in the course of employment, sustained a fatal injury at Kokotoni Area and the matter was reported to the respondent who thereupon subjected themselves to Work Injury Benefits Act process as per the law to determine the quantum payable on the deceased.



- c. that the Director of Occupational Safety and Health Services issued DOSH/Form 1 which the Respondent filled, detailing the date of employment, salary and cause of death.
  - d. that on November 11, 2019, the Director assessed the compensation payable at ksh. 9,349,344, the deceased having suffered 100% incapacity, which amount has attracted interest of ksh. 3,054,463 as at 28<sup>th</sup> February 2022, and continues to attract interest.
  - e. that the respondent did not object or appeal the decision within 90 days as required by the law but proceeded to engage its insurers, despite the fact that there is no relationship between the deceased and the Respondent's Insurance.
  - f. that the Respondent has not paid a single cent in compensation to the deceased's estate and as per Director's assessment.
3. The application is opposed by the respondent vide a replying affidavit of Christine Mfutu sworn on May 19, 2022 and filed herein. It is deponed in the said replying affidavit:-
- a. that the deceased was employed in the Administration department majoring in Fuel Management Logistics and IT, and was stationed in the respondent's office in Mombasa.
  - b. that the deceased's death was occasioned by injuries resulting from an accident not in the course of the deceased's employment.
  - c. that the accident did not involve any company vehicle and as such no liability would be occasioned on the Respondent as envisaged under the *Work Injury Benefits Act*.
  - d. that the respondent did not prepare and submit DOSH Form 1 as alleged by the applicant, and that DOSH FORM 1 indicated that the accident occurred while the deceased was travelling to work and not while at work.
  - e. that the applicant made a fraudulent representation to the Director of Occupational Safety and Health services by presenting DOSH FORM 1 which was not filled by the respondent.
  - f. that the respondent denies liability as the injury did not occur during work.
  - g. that the Respondent disputes the Court's jurisdiction as the injury did not occur in the normal course of employment.
4. It is evident from the material placed before me by both parties herein, that the respondent did not object to the Director's assessment of compensation payable to the applicant regarding the deceased's death. Section 51 of the *Work Injury Benefits Act* 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 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.”
5. The Respondent has not demonstrated that it objected to the Director's decision on assessment of compensation payable.



6. In interrogating the issues of whether this Court has jurisdiction to entertain and to determine the issue of liability between parties in work injury claims and whether the court can enforce the Director's decision on assessment of compensation payable to employees involved in occupational accidents or suffering occupational diseases, and particularly where such decisions have not been objected to pursuant to section 51(1) of WIBA, the provisions of sections 16 and 23 of the Work Injury Benefits Act must be considered. Section 16 of the Act 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.”

7. On the other hand, section 23 of the said Act provides as follows:-

“(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 enquiries 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.”

8. I have recently stated in the case of *Millicent Akinyi Odhiambo & another -vs- Quale Holdings Limited t/a Guyana Guest House* [2022] eKLR that it is evidently clear from the foregoing two Sections of the WIBA that determination of liability and assessment of compensation payable thereon in work injury claims is the preserve of the Director of Occupational Safety and Health Services, and that this Court does not have primary and/or original jurisdiction over those issues.

9. Section 23 of the Act specifically provides that the Director shall make such enquiries as are necessary to decide upon any claim or liability in accordance with the Act. Determination of liability and assessment of compensation payable in work injury claims is strictly within the statutory domain of the Director. The statute expressly takes away this court's jurisdiction to determine such issues.

10. The respondent's purported denial of liability in the proceedings herein is coming too late in the day, and is presented in the wrong forum. It ought to have been presented to the Director during the enquiries stage under section 23 of the WIBA, or by way of an objection under section 51(1) of WIBA.

11. On whether this court can enforce the Director's decision on assessment of compensation payable, I recently stated as follows in the case of *Amir Swaleh Omar -vs- Mackenzie Maritime [E.A.] Limited* [2022] eKLR:

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“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 intend 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.”

12. The foregoing position applies to the present case. I hold that this Court has jurisdiction regarding enforcement of the Director's decision, but the court cannot interrogate or determine any issues of liability between the employer and the employee which either of them may attempt to place before this court for determination. Such matters ought to have been raised with the Director in accordance with the *Work Injury Benefits Act* as already stated in this Ruling.

13. I allow the Notice of Motion dated March 17, 2022 in the following terms:-

- a. the award of the Director of Occupational Safety and Health Services made on November 11, 2019 is hereby adopted by this court and accordingly, judgment is hereby entered for the claimant against the Respondent for ksh. 9,349,344, being the amount of compensation assessed by the Director of Occupational Safety and Health Services.
- b. the applicant is also awarded costs of these proceedings and interest on the decreed sum at court rates.
- c. interest shall be calculated from the date of this Ruling until payment in full.

14. Orders accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MOMBASA THIS**

**17<sup>TH</sup> DAY OF NOVEMBER 2022**

**AGNES KITIKU NZEI**

**JUDGE**

**Appearance:**



**Mr. Nyongesa for Applicant**

**N/A for Respondent**

