



**Nyamai v Badar Hardware Limited (Miscellaneous Application
E058 of 2021) [2022] KEELRC 13248 (KLR) (17 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13248 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E058 OF 2021**

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

BETWEEN

JEPHTHAH MANTHI NYAMAI CLAIMANT

AND

BADAR HARDWARE LIMITED RESPONDENT

RULING

1. The application before me is an Amended Notice of Motion dated December 2, 2021. The Applicant seeks the following substantive orders:-
 - a. that this Court be pleased to adopt as its judgment the award of the Director of Occupational Safety and Health Services.
 - b. that judgment be entered for the Applicant against the Respondent for ksh 1,999.222, being the amount assessed under the *Work Injury Benefits Act*.
 - c. that the Court be pleased to award interest on the amount from the date of assessment until payment in full.
2. The application is based on the Applicant's supporting affidavit sworn on December 2, 2021 and a further supporting affidavit sworn on July 6, 2022. It is deponed in the said affidavits:-
 - a. that the Applicant was in the year 2013 employed by the Respondent as a truck driver and that on September 7, 2017, while ferrying soil for making cement to Nairobi, the claimant was attacked by robbers at Taru area and was hacked, whereby he sustained severe bodily injuries.
 - b. that the claimant was rescued by good Samaritans whereupon he was taken to Pandya Memorial Hospital where he was admitted for a period of three months at the Respondent's expense.



- c. that the Applicant's incapacity was subsequently assessed at 60%.
 - d. that a DOSH Form 4 was duly filled by the Director of Occupational Safety and Health Services whereby compensation payable to the Applicant was on 13th March 2019 assessed at ksh 1,999,222.
 - e. that the Respondent has refused to pay the assessed compensation despite request by the Director *vide* a letter dated October 14, 2019.
3. Documents annexed to the Applicant's supporting affidavit sworn on December 2, 2021 include Dosh Form 1, duly filed by the Respondent, while a copy of Dosh Form 4 is annexed to the Applicant's further affidavit sworn on July 6, 2022 and filed in Court on July 12, 2022 pursuant to the Court's further directions given on June 30, 2022.
 4. According to the DoshForm 4 exhibited by the Applicant as aforesaid, and as deponed by the Applicant, assessment by the Director of compensation payable to the Applicant was done on March 13, 2019. The Dosh Form 4 is addressed to the Respondent by the Director. The Director wrote to the Respondent on October 14, 2019 asking the Respondent to settle the amount of compensation stated in the DOSH Form 4 dated March 13, 2019 as it was overdue, in view of Section 26(4) of the Act (WIBA).
 5. Section 26(4) of the Work Injury Benefits Act (WIBA) provides:-
 - "(4) An employer or insurer against whom a claim for compensation is lodged by the Director under this section, shall settle the claim within ninety days of the lodging of claim."
 6. In the present case, the sum of ksh 1,999,222 assessed by the Director and claim thereof lodged with the Respondent by the Director on March 13, 2019, became due within ninety days of the said date. The claim was not settled, forcing the Director to write to the Respondent on October 14, 2019 and to ask for settlement. A copy of the letter is annexed to the claimant's supporting affidavit sworn on December 2, 2021.
 7. The application is opposed by the Respondent, which on December 17, 2021 filed a replying affidavit by one Fredrick EM Ondako, the Respondent's Human Resource Manager, sworn on December 17, 2021. The Respondent denied having been the claimant's employer, and alleged that the Applicant was an employee of the Respondent's sub-contractor by the name Mohammed Ahmed Yusuf. The said deponent however deponed that he was aware of all the facts of the claim herein.
 8. The Respondent did not deny having received the DoshForm 4 dated March 13, 2019 and the Director's letter dated October 14, 2019. Further, the Respondent did not object to the Director's decision contained in the Dosh Form 4. Section 51(1) of the Work Injury Benefits Act provides:-
 - "(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."
 9. The Respondent did not demonstrate that they objected to the Director's decision made on March 13, 2019 in accordance with the aforesaid statute.
 10. The Respondent cannot purport to dispute liability in this Court. Determination of liability and assessment of compensation in work injury claims is strictly within the province of the Director of



Occupational Safety and Health Services. Section 23 of WIBA is clear on this. This Court cannot delve into such issue. Indeed, that is the creed of Section 16 of the Work Injury Benefits Act (WIBA) which provides:-

“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.”

11. The Respondent ought to have raised objection, if any, with the Director, but did not.
12. The Work Injury Benefits Act 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.
13. I recently held in the case of Amir Swaleh Omar vs Mackenzie Maritime[EA] Limited[2022] eKLR that:-

“...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.”

14. Having said that, I make a finding that this Court has jurisdiction to grant the orders sought in the Amended Notice of Motion dated December 2, 2021, and hereby allow the application in the following terms:-
 - a. the award of the Director of Occupational Safety and Health Services dated March 13, 2019 is hereby adopted by this Court and accordingly, judgment is hereby entered for the Applicant against the Respondent in the sum of ksh 1,999,222, being the amount of compensation assessed by the Director.
 - b. the Applicant is awarded interest on the decreed sum at Court rates, to be calculated from the date hereof until payment in full.
15. Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MOMBASA THIS 17TH DAY OF NOVEMBER 2022

AGNES KITIKU NZEI



JUDGE

Appearance:

N/A for Applicant

Mr. Mokaya for Respondent

