



Musembi v Great Yaduo Industry Limited (Miscellaneous Case E080 of 2022) [2022] KEELRC 13025 (KLR) (1 November 2022) (Ruling)

Neutral citation: [2022] KEELRC 13025 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS CASE E080 OF 2022
JK GAKERI, J
NOVEMBER 1, 2022**

BETWEEN

ELIAS MUSEMBI APPLICANT

AND

GREAT YADUO INDUSTRY LIMITED RESPONDENT

RULING

1. This is an ex-parte originating summons by the ex-parte applicant dated May 30, 2022 seeking Orders That:-
 - i. Spent
 - ii. This honourable court be pleased to adopt as a judgement of this court the award of the Director Occupational Safety and Health Services (herein after DOSHS).
 - iii. Judgment be entered for the Applicant against the Respondent for Kshs 73,728/= being the amount assessed under the *Work Injury Benefits Act, 2007*.
 - iv. This honourable court be pleased to award interest on the amount from the date of assessment until payment in full.
 - v. This honourable court be pleased to award any other relief this court may deem fit and just to grant.
 - vi. Costs of this application be awarded to the Applicants.
2. The Application filed under Certificate of Urgency is expressed under Order 37, Rule 3 (c) (1) and Order 50 rule 6 of the *Civil Procedure Rules, 2010* and section 3A of the *Civil Procedure Act* and Article 162 (2) (a) of the *Constitution* of Kenya, 2010 and section 12 of the *Employment and Labour Relations*



- Court Act, 2011 is premised on the grounds therein outlined and is supported by the Affidavit of Elias Musembi who depones that he was an employee of the Respondent as a Machine Attendant.
3. That on or about June 6, 2020, while in the course of duty, he was injured when a mould fell from the machine he was attending to.
 4. That he reported the same to his Supervisor, one Mr. Vincent Okuku, first aid was administered and he was taken to Athi River, Shalom Hospital for treatment.
 5. The affiant states that he reported the incident to the Director of Occupational Safety and Health Services (DOSHS) on August 12, 2020 and served the employer with the DOSHS forms for completion and claim which the Respondent had not done to the date of filing of the Application herein.
 6. It is the affiant's case since he was injured while in the course of employment and reported the injuries/ accident to DOSHS, who awarded the sum of Kshs 73, 278/= as the compensation payable by the employer.
 7. That he is yet to fully recover to his previous state of health and had suffered irreparable loss for the injuries and traumatic amputation.
 8. The affiant further states that the Respondent stands to suffer no prejudice if the orders sought are granted.
 9. On June 2, 2022 when the Certificate of Urgency came up for hearing, the court directed the Applicant to serve within 14 days and the same be responded to within 14 days of service and inter-partes hearing was slated for June 30, 2022 on which date the Respondent was absent.
 10. The court directed that the Application be disposed by way of written submissions and each party had 14 days to do so. Mention to confirm compliance was slated for July 26, 2022 by which date the Respondent had not responded service of mention on July 22, 2022 notwithstanding.
 11. The Application is unopposed.

Plaintiff/Applicant's submissions

12. The Applicant identifies two issues for determination namely; whether the court has jurisdiction to hear and determine this suit and whether the application should be allowed.
13. On the first issue, reliance is made on the provisions of section 12 of the Employment and Labour Relations Court Act, 2011 and Articles 162 (2) (a) and 165 (5) of the Constitution of Kenya, 2010 which confer jurisdiction upon the court. It is urged that the court has unlimited jurisdiction to hear and determine employment and labour relations disputes and the instant dispute relates to enforceability of an award granted by the DOSHS as a result of an injury sustained in the course of an employment relationship.
14. Reliance is made on the articulation of the concept of jurisdiction by the Court of Appeal in the often cited decision in Owners of Motor Vessel "Lilian S" V Caltex Oil (Kenya) Ltd (1989) KLR 1.
15. Section 10 of the Work Injury Benefits Act, 2007 (WIBA) is relied upon to underline the fact that an employee is entitled to compensation for injuries or other form of adversities resulting from an employment relationship. The provisions of section 51 and 52 of the WIBA are relied upon to urge that since the Respondent has not objected to the award, they were in breach of their obligations to the Applicant.



16. The decision in [*Hadisha Engineering Co Ltd and another v Benson Chege Karori \(2015\) eKLR*](#) is relied upon to illustrate the duration within which an objector must do so to the DOSHS and appeal to this court, if need be.
17. As to whether the application should be allowed, reliance is made on Article 48 of the [*Constitution*](#) of Kenya, 2010 on access to justice by all persons. It is urged that this court has jurisdiction to fill in the lacuna in the law to meet the ends of justice.
18. It is contented that since the provisions of WIBA are silent on enforcement of awards, the court should rise to the occasion to ensure that justice is done.
19. Reliance is also made on the decision in [*Bollinger v Costa Brava Wine Co Ltd \(1960\) Ich 262 at 238*](#) to urge that remedies should be tangible.
20. Further, reliance is made on the equitable maxim that equity will not suffer a wrong to be without a remedy. That the court has jurisdiction to ensure that no wrong shall go unremedied.
21. It is urged that the award sought by the Applicant is due from the Respondent as a statutory obligation and should be adopted as a judgment of this court and the court should award costs.

Determination

22. The singular issue for determination is whether the application herein is merited.
23. As submitted by the Applicant, this court derives its jurisdiction from Articles 162 (2) (a) and 165 (5) of the [*Constitution*](#) of Kenya, 2010 as well as section 12 of the [*Employment and Labour Relations Act*](#), 2011.
24. The courts jurisdiction is limited to matters germane to employment and labour relations including violations of rights and fundamental freedoms incidental these relationships.
25. The jurisdiction of this court analogous to any other court and is core to the discharge of judicial functions as elucidated in [*Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others \(2012\) eKLR*](#), where the Supreme Court emphasized that a court derives its jurisdiction from the [*Constitution*](#) or statute or both and cannot exercise jurisdiction not conferred by law. A court cannot arrogate jurisdiction unto itself not even on the ground of interest of justice as urged by the Applicant herein.
26. As explained by the Court of Appeal in the Owners of Motor Vessel “Lilian S” V Caltex Oil (Kenya) Ltd ([*Supra*](#))

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”
27. However, in the instance case, it is urged that there is a lacuna in the law as the provisions of the [*Work Injury Benefits Act*](#), 2007 are silent on enforcement of Awards made by the DOSHS and litigants have not infrequently sought adoption of such awards by the court and the court has adopted the awards as its judgments for purposes of enforcement.
28. Cases in point are the decisions in [*Richard Akama Nyambane v ICG Maltauro SPA \(2020\) eKLR*](#), [*Ruth Wambui Mwangi & another v Alfarab Wholesales Ltd \(2017\) eKLR*](#) and [*Jared Ingling Obuya*](#)



- v Handicap International (2021) eKLR* and many others where the court held that it had jurisdiction and adopted the awards as its judgements.
29. While the foregoing may be justified on the premise that it enabled the parties realise the compensation awarded by the DOSHS expeditiously, as ordained by Article 159 (2) of the *Constitution* of Kenya, 2010 among other reasons, it would appear to compromise the appellate jurisdiction of the court under section 52 (2) of the *Act*.
 30. Having heard and determined appeals challenging decisions of the Director of Occupational Safety and Health Services (DOSHS), it is unpalatable for the court to adopt the awards of the DOSHS as its judgement.
 31. It is not to overstretch imagination to envision a situation where the appellate jurisdiction of the court could in future be challenged on the ground that the court is sitting on appeal over its own decisions.
 32. This position finds support in the provisions of *WIBA*.
 33. Section 51 of *WIBA* 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.
 34. 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 Director's reply being received by him, appeal to the Industrial Court against such decision.
 35. This is the only jurisdiction expressly conferred upon this court by the *Work Injury Benefits Act*, 2007.
 36. The framers of the legislation did not envision the need for judicial intervention in the enforcement of awards by the DOSHS but the reality is different and this court has been filling the lacuna using the purpose approach to construction of Articles 162(2) and 165(5) of the *Constitution* and section 12 of the *Employment and Labour Relations Court Act*, 2011 as was the case in *Jared Ingling Obuya v Handicap International (2021) eKLR* and *Samuel Wambua Mbithuka v Metro Concepts East Africa Ltd and Kenindia Insurance Co Ltd (2021) eKLR*.
 37. For the foregoing reasons, it is the finding of the court that the Employment and Labour Relations Court exercises appellate jurisdiction under the provisions of the *Work Injury Benefits Act*, 2007 specifically over decisions made by the DOSHS including but not limited to awards.
 38. The court is further guided by the decisions in *Peter Mutua Kaloki v China State Construction & Engineering (Kenya) & another (2022) eKLR* and *Lameck Nyakundi Anyona v WJJ Kenya Construction Company Ltd (2022) eKLR* where similar sentiments were expressed.



39. In the latter case, the court expressed itself as follows;

“In the end, the court is satisfied that this matter should have been presented to it by way of an Appeal. The court does not have jurisdiction to enforce awards of the Director either through fresh claims, or Miscellaneous Applications.”

40. For the above stated reasons, this court is persuaded that it has no jurisdiction to grant the orders sought herein.

41. The originating summons dated May 30, 2022 is accordingly dismissed with no orders as to costs.

42. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 1ST DAY OF NOVEMBER 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 March 15, 2020 and subsequent directions of April 21, 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

