



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO.E074 OF 2021

AUSTIN ODUOR ODIRAAPPLICANT

VERSUS

KENYA SWEETS LIMITED1ST RESPONDENT

BENORI AGENCIS & SERVICES LIMITED.....2ND RESPONDENT

RULING

The applicant filed application dated 14th April, 2021 pursuant to section 3, 12, 20 of the Employment and Labour Relations Court Act and section 181(b) of the Civil Procedure Act and seeking for orders that;

Cause CMELRC No.845 of 2018 – Austin Odira v Kenya Sweets Limited & Bendori Agencies & Services Limited filed in the Chief Magistrates Court, Milimani Commercial Court, Nairobi be withdrawn and transferred to this court and set down for hearing.

The application is made on the grounds that on 1st April, 2016 the applicant was employed by the respondents as a casual labourer in the sweets factory and on 27th June, 2016 while mixing sugar and gum, a power operated mixture machine blades caught, crushed and sliced off his right arm severing it from the shoulder. On 29th June, 2016 the matter was reported to the Director of Occupational Safety and Health Services who awarded the applicant Ksh.1, 720,000 as compensation and the respondents have refused to pay the award.

Other grounds in support of the application are that on 29th November, 2017 the applicant filed CMELRC No.845 of 2018 seeking the enforcement of the award. At the time there was confusion as to whether the magistrate's court had jurisdiction to entertain claims under the Work Injury Benefits Act and this matter remained pending before the lower court and in the interests of justice this matter ought to be transferred to this court for hearing and determination.

The application is supported by the Affidavit of J.A. Oriema Okoth advocate for the applicant and who avers that upon the award by the Director of Occupational Health and Safety the respondents refused to pay leading to the filing of CMELCR No.845 of 2018 but in June, 2018 the presiding magistrate sought to seek guidance from head of station with regard to jurisdiction on work injury claims and 28th September, 2020 the application furnished the court with Gazette Notice No.9243 of 27th July, 2011 where the Chief Justice designated magistrates courts to hear and determine work injury claims. The matter was never placed for hearing. This has caused the applicant distress and hardship as the accident rendered him unable to fend for himself hence this application seeking to transfer the matter to this court for hearing and determination.

Determination

The applicant filed a Complaint before the Chief Magistrate's Court at Nairobi in CMCC No.845 of 2018 on the grounds that on 27th June 2016 the respondent assigned him duties and in the course of undertaking such duties got injured. That such injury arose out of negligence and breach of statutory duty on the part of the respondent under the Occupational Safety and Health Act, 2007. The accident was reported to the Director of Occupational health and Safety who assessed the same and made an award of Ksh.1, 720,000.

In the Complaint, the applicant was claiming the following;

- a) *General damages*
- b) *Special damages in the sum of Ksh.9, 200;*
- c) *Ksh.1,720,000 awarded by the Director of Occupational Health and Safety together with interest at court rate from the date of the award until payment in full.*

d) *Costs of the suit ...*

The applicant is now seeking that the suit filed before the lower court be transferred for hearing and determination before this court on the grounds that at the time the suit was filed there was confusion as to which court had jurisdiction to hear work injury claims.

The work injury arose on 27th June, 2016.

Under the Work Injury Benefits Act, 2007 the matter was reported to the Director and who made an assessment and award on 29th June, 2016 of which the applicant avers at paragraph 5, 6 and 7 of his Supporting Affidavit dated 14th April, 2021 that;

The respondent reported the incident to the Director of Occupational Safety and Health Services who after conducting the statutory assessment awarded the applicant a paltry Kshs.1.7 million as compensation.

Despite being notified of the award, the respondent to date has not compensated the applicant.

The applicant filed the plaint dated 29th November 2017 for the enforcement [of the] aforementioned award at the Chief Magistrate's Courts Milimani Commercial Court Nairobi, being MCELRC No.845 of 2018.

Under section 52 of the Work Injury Benefits Act, 2007 (WIBA) a party who is dissatisfied with the decision and award of the Director is allowed to file an appeal against the decision of the Director with the Court.

Rule 8 of the Employment and Labour Relations Court (Procedure) Rules, 2016 address how appeals are to be processed before the court.

Upon an award of the Director, where the parties are satisfied, the WIBA has not established a framework for the enforcement mechanism. The court being seized of original jurisdiction with regard to employment and labour relations disputes has adopted a purposive approach of parties filing a claim to enforce the decision of the Director. Such approach is limited to the enforcement of the Director's award as where a party is dissatisfied with the award, an appeal is permissible. See **Ruth Wambui Mwangi & Another Versus Alfarah Wholesalers (2017) eKLR**.

In this case, the applicant filed CMEELRC No.845 of 2018 as an ordinary suit seeking to address the alleged *paltry award of Ksh.1.7 million as compensation* together with a claim for general damages, special damages and interests on the award.

The Director has already addressed the matter and injury of the applicant and made an award. There is no appeal to this court seeking to challenge any part of such award.

The claims filed under CMEELRC No.845 of 2018 relates to matters which go beyond the Director's award. Under WIBA even where the court to allow the instant application seeking for a transfer to this court from the lower court, which is not the case here, the court would not be properly moved to deal as only an appeal can address the award of the Director or a specific claim seeking to enforce the award of the Director. See **Virginia Wangari Muita v Nyoro Construction Company Limited [2020] eKLR**.

Section 16 of WIBA requires that;

No action shall lie by an 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. [underline added]

the Supreme Court in **Law Society of Kenya v Attorney General & COTU (2019) eKLR** in addressing the application of section 16 of WIBA held that;

... a plain reading of Section 16 of the Act would reveal that its intention is not to limit access to courts but to create a statutory mechanism where any claim by an employee under the Act is subjected, initially, to a process of dispute resolution starting with an investigation and award by the Director aforesaid and thereafter, under Section 52 an appeal mechanism to the then Industrial

Court. ...

Section 16 cannot be read in isolation because if read with Section 23 and 52 of the Act, the Act provides for legal redress to the Industrial Court (now the Employment and Labour Relations Court) and therefore judicial assistance can be sought by aggrieved parties from decisions of the Director and the court can make a determination with respect to all relevant matters arising from those decisions. ...

Thus addressed, the court is not the right forum for the applicant to urge his case for the claims made for assessment of general damages, special damages and including assessment of interests from the award of the Director. A transfer of the suit from the lower court to this court would not yield the desired results in fact or in law. it would further mar up the issue and commence a procedure not envisage under WIBA or the Rules of the court. see **West Kenya Sugar CO Ltd v Tito Lucheli Tangale [2021] eKLR**.

Without delving into the merits of the matter, this court is not appropriate forum to address the applicant's case as framed. The intended

transfer would not achieve the desired results. The Chief Magistrate shall address the matter as appropriate.

Accordingly, application dated 14th April, 2021 is found without merit and is hereby dismissed. parties shall be heard under Chief Magistrates Court at Nairobi Millimani Commercial Court Civil Case No.845 of 2018.

DELIVERED IN COURT AT NAIROBI THIS 10TH DAY OF JUNE, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

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