



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

MISC. CAUSE NO E044 OF 2020

FELIX MAKORI OMOSAAPPLICANT

VERSUS

MANJI FOOD INDUSTRIES LIMITED.....RESPONDENT

RULING

1. This ruling relates to the Notice of Motion dated 2.9.2020. It is brought under Section 12 of the Employment and Labour Relations Court Act (ELRCA) Section 16, 37 and 51 of the Work Injury Benefits Act (WIBA). The application seeks the following orders:

- a) That this Honourable Court be pleased to adopt as Judgment of this Court the award of the Principal Occupational Health and Safety Officer dated 3.9.2018;
- b) That Judgment be entered for the Applicant against the respondent for Kshs.2,173,344 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;
- d) Costs of the application be awarded to the applicant.

2. The application is premised on the grounds set out on body of the motion and amplified in the supporting Affidavit sworn by the applicant on 2.9.2020. The respondent has opposed the application vide the Notice of Preliminary Objection (PO) dated 11.6.2021 and the Replying Affidavit sworn by its HR and Administration Manager Mr. Christopher Nzyoka.

3. The application and the Objection were disposed of simultaneously by written submissions.

Applicant's case

4. The claimant was employed by the respondent in its factory in Nairobi. On or about 1.12.2016, he slipped and fell onto a metal object while in the course of his duties and as a result, he sustained bodily injuries. Thereafter his compensation was assessed by the Occupational Safety and Health Officer under the provisions of WIBA as Kshs.2,173,344 as the Report DOSH Form 4 dated 3.9.2018.

5. The respondent was notified of the said assessment but has so far not paid him the same and persists in the refusal or neglect to pay. The respondent has not challenged the award by an objection under the WIBA and as the delay in paying the assessed compensation is inordinate and against the overriding objective of the Act.

6. As regards the Preliminary objection, the applicant contends that he sought stay of proceedings in his suit number CMCC 8876 of 2019 vide Notice of Motion dated 10.11.2020, pending the outcome of the instant application.

7. With respect to the Replying Affidavit the applicant contends that it has not given any reason for the inordinate delay in paying the compensation and it is otherwise scandalous and ought to be expunged from the record.

Respondent's case

8. The respondent admits that this case arose from an industrial accident and that it received the assessment of damages from the Principal Occupational Health and Safety Officer. that it was aggrieved by the said assessment and requested the claimant to undergo second medical

evaluation from Dr. Madhiwalla on 2.12.2019 but immediately the said doctors report came out, the claimant sued the company vide CMCC No.8876 of 2019.

9. According to the respondent, the claimant abandoned the WIBA claim and as such it could not appeal against the decision by the Director as required by the law but subjected itself to the court process. It contends that the lower court suit is still active and as such the *sub judice* rule applies to this case because the same parties herein are litigating the same dispute in the court below. Consequently, it submits that the application herein is an abuse of the process of the court and ought to be struck out with costs.

10. For emphasis, it relied on **Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR** among other precedents where the courts have held the filing of multiple suits in respect of the same disputes amounts to abuse of the process of the court.

Analysis and determination

11. I have carefully considered the materials presented to the court in respect of the instant application. The issue for determination are:

- a) Whether the application should be struck out for violating section 6 of the Civil Procedure Act.
- b) Whether the application should be allowed as prayed.

Whether section 6 has been violated

12. Section 6 of the Civil Procedure Act provides as follows: -

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them is claiming, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.” [Emphasis added]

13. It is common ground that the applicant filed suit in the lower court seeking compensation for the injuries arising from the industrial accident on 1.9.2016 and later filed the instant application for judgment in terms of the assessment of damages by the Director under WIBA. The basis of the instant application is that the Court of Appeal pronounced that ordinary courts have no jurisdiction to assess compensation for WIBA claims and reinstated the statutory provisions of WIBA which gave the jurisdiction to the Director.

14. In view of the foregoing, the suit filed in the lower court could not and cannot proceed there any further due to lack of jurisdiction. Consequently, even without an order staying the proceedings there, new proceedings filed in this court for enforcement of the Assessment of damages by the Director under WIBA cannot be *sub judice*.

15. As per section 6 of the Civil Procedure Act, *sub judice* principle can only be pleaded where the previous proceedings are pending before a court of competent jurisdiction. Since the lower court has no jurisdiction to assess damages for a claim under WIBA, the instant proceedings do not violate section 6 of the Civil Procedure Act and consequently, the preliminary objection by the respondent falls on its face.

Whether the application should be allowed.

16. The applicants wants the court to adopt the assessment of damages by the Director under WIBA as judgment of the court. The respondent acknowledges that the assessment of Kshs 2,173,344 was served upon it but it did not object to the same under section 51 of the Act. Section 51 (1) of the WIBA provides that:

“Any person aggrieved by a decision of the Director on any matter under this Act, may within sixty days of such decision, lodge with the Director an objection against such decision.”

17. In view of the fact the respondent did not challenge the said award of damages by the Director, there is no reason why the award should not be adopted as a judgment of this court and enforced against the respondent. Consequently, I allow the application by adopting the assessment of damages by the Principal Occupational Health and Safety Officer on 3.9.2018 being **Kshs. 2,173,344** as judgment of this court. I further award interest on the said award at court interest from the date of filing the application herein since that is when the applicant commenced the process of enforcing the award. The applicant will also have costs of the application.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 22ND DAY OCTOBER, 2021.

ONESMUS N MAKAU

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 April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE