



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

JUDICIAL REVIEW APPLICATION NO. 6 OF 2021

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDER OF MANDAMUS

IN THE MATTER OF ARTICLE 162(2) AND 165 (5) OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CAP 26 LAWS OF KENYA

IN THE MATTER OF RULE 7 OF THE EMPLOYMENT AND LABOUR RELATIONS COURT (PROCEDURE) RULES, 2016

AND

IN THE MATTER OF ORDER 53 RULE 1(1) OF THE CIVIL PROCEDURE RULES, 2010

BETWEEN

GODFREY NGONDI WAITITU.....EX-PARTE APPLICANT

- VERSUS -

DIRECTORATE OF OCCUPATIONAL

SAFETY AND HEALTH SERVICES.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 22nd October, 2021)

JUDGMENT

The ex-parte applicant is Godfrey Ngondi Waititu. He obtained leave to apply for the judicial review order of mandamus on 14.07.2021. He filed the relevant notice of motion on 19.07.2021 through Okello Kinyanjui & Company Advocates. He invoked Article 162(2) and 165(6) of the Constitution of Kenya, 2010, section 8 and 9 of the Law Reform Act, section 7(1) and (2) of the Fair Administrative Action Act, 2015, rule 7 of the Employment and Labour Relations Court (Procedure) Rules, 2016, Order 53 rule 1(1) of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. The applicant prayed for orders:

- 1) The Honourable Court be pleased to issue an Order of Mandamus directed at the respondent and compelling the respondent to accept, investigate, hear and determine a work injuries claim placed before it by the applicant's advocates on 12.08.2020.
- 2) The respondent be condemned to pay costs of the application.

The application was based upon the statutory statement dated 12.07.2021, the applicant's verifying affidavit sworn on 12.07.2021 and exhibits thereto. The claimant's case is as follows.

He was employed by Tamal Wire Products Limited as a Scrape Charger at a monthly gross pay of Kshs. 12, 950.00. On 14.12.2019 at around 2.00pm the applicant was on duty in the process of scrape charging when hot molten metal splashed on his right eye causing total visual loss and disfigurement amounting to 30% incapacity. The employer rushed the applicant to Light House for Christ Eye Centre for treatment. The claimant presented to the employer a request to facilitate medical treatment and compensation for injuries suffered but the employer failed or refused and neglected to facilitate the applicant's treatment and compensation for injuries suffered as a result of the accident. In the circumstances the applicant engaged his advocates (now on record) to institute a claim for compensation for work injuries at the respondent's offices in Mombasa. Thus, on 12.08.2020 the advocates made an application with respect to the compensation payable to the applicant pursuant to section 26 of the Work Injury Benefits Act, 2007 (WIBA) but the respondent, its officers, employees or agents refused to accept the claim form and supporting documents. Section 12 of WIBA provides:

“(1) A claim for compensation in accordance with this Act shall be lodged by or on behalf of the claimant in the prescribed manner within twelve months after the date of the accident or, in the case of death, within twelve months after the date of death.

(2) If a claim for compensation is not lodged in accordance with subsection (1), the claim for compensation may not be considered under this Act, except where the accident concerned has been reported in accordance with section 21.

(3) If an employer fails to report an accident or to provide information requested by the Director as specified in the request, the Director may— (a) conduct an investigation and recover the cost of the investigation from the employer as a debt due from the employer; or (b) levy a penalty on the employer.

(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 the claim.

(5) The Director shall, within thirty days of receipt of the money claimed under subsection (1), pay the money to the employee who made the claim or his dependants.

(6) An employer or an insurer who fails to pay the compensation claimed under this subsection commits an offence and shall on conviction be liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding one year or to both.”

The applicant’s further case is that the right to access to justice is enshrined in Article 48 of the Constitution of Kenya, 2010 and the respondent has without colour of right denied the applicant the said right by refusing, ignoring or neglecting to accept the claim form and supporting documents lodged on 12.08.2020.

The applicant has exhibited copies of the duly completed general application form No.3 dated 12.08.2020 signed for him by his advocates; DOSH FORM1 being notice by the employer of an occupational accident or disease of an employee dated 16.06.2020 signed for the employer on 16.06.2020 and signed by Dr. Fredrick Korir; a declaration by the applicant dated 17.06.2020 confirming instruction to his advocates; his national identification card; the hospital treatment notes and evidence of medical expenses; payslips by his employer Tarmal Wire Products Limited; NSSF statement showing due contributions; letter by the advocates dated 09.09.2020 forwarding to the respondent claim forms; and the notice to sue by the advocates dated 05.10.2020 and with a view of compelling the respondent to receive the applicant’s claim for compensation.

The notice of motion and all material filed for the applicant were served upon the respondent on 23.07.2021 as per the affidavit of service by an authorised court process server one Boniface Musyoka Joseph and filed on 04.10.2021. The date for hearing endorsed on the notice of motion was 13.10.2015 but despite the service, the respondent did not attend Court or file opposing affidavit. The advocate for the applicant made oral submissions in the ex-parte hearing to support the application.

The Court has considered the material on record and the oral submissions by the applicant’s counsel. The Court considers that the facts as per the applicant’s affidavit and exhibits are undisputed and the respondent is deemed to admit the same accordingly. The Court finds that the applicant has established that he got injured while on duty and he was entitled to make a claim for compensation as provided for in section 26(1) of WIBA. The Court further finds that the section entitled the applicant to make the claim by himself or by a person on his behalf and it was in accordance with the section when the applicant made the claim through his advocates. The Court finds that the injury is said to have been on 14.12.2019 and the claim made to the respondent was further forwarded by the letter dated 09.09.2020 and signed on 12.08.2020 - and the Court returns that the claim was within 12 months of the occurrence of the injury as prescribed in section 26(1) of WIBA. The Court further finds that despite demand that the claim is accepted and acted upon per the advocates’ letter of 09.09.2020, the respondent failed or refused to discharge the statutory duty to do so. The Court considers that failure by the respondent to reply the demand letter is a further manifestation of the respondent’s refusal to discharge the statutory duty with respect to the applicant’s claim for compensation. In the circumstances, the Court returns that the applicant has indeed established his case for an order of mandamus as prayed for. The applicant being successful, the respondent will pay costs of the proceedings.

In conclusion judgment is hereby entered for the ex-parte applicant against the respondent for:

- 1) The Order of Mandamus hereby issued and directed at the respondent and compelling the respondent by itself or by its officers or agents to accept, investigate, hear and determine a work injuries’ claim placed before it by the applicant’s advocates on 12.08.2020.
- 2) The respondent to pay costs of the application.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 22ND OCTOBER, 2021.

BYRAM ONGAYA

JUDGE