



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

MISCELLANEOUS NO. E127 OF 2021

SAMUEL WAMBUA MBITHUKA.....APPLICANT

VERSUS

METRO CONCEPTS EAST AFRICA LIMITED.....1ST RESPONDENT

KENINDIA ASSURANCE COMPANY LIMITED.....2ND RESPONDENT

RULING

1. The Applicant has moved the Court under a Miscellaneous Cause in a Notice of Motion expressed to be brought under Article 165 of the Constitution of Kenya 2010, Rules 28 & 31 Employment and Labour Relations Court (Procedure) Rules, 2016 and Section 26 of the Work Injury Act, and all other enabling provisions of the law. The Applicant seeks to be heard for orders:-

- 1) THAT the Honourable Court adopts the assessment of the Director of Occupation Health and Safety as a judgment of the court.
- 2) THAT a decree to issue in accordance with assessment of the Director of Occupation Health and Safety jointly and severally against the Respondents.
- 3) THAT the costs of this application be provided for.

2. The application is predicated on the grounds: -

- a) THAT the Applicant was an employee of Metro Concepts East Africa Limited.
- b) THAT Metro Concepts East Africa Limited hold a work injury insurance policy cover with Kenindia Assurance Company Limited, the 2nd Respondent.
- c) THAT around 14th March 2020, the Applicant sustained an injury while working for the 1st Respondent.
- d) THAT the 1st Respondent filled a DOSH FORM 1 and reported the accident to the Director of Occupation Health and Safety.
- e) THAT around 7th December 2020, the Director assessed the compensation due to the Applicant at Kshs. 891,682/-.
- f) THAT the Applicant has served the Respondents with the assessment of the Director of Occupation Health and Safety but no payment has been forthcoming.
- g) THAT the Respondents have jointly and severally refused and or neglected to pay the compensation.
- h) THAT Section 26(6) of the Work Injury Benefit Act provides that 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.
- i) THAT this situation has necessitated the instant application.
- j) THAT it is an equitable legal maxim that no person will suffer a wrong without a remedy.

- k) THAT no wrong should be allowed to go without any compensation if it can be redressed by a court of law.
- l) THAT Article 159 (2) of the Constitution of Kenya provides that justice shall be done to all, irrespective of status.
- m) THAT Article 159 (2) of the Constitution of Kenya provides that justice shall not be delayed.
- n) THAT justice shall be administered without undue regard to procedural technicalities.
- o) THAT therefore it is in the interest of justice that this matter be heard expeditiously.

The application is further supported by the affidavit of the Applicant Samuel Wambua Mbithuka. The Applicant urged the motion on 15th November 2021 through his Advocate Mr. Maina. He argued that the matter related to the adoption of the WIBA assessment as an order of the Court and prayed that the application be allowed.

3. The issue for consideration is mainly whether the Court has authority to enforce a decision of the Director for payment of compensation for work Injury/occupational disease contracted in the course of duty and which has not been objected to nor appealed against. For this matter, I am suitably guided ruling of my sister Mbaru J. in **Richard Akama Nyambane v ICG Maltauro SPA [2020] eKLR** where the Learned Judge stated:

*“The Work Injury Benefits Act, 2007 (WIBA) does not provide for an enforcement mechanism in respect of awards of the Director and recourse was section 87 of the Employment Act, 2007 (the Act) as held in the case of **Ruth Wambui Mwangi & Another versus Alfarah Wholesalers Limited [2017] eKLR**. Section 87(1) Subject to the provisions of this Act whenever— (a) an employer or employee neglects or refuses to fulfil a contract of service; or (b) any question, difference or dispute arises as to the rights or liabilities of either party; or (c) touching any misconduct, neglect or ill-treatment of either party or any injury to the person or property of either party, under any contract of service, the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Industrial Court. (2) No court other than the Industrial Court shall determine any complaint or suit referred to in subsection (1). ”The award under WIBA may only be enforced by filing suit with the court under the provisions of section 87 of the Act.”*

4. The Court is further guided by the case of **Jared Ingling Obuya v Handicap International [2021] eKLR** where my brother Nduma J. held that:-

“In the meantime applying purposive interpretation of Work Injury Benefits Act; Article 162(2) of the Constitution as read with Section 12(1) of Employment & Labour Relations Court Act, this Court finds that Employment & Labour Relations Court has jurisdiction to enforce awards of compensation by Director DOSH.”

5. These decisions demonstrate this Court has authority to enforce a decision of the Director which has not been objected to nor appealed against and therefore the Applicant herein is entitled to the reliefs sought in the motion. If I were to find otherwise the import would drive the Applicant from the seat of justice and leave said Applicant with nowhere to turn given that the Latin maxim holds *Ubi jus ibi remedium* meaning '**where there is a right, there is a remedy**'. This is a principle that postulates where the law establishes a right there should be a corresponding remedy for its breach. Put another way the principle is simply that no wrong should be allowed to go without any remedy. The fact there is lacunae is the precision of the enforcement of the latter part of the assessment of the Director of Occupational Safety and Health sans the punitive sanctions which ideally should be visited on the 2 Respondents before the Court, there is some modicum of relief the Court can grant to the Applicant which is to allow the application in terms of prayers 1 and 2 of the notice of motion application dated 9th July 2021. The Respondents to jointly and severally meet the award of the Director Occupational Safety and Health as well as the costs for the motion as their refusal to settle the award is what has led to this suit.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF NOVEMBER 2021

NZIOKI WA MAKAU

JUDGE