



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA**

**AT NAIROBI**

**MISCELLANEOUS APPLICATION NO. E102 OF 2021**

**EVANS KIGANANE ANYITI.....APPLICANT**

**VERSUS**

**DUNHILL BUILDING CONSTRUCTOR LIMITED...1<sup>ST</sup> RESPONDENT**

**APA INSURANCE LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Applicant filed a Notice of Motion Application dated 17<sup>th</sup> June 2021 seeking for orders:-

1. THAT this honourable court be pleased to adopt the assessment of the Director of Occupation Health and Safety as an order of the court.
2. THAT a decree to issue in accordance with assessment of the Director of Occupation Health and Safety.
3. THAT the costs of this application be provided for.

2. The Application is premised on the grounds that the Applicant is an employee of the 1<sup>st</sup> Respondent who holds a work injury insurance policy cover with the 2<sup>nd</sup> Respondent. That the Applicant sustained a severe fracture on the left ankle joint while working for the 1<sup>st</sup> Respondent and the matter was reported to the Director of Occupation Health and Safety (hereinafter 'the Director') who assessed the compensation due to him to Kshs 334,800/-. The Applicant asserts that he has served the Respondents with the assessment of the Ministry of Labour but no payment of the compensation has been forthcoming in contravention of Section 26(6) of the Work Injury Benefits Act, thus necessitating the instant application. The Application is supported by an affidavit sworn by the Applicant's lawyer, Maina Karanja Advocate who avers that after the assessment by the Director, the Respondents were aggrieved and sent the Applicant for a second medical examination on 5<sup>th</sup> February 2021. That the doctor for the insurance and employer revised the permanent incapacity downwards from 25% to 10% and the Applicant then subsequently lodged an objection with the Director. He further avers that the Labour Office then directed the Applicant to appear for assessment before its doctors Dr. Kowino and Dr. Kimani so as to determine once and for all the permanent incapacity suffered by the Applicant. That vide a report dated 22<sup>nd</sup> April 2021 prepared by the two doctors awarded the Applicant 25% permanent incapacity and the Director recommended that the initial demand notice dated 17<sup>th</sup> February 2021 be paid. He asserts that no payment has however been forthcoming and the statutory ninety days have elapsed since the claim for compensation was made. Further, the Respondents have not preferred an appeal against the assessment of the Director. He depones that it is thus in the interest of justice that the Court adopts the assessment of the Director and issue a decree as prayed.

3. In response, the 2<sup>nd</sup> Respondent filed a Replying Affidavit sworn on 23<sup>rd</sup> July 2021 by its Legal Officer, Ruth Mbalelo who avers that from the onset the instant application which is *sui generis* is incompetent and fatally defective as the same is supported by an affidavit sworn by a person who cannot legally swear to the contested facts therein. Further, that the application has also been made before a court with appellate jurisdiction on such matters only as provided for under Part VIII of the Work Injury Benefits Act No. 13 of 2007. She depones that there has never been any claim for compensation lodged by the Director against the 2<sup>nd</sup> Respondent and that the instant application discloses no cause of action and/or criminal culpability as against the 2<sup>nd</sup> Respondent at all. That it is clear in the instant case that the claim for compensation was expressly made against the 1<sup>st</sup> Respondent and the inclusion of the 2<sup>nd</sup> Respondent herein is therefore a misjoinder. She further asserts that the insurance policy taken by the 1<sup>st</sup> Respondent with the 2<sup>nd</sup> Respondent is a contract of indemnity intended to cushion the 1<sup>st</sup> Respondent against the risks or liability to compensate the injured employees and is not a contract between the 2<sup>nd</sup> Respondent and the said employees. That the Applicant cannot therefore seek to enforce a contract that he is not privy to.

4. She further depones that on the basis of the insurance policy between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the 2<sup>nd</sup> Respondent paid the said sum of Kshs. 204,101/- to the 1<sup>st</sup> Respondent for onward transmission to the Applicant in full and final settlement of the matter. That the 2<sup>nd</sup> Respondent was formally discharged and indemnified by the 1<sup>st</sup> Respondent in relation to the claim by the Applicant and that the Applicant should therefore direct his claim, if at all, to the right party. According to her, the Applicant is seeking and purporting to enforce this claim on the basis of a previous claim that was duly revised and settled by the 2<sup>nd</sup> Respondent as aforesaid. She further avers that the 2<sup>nd</sup> Respondent is a stranger to the document (Exhibit MK5) which she asserts was never part of or the basis of any claim lodged by the Director against the 1<sup>st</sup> Respondent. She produces documentation in support of her averments and prays that the application herein be struck out and/or dismissed with costs to the 2<sup>nd</sup> Respondent.

5. The Applicant then filed a Further Affidavit sworn on 27<sup>th</sup> September 2021 by his advocate who avers that an advocate of the High Court is an officer of the court competent to swear an affidavit on procedural matters of law and that he is therefore properly on record in this application and competent to swear the supporting affidavit. He asserts that the application herein does not seek to appeal the decision of the Director but to enforce the same and denies the claims that the 2<sup>nd</sup> Respondent was not aware of the Applicant's claim. That the 2<sup>nd</sup> Respondent's head of claims Mr. Festus Githinji even responded to their demand letter on 3<sup>rd</sup> February 2021 via email and acknowledged receipt of the same. He further avers that the 2<sup>nd</sup> Respondent's averments are self-contradicting because if indeed the Applicant was not part of the contract, it has not explained on what basis was the 2<sup>nd</sup> Respondent sending the Applicant for a second medical examination as highlighted in their response. That the 2<sup>nd</sup> Respondent's involvement cannot be dismissed and with email correspondence on record, the 2<sup>nd</sup> Respondent is clearly lying of not being aware of the objection by the Applicant on the revision of the permanent disability percentage and subsequent reinstatement of the initial demand notice. That the 2<sup>nd</sup> Respondent went on to prematurely pay Kshs 204,101/- to the 1<sup>st</sup> Respondent instead of waiting for a final determination and which payment the Applicant has never received. That the Applicant's claim for the said Kshs 334,800/- thus remains outstanding until settlement in full and that any further delay by the Respondents continues to a violation of Statute.

6. The 1<sup>st</sup> Respondent also filed a Replying Affidavit sworn on 29<sup>th</sup> September 2021 by the 2<sup>nd</sup> Respondent's Legal Officer, Linda Chorio who depones that she is informed by the 1<sup>st</sup> Respondent that this matter has since been settled and the Applicant has written a letter withdrawing the suit herein. That the details and documents relating to the settlement and withdrawal were put to the attention of Counsel for the Applicant on 10<sup>th</sup> August 2021 and that it is thus surprising that Counsel for the Applicant only waited until the eve of the hearing of the application herein to file and serve the Respondent's Advocates with a Further Affidavit while concealing the facts of the said settlement and withdrawal of the matter by the Claimant. She produces the exhibits showing the settlement marked as *Exhibits LC 2 (a) – (h)* for the attention of this Court. She further avers that it is suspicious that there is no pleading, affidavit and/or any document on record in support of the persistent claim herein that is signed by the Applicant himself and which makes the matter appear to be a pursuit of an underhanded scheme.

## 7. Applicant's Submissions

The Applicant submits that on 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, he is guided by the ruling of the Employment and Labour Relations Court at Nakuru in **Richard Akama Nyambane v ICG Maltauro SPA [2020] eKLR** where the Court stated that:

“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.”

8. The Applicant submitted that he is further guided by the case of **Jared Ingling Obuya v Handicap International [2021] eKLR** where the Court stated 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.*” He submits that he has demonstrated to this Honourable Court that the court has authority to enforce a decision of the Director which has not been objected to nor appealed against and that he is entitled to the reliefs sought. That however if the Court were to find that it does not have jurisdiction, the import would drive the Applicant from the seat of justice and leave him with nowhere to turn and that the law does not anticipate a wrong without a remedy. The Applicant submits that Section 19(2) of the Work Injury Benefits Act states that ‘Any provision of an agreement in terms of which an employee assigns, purports to assign, relinquishes or purports to relinquish any right to benefits in accordance with this act shall be void.’ That the agreement the 1<sup>st</sup> Respondent purports to have entered with him is thus an illegal contract as per Section 19 and cannot be enforced and that such contracts are against public policy as they deny employees their rightfully assessed compensation for injuries sustained in the course of their duty. That public policy holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good-which may be termed the policy of the law, or public policy in relation to the law. That the principle was followed in **Mohamed v Attorney General [1990] KLR 146** and **Nyeri Civil Appeal No. 40 of 2001-Nyeri County Council vs. Monicah M. Mwangi (unreported)** where the Courts held that no court ought to enforce an illegal contract or allow itself to be made instrument of reinforcing obligations alleged to arise out of a contract or transaction that is illegal, if such illegality is brought to the notice of the court and the person invoking the aid of the court is himself implicated in the illegality. He also cites the case of **Kenya Airways Limited v Satwant Singh Flora [2013] eKLR** where the Court set out the guidelines for determining rights and obligations of parties where one party pleads alleged illegality of the contract as justification for refusal to be bound under such a contract; including that if the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not. It is the Applicant's submission that the Respondents should not be allowed to rely on an illegal

contract to avoid their obligations and that the application herein ought to be allowed as prayed with costs to the Applicant.

#### 9. 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Submissions

The Respondents submit that Rule 8 of the Advocates (Practice) Rules, provides:

"No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear."

The Respondents submit that no reason has been advanced by the Applicant's advocate on why the Applicant cannot swear the Affidavits on his own behalf especially with glaring and ample evidence that the Applicant has accepted the full and final settlement of the claim through the office of Nairobi County Occupational Safety and Health Officer. On advocates swearing affidavits on behalf of their clients, the Respondents rely on the authorities of **Oxbridge Limited v Guaranty Trust Bank (Kenya) Limited [2021] eKLR** which cited the Court of Appeal case of **Kamlesh Manshuklal Damji Pattni v Nasir Ibrahim Ali & 2 Others [2005] eKLR**; and **International Community of Women Living With HIV Registered Trustees v Non-Governmental Organizations Co-ordination Board & 2 Others; Teresia Otieno (Proposed Interested Party) [2019] eKLR** which quoted the case of **Magnolia PVT Limited v Synermed Pharmaceuticals (K) Ltd [2018] eKLR**. The Respondents thus urge this Court to disregard the Affidavits sworn by the Advocate in support of the instant application and expunge the same from the record. It is the Respondents' submission that Section 52 of the Work Injury Benefits Act provides that an objector may appeal to the Industrial Court against the decision of the Director, within thirty days of the Director's reply being received by him. The Respondents submit that this Court can only therefore get involved as an Appellate Court and that in **Kenya Plantation and Agricultural Workers Union v KTDA Mogogosiak Tea Factory [2021] eKLR**, the court stated that the matter was improperly before Court as the applicant had not taken the matter for adoption by the lower court for it to become a court order which can therefore be appealable to this Court. That this holding confirmed that this Court only sits as an Appellate Court in matters such as the instant one and the Applicant herein therefore ought to have filed the application for enforcement of the award (if at all), in the Magistrate's court which has jurisdiction to entertain such matters. The Respondents submit that the instant application also fails on this score.

10. The Respondents submit that there is no evidence that the permanent disability was re-assessed back to 25% nor that the initial award of Kshs. 334,800/- was reinstated by the Director as alleged. The Respondents submit that the only recourse the Applicant had after the award was re-assessed downwards was to appeal against the decision of the Director, which has evidently never been done and that there is no provision for the Director to make assessment twice. They further submit that as the Director also issued a certificate of payment upon the Applicant's receipt of the award of Kshs. 166,320/-, the Director could not have reinstated the initial award of Kshs. 334,800/- hence the reason that the payment was accepted as full and final payment to the Applicant. They urge this Court to find that the award of the Director dated 5<sup>th</sup> March 2021 was valid and the payment made to the Applicant was final and that the Applicant has no further claim against the Respondents as alleged.

#### 11. Determination

The Court is being asked to interpose between the Applicant and the employer and its insurer. It is asserted there was a determination by the Director of Occupational Safety and Health wherein the 1<sup>st</sup> Respondent, and by extension the 2<sup>nd</sup> Respondent, were ordered to make payment to the Applicant for his injuries sustained at the workplace pursuant to the provisions of the Work Injury Benefits Act. It is not in doubt that this Court exercises an appellate jurisdiction in relation to the assessment by the Director in terms of Section 52(2) of the Work Injury Benefits Act. Contrary to the averments by the Respondents, this Court exercises its appellate jurisdiction directly from the refusal by the Director of Occupational Safety and Health and does not require the matter to be first presented before the Magistrate's Court so as to lay basis for an appeal to this Court. A correct reading of Section 52(2) is that the appeal flows directly to this Court much as would be the case if the Director were exercising magisterial powers. He indeed exercises quasi-judicial powers in the determination under Section 51.

12. There was the issue of an advocate swearing an affidavit relating to the facts of the case. Under the Advocates (Practice) Rules, an advocate is not the proper party to swear an affidavit in relation to the factual aspects of a claim as it presents a problem when the facts are to be tested by way of cross-examination of the deponent. Would the Advocate don the hat of a party and take the stand to be cross-examined on facts related to the claim? I think not. In my considered view there must be a demarcation between the two and the client is the best person to depone to facts. An advocate may swear an affidavit which relates to the law and legal positions. In this case there was an overreach by the Applicant's counsel in swearing the affidavit as he could not be the appropriate party to respond to the matter.

13. The law is silent as regards the refusal of a party to meet the obligations that the Director imposes on the parties. There is no provision on the execution of the order, or the enforceability thereof. In my considered view, this is lacunae that the Employment & Labour Relations Court (Procedure) Rules should cure as the execution of the decision of the Director or his directives is not provided for expressly in the statute. As the area is grey at best, this Court will not hazard to determine something that is purely for legislation to cure. As such there being an application that demonstrates there was satisfaction of the directive and there being a defective application before me the best that the Court can do is dismiss the application albeit with no order as to costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF NOVEMBER, 2021**

**NZIOKI WA MAKAU**

**JUDGE**