



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. E065 OF 2021

(Before Hon. Lady Justice Maureen Onyango)

GLYDE KHATETE OKWARO

CLAIMANT

VERSUS

MOHNLAL J. CHABADIYA T/A ASHADIP ENTERPRISES

RESPONDENT

JUDGMENT

1. Vide his Memorandum of Claim dated and filed in Court on 26th January, 2021, the Claimant seeks to have the decision of the Director Occupation Health and Safety adopted as a Judgment of this Court and that he be allowed to subsequently proceed with the process of execution.
2. In his Claim the Claimant averred that on 1st June, 2020 while working for the Respondent he was injured when a plank of wood fell on his shoulders as a result of which he sustained a fracture of his shoulder bone.
3. He further averred that he was rushed to Kenyatta National Hospital where first aid was administered. He was subsequently transferred to Ladnan Hospital where he was operated on and had a steel plate inserted on his shoulder.
4. He stated that a report of the accident was made to the Director Occupational Safety and Health on 3rd August, 2020 who awarded the Claimant Kshs.78,000/- as full and final settlement for the injuries sustained.
5. Being dissatisfied with the award the Claimant sought a review of the award on 29th September, 2020 and on 8th October, 2020 a work injury evaluation clinic was conducted by Dr. Kimani W. and Dr. Kowino J whose reports indicated that the Claimant had suffered disability to the degree of 20%.
6. That following the report the Director Occupational Safety and Health issued an amended DOSH WIBA Form 4 indicating an enhanced award of Kenya Shillings Eight Hundred and Twenty Six Thousand, Eight Hundred Only (Kshs.826,800/-).
7. The revised award was on 21st October, 2020 served upon the Respondent, who acknowledged receipt of the same but failed to pay the award.
8. Aggrieved by the Respondent's failure to settle the award, the Claimant filed the instant Claim seeking the following reliefs that:
 - (a) *This Court does adopt the decision of the Director Occupation Health and Safety as a Judgment of this Court and that execution does proceed in the usual manner.*
 - (b) *Costs of this Claim.*
 - (c) *Interest on the award at Court rates from the date of filing of the award.*
 - (d) *Such other or further reliefs as this Court may deem just to grant.*
9. The Respondent despite being served with the Summons and the Memorandum of Claim failed to enter appearance and file its defence in this matter. The matter therefore proceeded as undefended Claim by way of the Claimant filing its Witness Affidavit and written

submissions.

10. In his Witness Affidavit sworn on 20th May, 2021 reiterated the averments in the Statement of Claim.

Claimant's Submissions

11. In his submission the Claimant maintained that this Court is clothed with the requisite jurisdiction to hear and determine this matter by dint of the provisions of Section 87 of the Employment Act which provides that all matters relating to disputes between employers and employees lies with this Court.

12. He further submitted that Section 52(2) of the Work Injury Benefits Act provides that appeals from decisions of the Director of Occupational Safety and Health lie with this Court. To buttress this argument the Claimant cited and relied on the case of **Ruth Wambui Mwangi and Agnes Nyambura Wangai (Suing as the legal representatives of the Estate of the Late Joseph Wangai Muraya) v Alfarah Wholesalers Limited Miscellaneous Application Number 21 of 2017** where the Court held that *the available enforcement mechanism for an award from the Director of Occupational Health and safety lies in the filing of a Memorandum/Statement of Claim in the Employment and Labour Relations Court.*

13. The Claimant further submitted that in the absence of an Appeal by the Respondent against the award this Court has jurisdiction to determine this Claim.

14. He further submitted that the Respondent was at all times properly served with Court processes and a return of service filed in accordance with the provisions of Rule 11 (5) of the Employment and Labour Relations Court (Procedure) Rules 2016.

15. In conclusion the Claimant urged this Court to find merit in his Claim and allow it in terms of reliefs sought therein.

Analysis and Determination

16. Having considered the pleadings, evidence, submissions, and authorities cited by the Claimant the following are the issues for determination:

(i) Whether this Court has jurisdiction to entertain the Claim as filed;

(ii) Whether the Claimant is entitled to the reliefs sought.

Jurisdiction of this Court

17. In the case of **Motor Vessel "SS Lillian" (1989) KLR I** Nyaranyi J as he then was, stated –

“Jurisdiction is everything, without it, a court has no power to make one more step. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

18. The Supreme Court restated the above decision in the matter of **Advisory Opinions of the Supreme Court under Article 163(3) of the Constitution, Constitutional Application No. 2 of 2011** as follows: -

“The Lillian 'S' case (1989) KLR1 establishes that jurisdiction flows from the law, and the recipient-court is to apply the same, with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity.”

19. The Claimant maintained that this Court has jurisdiction to determine the instant Claim by dint of the provisions of Section 87 of the Employment Act. He further argued that there being no Appeal preferred by the Respondent to the Director of Occupational Safety and Health this Court ought to enforce the award. He relied on the decision by Radido J. in the case of **Ruth Wambui Mwangi and Agnes Nyambura Wangai (Suing as the legal representatives of the Estate of the Late Joseph Wangai Muraya) v Alfarah Wholesalers Limited (Supra)** for emphasis.

20. Contrary to the Claimant's submission the law is silent on the refusal of a party to settle the award made by the Director. There is no provision on execution of the order or the enforceability thereof.

What is provided for in terms of enforcement of an award?

21. Once an award is made by the Director parties are bound by the provisions of Section 26 (6) of the Work Injuries Benefits Act, 2007 which provides as follows:

“(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”.

22. In Appeal No. 36 of 2019 between **Virginia Wangari Muita (Legal Representative of Philip Maina Mwangi (deceased) v Nyoro Construction Company Limited**, Ongaya J, citing with approval the decision of Radidi J in **Ruth Wambui Mwangi & Another v Alfarah Wholesalers [2017] eKLR**, held that in the absence of a prescribed summary procedure for enforcement of the Director’s decisions, the proper Court of enforcement of the Director’s decisions made under WIBA is the Employment and Labour Relations Court in exercise of the unlimited inherent jurisdiction over employment and labour relations matters.

23. Judgement is accordingly entered for the Claimant against the Respondent in terms of the Director’s award in the sum of Kshs.826,800. The award shall attract interest from the date of filing suit.

24. The Respondent shall also pay Claimant’s costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF DECEMBER 2021

MAUREEN ONYANGO

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 March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE