



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISCELLANEOUS APPLICATION NO. E096 OF 2021

BORNIFACE INDOLO LUCIVA.....APPLICANT

VERSUS

PRIME QUANTIFIERS CONSTRUCTION

COMPANY LIMITED.....1ST RESPONDENT

AFRICA MERCHANT ASSURANCE LIMITED.....2ND RESPONDENT

RULING

1. The Miscellaneous Application was filed on 24th May, 2021 seeking an order in the following terms:-

- 1. That the Court 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 Health and Safety.**
- 3. That the costs of the application be provided for.**

2. The application is premised on grounds set out on the face of the Notice of Motion and buttressed in the supporting affidavit of Maina Karanja, advocate for the applicant, the nub of which is that the applicant is a former employee of the 1st respondent and the 1st respondent has a Work Injury Insurance Policy Cover with the 2nd respondent.

3. That the applicant suffered a severe fracture on the ankle joint in the course of work at the 1st respondent's premises.

4. That matter was reported to the Director of Occupation Health and Safety who assessed the compensation due to the applicant in the sum of Kenya Shillings one million, one hundred and ninety eight thousand and eighty (1,198,080).

5. That the applicant has served the respondents with the claim aforesaid but the respondents have refused and or neglected to pay the compensation.

6. That Section 26(6) of the Work Injury Benefits Act, provides that an employer or an insurer who fails to pay the compensation claimed under this sub-section 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.

7. That the purpose of this application is to enforce the decision by the Director.

8. The application is supported by a further affidavit by the applicant to which is attached the assessment by the Director DOSH in the sum of Kshs 1,198,080.00. This had been left out in the initial application.

9. The applicant states that Section 51(1) of the Work Injury Benefits Act, provides for any person aggrieved by a decision of DOSH to object to the decision within 60 days. That no such objection was filed by any person and hence the Court to enforce the same by allowing the application with costs.

10. The respondent filed a replying affidavit in opposition to the application dated 22/6/2021.
11. The respondents state that the application is incompetent as it is supported by a defective affidavit sworn by a person who is not a party to the suit. That the application was also filed by a wrong party in violation of Section 26(4), (5) and (6) of Work Injury Benefits Act (WIBA) and only the Director DOSH may enforce the award.
12. The respondents state that the applicant attached incorrect DOSH form in the initial application though the current one attached to the further affidavit shows the sum of Kshs 1,198,080 sought to be paid.
13. The applicant prays that the matter be remitted back to Director DOSH to have reassessment done taking into account representations by the 1st respondent as they never got opportunity to be heard in the first place.
14. That the application be dismissed with costs.

Determination

15. The Court is satisfied that the applicant has placed before Court a competent Work Injury claim assessment in the sum of Kshs 1,198,080 done by Director DOSH pursuant to Section 26 of the Work Injury Benefits Act, 2007. The Court is satisfied that the compensation was made in favour of the applicant against the respondents.
16. The Court is also satisfied that the 1st respondent did not object to the decision by Director DOSH regarding the assessed compensation in terms of Section 51(1) of Work Injury Benefits Act within 60 days of the decision. The 2nd respondent has not filed any opposition to this claim being the insurer of the 1st respondent.
17. The Court further is satisfied that the 1st and 2nd respondents have not paid the assessed compensation within 90 days in terms of Section 26(4) of the Act. The 2nd respondent has not filed any opposition to this claim being the insurer of the 1st respondent.
18. This Court held in the matter of **Jared Ingling Obuya –vs- Handicap International – Cause No. 296 of 2018** that:-

“The Work Injury Benefits Act is silent on the manner of enforcement of the decisions by Director DOSH. It is however the Court’s finding that it could not have been the intention of the legislator that beneficiaries of compensation by Director DOSH remain without a remedy in the event an employer does not implement the decision of the Director awarding an employee compensation. The Court must bridge the lacuna to bring to effect the objects and purpose of the Act as captured in the preamble as follows:-

“An Act of Parliament for compensation to employee for work related injury and diseases control in the cause of their employment and for connected purposes.”

19. This Court has not found any reason to depart from its previous finding.
20. However, the Court notes that the legislator provided a criminal enforcement mechanism under Section 26(b) as follows:-

“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.”

21. The Court is not inclined to follow this route and holds the view and finds that it has jurisdiction under Section 12 of the Employment and Labour Relations Court Act to enforce a decision of the Director DOSH without first having to resort to criminal sanction against the respondents.
22. The Court shall however, not hesitate to hold a party who fails to comply with orders of this Court guilty of contempt of Court and apply equivalent sanctions to those recommended under Section 26(6) of Work Injury Benefits Act.
23. In the final analysis, the Court finds that the conduct by the respondents is merely dilatory and aimed at delaying the applicant from enjoying the fruits of the Decision by Director DOSH.
24. The Court adopts the decision by the Director DOSH to award the applicant Kshs 1,198,080 as against the 1st and 2nd respondent as an order of the Court and directs the respondents to comply with the Decision within 30 days of this Ruling failing which execution to ensue.
25. Costs to follow the event.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 9TH DAY OF DECEMBER, 2021.

MATHEW N. NDUMA

JUDGE

Appearances

Mr. Murang'ata for Applicant

Mr. Muumbi for 1st respondent

Ekale – Court Assistant