



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**APPEAL NO. 36 OF 2019**

**(Being an appeal from the Ruling and Orders by the Senior Resident Magistrate Hon. E. Wanjala in Milimani Employment and Labour Case No. 594 of 2019 delivered on 05.09.2019)**

**VIRGINIA WANGARI MUITA (Suing a the legal representative of the Estate of the late Philip Maina**

**Mwangi (Deceased) on her behalf and on behalf of the Dependants of the Estate).....APPELLANT**

**-VERSUS-**

**NYORO CONSTRUCTION COMPANY LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 6th March, 2020)

**JUDGMENT**

The late Philip Maina Mwangi was at all material time employed by the respondent. While on duty, the said Philip Maina Mwangi (deceased) suffered fatal injuries. The Director of Occupational Safety and Health Services on 16.05.2017 assessed the compensation under provisions of the Work Injury Benefits Act (WIBA) 2007 and fixed it at Kshs. 998, 400.00. The respondent did not object to that assessment within 90 days as provided for under WIBA. Thereafter, the respondent failed to pay the compensation to the appellant. Thus the appellant filed a statement of claim in the Chief Magistrate's Court at Nairobi, Millimani Commercial Courts on 23.04.2019 through Kimathi Wanjohi Muli Advocates for judgment against the respondent for a sum of Kshs. 998, 400.00 as assessed by the Director in the decision rendered on 16.05.2017. The appellant further prayed that the respondent be fined Kshs. 500, 000.00 for failing to comply with the provisions of the WIBA; interest at 14% per annum from 16.05.2017; costs of the suit; and any other relief the Court may deem just and fit to grant in the circumstances.

The respondent opposed the claimant's suit by filing on 10.06.2019 the response to the statement of claim through R.M. Mutiso & Company Advocates. The respondent denied that the accident had occurred, denied the particulars of negligence, that the respondent had taken measures to ensure safety of the employee, the deceased, that if the injuries had occurred then they were due to the deceased's contributory negligence, and the jurisdiction of the trial court was admitted. The appellant filed a reply to the response on 18.06.2019.

The appellant filed a notice of motion on 17.06.2019 under section 12 of the Employment and Labour Relations Court Act, Section 10, 26(4& 6), 28, 36 and 51 of WIBA, 2007, and rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and Articles 159 (2) (b) of the Constitution of Kenya, 2010 and all the enabling provisions of law. The application was for orders:

1. That the decision by the Director of Occupational Safety and Health Services rendered on 16.03.2017 awarding the claimant a sum of Kshs.998, 400.00 as against the respondent be adopted as a judgment of court as prayed in the statement of claim dated 18.04.2019 and execution to proceed in the usual manner.
2. That the respondent be condemned to pay a fine in the sum of Kshs.500, 000.00 to the claimant for failing to comply with the decision of the Director rendered on 16.03.2017.
3. That interest on a sum of Kshs. 998,400.00 be awarded at the rate of 14% per annum from 16.05.2017.
4. That costs of the application and the main suit be awarded to the claimant.

The application was based upon the grounds that the 90 days for the respondent to object to the assessment had lapsed; the instant suit was for enforcement of the Director's decision and nothing was triable; the response as filed constituted mere denials and was a sham denial as an afterthought; and the interest was due for failure to comply with the Director's decision.

The respondent opposed the application by filing grounds of opposition dated 20.06.2019 that the statement of response raised triable issues and hence the matter cannot be determined summarily. Parties filed their respective submissions. The trial Court delivered the ruling on the application on 05.09.2019. The findings were as follows:

1. Radido J in **Ruth Wambui Mwangi & Another Versus Alfarah Wholesalers (2017) eKLR** it was held that the proper Court for enforcement of the Director's decision in an assessment under provisions of WIBA was the Employment and Labour Relations Court by dint of section 52 (2) of WIBA and was by a statement of claim.

2. In the present case, the statement of claim had been filed before the Magistrate's Court and the respondent had filed a response. There was no application to strike out the memorandum of response and the same being on record, the trial Court found that there was no reason for summary judgment and the suit ought to go to a full hearing. Thus the application was dismissed and each party was to bear own costs of the application.

Now the claimant, the appellant herein, is dissatisfied with that ruling and has filed on 03.10.2019 the memorandum of appeal upon the grounds summarised as follows:

1. The learned trial Magistrate erred in failing to adopt the Director's decision of 16.05.2017.

2. The learned trial Magistrate erred in failing to appreciate that the present suit was for the enforcement of a statutory decision of the Director and not a trial on issues of liability and quantum.

3. The learned trial Magistrate erred in failing to appreciate that the present suit was for the enforcement of a statutory decision of the Director and there were no triable issues.

4. The learned trial Magistrate erred in failing to appreciate that the respondent had failed to object to the Director's assessment of compensation on 16.05.2017 and the 60 days for such objection had already lapsed and the 90 days to pay the compensation had lapsed and the challenge to the decision was time barred as the 90 days had lapsed.

5. The learned Magistrate erred in dismissing that notice of motion dated 17.06.2019 because there was no prayer for striking out the memorandum of reply.

6. The learned Magistrate erred by considering issues not raised and by basing her ruling on issues not raised by the respondent.

The appellant prayed for orders:

1. The appeal be allowed and the orders issued on 05.09.2019 be set aside.

2. The appellant's notice of motion application dated 17.06.2019 be allowed and orders sought therein granted and the statutory decision of the Director made on 16.05.2017 be and is hereby adopted as judgment of Court and execution to proceed in the usual manner.

3. The respondent to pay the costs of the appeal and costs at subordinate court in CMEL No. 594 of 2019.

4. Any order the Honourable Court may deem fit and just to grant.

The parties filed submissions on the appeal through their respective advocates. The Court has considered the record of appeal, the submissions and the matters in dispute and makes findings as follows:

**First**, under section 52 (2) of the WIBA an objector to the decision of the Director's reply may appeal to the Employment and Labour Relations Court against the decision within 30 days of the Director's reply. Thus the Court returns that the proper way to challenge the Director's decision is by way of an Appeal accordingly. Thus the Court holds that the merits or otherwise of the Director's decision cannot be challenged by way of an ordinary suit commenced by a statement of claim but only by way of an appeal as prescribed in the section. Such appeal would be filed by way of a memorandum of appeal under rule 8 of the Employment and Labour Relations Court (Procedure) Rules, 2016. It is obvious that the present case is not about such appeal but the suit would amount to an abuse of Court process if it opens itself up to challenge the merits of the Director's decision. The Court considers that enforcement of the Director's decision made under the provisions of WIBA would not amount to a labour dispute under rule 5 of the Court's Rules or a dispute to be referred to the Court under rule 4 of the Court's rules. Thus it appears to the Court that the Director having made an assessment and there being no objection and then appeal per section 52 of WIBA it is not available for a party to file a statement of claim for enforcement of the Director's decision as though a dispute exists in that regard. While making that finding, in absence of a prescribed summary procedure to enforce the Director's decision, the memorandum of claim (but limiting itself to issue of enforcement of the Director's decision) would appear to be an available process as per Radido J in **Ruth Wambui Mwangi & Another Versus Alfarah Wholesalers (2017) eKLR**.

**Second**, the WIBA does not provide for the procedure for enforcement of the decision by the Director. It is the Court's considered view that such procedure ought to be provided for in the regulations to be made by the Cabinet Secretary under section 56 of the WIBA or the rules of this Court made under Part V of the Employment and Labour Relations Court Act, 2011 (ELRCA). The Court considers that such regulations having not been made, it is proper that this judgment be served upon the Cabinet Secretary responsible for labour, the Attorney General and the Registrar of the Employment and Labour Relations Court (in his capacity as Secretary under section 26 of the ELRCA) for appropriate action. For the time being that the procedure is not expressly provided, the Court considers that the Director's decision would be enforceable by way of a miscellaneous application or memorandum of claim and exhibiting the Director's decision for enforcement by this Court.

**Third**, in the instant case it is clear that the appellant filed an ordinary suit by way of a statement of claim as though there was a dispute between the parties as per rule 4 of this Court's rules. The appellant further went beyond the enforcement of the Director's decision and raised many other triable issues such as claims of malice and illegality, prayer for a fine of Kshs. 500,000.00 and other matters. The Court finds that the learned trial magistrate cannot therefore be faulted for finding that the case was not proper for a summary judgment as was applied for and in the face of the numerous triable issues. For instance the Director obviously made no finding of a fine and the respondent would be entitled to be heard prior to a finding by the trial Court on the claims and prayer in that regard. Looking at the material before the trial Court, clearly there was a proper suit duly filed and whose pleadings had properly closed in readiness for a full hearing in accordance with the rules on hearing. The appeal will therefore fail. The Court upholds the respondent's submission that the suit as was filed was ready for pre-trial and nothing barred the appellant from participating accordingly. In any event, the Court holds that the proper Court for enforcement of the Director's decision made under WIBA is this Court in exercise of its unlimited and inherent jurisdiction over the employment and labour relations matters.

**Fourth**, the Court has considered the lacuna in the law on procedure for enforcement of the Director's decision made under provisions of WIBA and the genuine difficulties the appellant may have encountered in that regard and returns that each party shall bear own costs of the appeal.

In conclusion judgment is hereby entered for dismissal of the appeal with orders:

1. Each party to bear own costs of the appeal.
2. The appellant to serve this judgment in 7 days upon the Cabinet Secretary responsible for labour, the Attorney General and the Registrar of the Employment and Labour Relations Court for considered appropriate action in view of the findings in this judgment for appropriate legislative intervention.

**Signed, dated and delivered** in court at **Nairobi** this **Friday, 6th March, 2020**.

**BYRAM ONGAYA**

**JUDGE**