



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CUASE NO.4 OF 2020

RICHARD AKAMA NYAMBANE.....CLAIMANT

VERSUS

ICG MALTAURO SPA.....RESPONDENT

RULING

The claimant application dated 24th January, 2020 is seeking for orders that the court to order the respondent to pay him the sum of Ksh.691,277 as awarded by the Director of Occupational Health and Safety on 11th August, 2015 plus interest at 14% per annum from 11th August, 2015 to date.

The application is supported by the annexed affidavit of the claimant and on the grounds while in the employment of the respondent on 23rd March, 2015 he sustained work related injury while driving the employer's tractor on Webuye-Eldoret road. The injury was recorded by the respondent and the necessary documentation with Director of Occupational Health and Safety services obtained and assessment done with an award on 11th August, 2015. The claimant was found with severe burns to his face and hands leading to permanent disability at 20% and the Director awarded him Ksh.691, 277 compensation. This awarded was on the basis that the claimant's wages were Ksh.36, 004 per month at 96 months with 20% disability all 691,277.

Other grounds in support of the application are that despite the respondent being aware of the award and demand being made to pay the claimant, there is no compliance hence the suit herein.

In reply the respondent filed Replying Affidavit sworn by Sandro Spencer the financial controller for the respondent and avers that the respondent complied with the law in processing the claimants claim. The claim was forwarded to the insurance who delayed in settling the same. The claimant was kept informed of the progress.

Spencer also avers that in the year 2018 the claimant and the respondent agreed at the claimant's request to be paid ksh.122,875 to meet urgent financial need and that such amount be retained upon the payment of his claim and on 31st January, 2018 he was paid via cheque.

Later the claimant visited the respondent and agreed to be paid ksh.150, 000 in full and final settlement of his claim against the respondent and a cheque dated 5th February, 2019 was issued. He signed a discharge voucher.

The claimant is guilty of material non-disclosure and has come to court with unclean hands and undeserving of the orders sought and his application and suit should be dismissed.

The claimant filed Further Affidavit and avers that the respondent misled the court with regard to his claims. he had two work injuries while in the course of his employment with the respondent. the first injury occurred on 23rd March, 2015 at Chemoi while driving the respondent's tractor which overheated as a result of which he sustained severe burns to his face and hands with 20% disability from the injury. There is no compensation therefrom.

The second work injury occurred on 23rd November, 2015 at Kipkaren River along Eldoret-Webuye road while a passenger in motor vehicle registration number KAM 276J Mitsubishi lorry. The lorry had been provided by the respondent to carry workers to work when it developed mechanical problems and overturned as a result of which the claimant sustained a severe maxilla facial trauma, fracture and dislocation of the right acetabulum and was admitted at Moi Teaching Referral Hospital for a long time.

The claimant also avers that the injury incident of 23rd November, 2015 is subject of Eldoret CMCC No.1203 of 2019.

The payment of Ksh.122, 815 on 31st January, 2018 was in respect of medical expenses at Moi Teaching and Referral Hospital for severe injuries on 23rd November, 2015. The partial payment of ksh.150, 000 on 5th February, 2019 was for the same injuries.

The respondent has never made any payment for the injury and 20% work injury.

Both parties filed written submissions.

The claimant submitted that while in the employment of the respondent on 23rd March, 2015 he suffered work injury which was reported to the Director of Occupational Health and Safety and who assessed the injuries and made an award of ksh.621,277. The respondent failed to pay.

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 Mwanggi & another versus Alfarah Wholesalers Limited [2017] eKLR**. the claimant also submitted that the respondent has applied the provisions of section 90 of the Act and on the basis that the court lacks jurisdiction for the claim has been filed contrary to the law but such provisions do not apply. The Director awarded him at ksh.691, 277 the respondent has failed to pay or file any appeal as required under section 51 and 52 of the WIBA as held in the case of **Hadisha Engineering Co. Ltd & another versus Benson Chege Karoki [2015] eKLR** that any objections to the award by dint of section 51 of the WIBA should be preferred within 60 days to the Director. After 30 days an objector may lodge an appeal.

The award under WIBA may only be enforced by filing suit with the court under the provisions of section 87 of the Act.

The claimant also submitted that the suit is properly filed with the court. upon injury on 23rd March, 2015. Upon report under Directorate of Occupational Safety and Health Services (DOSHS) there was an award of the Director on 11th august, 2015. The Director was thus moved within three (3) years prescribed under section 90 of the Act. there is no set framework within which the Director's award may be enforced and the instant proceedings only relate to the enforcement of the director's award.

The respondent has not made any payments to the claimant as alleged in response. The work injury on 23rd March, 2015 has not been redressed and the payments made were with regard to a second work injury and subject of **Eldoret CMCC No.1203 of 2019**.

The respondent submitted the claimant was an employee and was injured while at work and awarded Ksh.691, 277 by DOSH. He has since been paid Ksh.272, 875 on account of the said assessment. The claim that these payments related to a different claim from an accident which arose on 23rd November, 2015 and subject of **Eldoret CMCC No.1203 of 2019** is not true. The payments were on account of the accident which occurred on 23rd March, 2015 per the DOSH forms and award.

The respondent also submitted that the claimant is guilty of material non-disclosure a she failed to inform the court that he has been paid and signed discharge voucher.

The respondent also submitted that the matter is time barred by virtue of section 90 of the Act.

The Notice of Motion by the claimant is with Memorandum of Claim seeking similar orders. That the claimant be awarded ksh.691, 277 as awarded by the DOSHS on 11th August, 2015 with interest at 14% from such date. The award followed an accident on 23rd March, 2015.

The respondent in response admitted the claimant was an employee and following an accident on 23rd March, 2015 for which he was paid the sum of Ksh.272, 875 and he signed a discharge voucher. That the claims failed is time barred under section 90 of the Act.

The claimant contested the defence on the basis that he had a second accident on 23rd November, 2015 and admitted to hospital for a long time and the respondent paid hospital expenses.

On the motion, responses and the written submissions, the issues which emerge are;

Whether the claim is time barred pursuant to section 90 of the Act;

Whether the award under Work Injury Benefits Act, 2007 following assessment by Directorate of Occupational Safety and Health Services (DOSHS) is payable as claimed;

Who should pay costs.

It is not contested that the claimant was injured at work on 23rd March, 2015 and his claims assessed by DOSH and an award made on 11th August, 2015. This award is not contested.

The respondent case is that the award was paid and the claimant executed a discharge voucher attached to the affidavit of Sandro Spencer dated 9th May, 2020. The court reading of the discharge voucher is that the payment of ksh.150,000 to the claimant was for;

... release of the respondent from pursuit of any liability or claims whatsoever in relation to and all claims from events whatsoever and howsoever arising from my employment with the [respondent and until] ... such time when my claims will be FULLY settled by their insurer for whatsoever period of time now past up to and including on or about the 5th day of February 2019 ...

The discharge voucher fails to articulate with certainty, clarity and unequivocally as to whether the same covered the award of 11th August, 2015. On the averments that there was a second accident on 23rd November, 2015 and the claimant admitted in hospital for a long time, and that the respondent paid part of the hospital bills, the payments made and the discharge voucher executed on 5th February, 2019 are vague and ambiguous this far. These payments cannot confirm partial payment of the of the award by the Director under WIBA.

The existence of Eldoret CMCC No.1203 of 2019 is not contested. Though not delved into at length, what is apparent is that the same relates to the accident and injuries to the claimant on 23rd November, 2015. Where the matter is resolved and the respondent directed to pay, then any payments and discharge voucher should relate to such suit.

This is not the case in this instance. The payments allegedly made by the respondent on the records attached do not speak to the partial settlement of the Director's award of 11th August, 2015 or with regard to the proceedings under Eldoret CMCC No.1203 of 2019 the details of which have not been addressed by either party save there was an accident on 23rd November, 2015.

On the application of section 90 of the Act, as the claimant has correctly relied upon an award under section 51 and 52 of WIBA, one may lodge an appeal with the Director within 30 days. As held in the cited case of **Ruth Wambui Mwanggi & another versus Alfarah Wholesalers Limited [2017] eKLR**. upon Directorate of Occupational Safety and Health Services (DOSHS) making the work injury assessment under Occupational Safety and Health Act, 2007 on the award by the Director under WIBA, there is no enforcement mechanism and this being the court with mandate to address employment and labour relations claims and for connected purposes, the practice has been to file such claims under the provisions of section 89 of the Act as the Work Injury Benefits Act, 2007 read with the Occupational Safety and Health Act, 2007 do not outline the enforcement mechanism and procedures save to address work place injury assessment and award by the Director.

The application of section 87 of the Act, thus put into perspective, all claims premised under the Employment Act, 2007 are subject to the provisions of section 90 thereof. Section 87 and 90 thus read together, the cause of action herein and the orders sought seeking to enforce the DOSH award, such must be subject to the mandatory provisions of section 90. All claims must be lodged with the court within 3 years from the date the cause of action arose.

On the award of 11th August, 2015 by the Director such having been the cause and subject of proceedings herein, the application of 87 of the Act, claims thereof ought to have been addressed within 3 years thereof.

The claimant has not addressed the time lapse from 11th August, 2015 to 24th January, 2020 when he filed the matter herein.

The matter in issue, the claimant ought to have addressed his claims from the Director of Occupational Safety and Health Services award running from 11th August, 2015 on or before 10th August, 2019. To file his claim and seeking to enforce the award as herein under section 87 of the Act on 24th March, 2020 is way out of time and subsequently denies this court the requisite jurisdiction over the matter.

The alleged partial payments of the Director's award contested, and that such partial payments of ksh.272,875 related to a different and second accident on 23rd November, 2015, on the findings above that such payments are not specific, certain and are ambiguous, such cannot be related herein as admission of liability to elongate time and the award of 11th August, 2015 to give the court jurisdiction.

Accordingly, the claim to enforce the Director's award of 11th August, 2015 as herein is time barred pursuant to section 90 of the Employment Act, 2007. Each party shall bear own costs.

Dated and delivered electronically this 25th June, 2020.

M. MBARU JUDGE