



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

MISC.APPLICATION NO. 21 OF 2017

RUTH WAMBUI MWANGI

AGNES NYAMBURA WANGAI (suing as

the legal representatives of the estate of

Joseph Wangai Muraya.....APPLICANTS

v

ALFARAH WHOLESALERS LIMITED.....RESPONDENT

RULING NO. 2

1. In a ruling delivered on 31 July 2017, the Court allowed an application by applicants seeking enforcement of compensation awarded by the Director of Occupational Health and Safety.
2. The applicants thereafter moved to execute and this prompted the Respondent to move Court on 26 September 2017 seeking
 - a)
 - b) there be a stay of any further execution of the orders of this court dated and issued on 3rd August 2017 plus all consequential orders and proceedings and stay of sale of motor vehicle KBL 739B/ZD
 - c) There be stay of intended sale of motor vehicle registration number KBL 739 B Mercedes Actros attached by Direct O. Auctioneers on 14/9/2017 in execution of the order issued on the 31st July 2017 in this matter pending hearing and determination of this application inter partes
 - d) the motor vehicle KBL 739B Mercedes Actros attached at the roadside in Nakuru and driven away by Direct O. Auctioneers be released forthwith and unconditionally, and or on running attachment, to the Respondent, Alfalah Wholesalers Limited pending hearing and determination of the application inter partes.
 - e) The Court be pleased to review and set aside the ruling and order passed against the Respondent on 31st July 2017.
 - f) The auctioneers fees and storage charges and expenses be borne by the substantive Applicants.
 - g) Cost of this application be provided for.

3. The application was placed before Court in Eldoret on 26 September 2017 and the Court granted temporary stay of execution on condition Kshs 900,000/- was deposited into Court pending *inter partes* hearing on 2 October 2017.

4. The applicants filed a replying affidavit in opposition to the motion sworn by Ruth Wambui Mwangi and arguments were taken by the Court on 2 October 2017 as was scheduled and ruling was reserved to today (in the intervening period, the Applicants filed an application to bring forward the ruling, but the Court dismissed the application).

Stay of sale/release of vehicle KBL 939B

5. Orders c) and d) in the motion under consideration need no address by the Court as the same sought transient orders pending *inter partes* hearing which has now happened.

Auctioneer's fees/charges

6. Order f) was the subject of consent by the parties on amount of auctioneer's fees and also need not be discussed by the Court.

7. Consequently the substantive prayer for the Court's consideration is proposed orders b) seeking stay of further execution and proposed order e) seeking review and setting aside.

Respondent's contentions

8. In attempting to secure review and setting aside, the Respondent contended that the application was never served upon it and therefore it was condemned unheard contrary to the right to a fair hearing/natural justice; that the proceedings upon which the Court allowed enforcement of the award by the Director of Occupational Health and Safety were caught up by limitation as prescribed by section 90 of the Employment Act, 2007; the aforesaid proceedings were defective for not being commenced under the prescribed manner and that it is in the interest of justice to do substantial justice after hearing all parties.

Applicants' case

9. The Applicants in opposing the motion asserted that the application was duly served upon the Respondent and an affidavit of service was filed and was on record; that a copy of the ruling was also served as directed by the Court before execution; that the proceedings were brought within the prescribed limitation period; that what was before Court were enforcement proceedings arising from an award by the Director of Occupational Health and Safety which needed no *proving*; the proceedings were within the ambit of section 87 of the Employment Act, 2007 as read with sections 51 and 52 of the Work Injury Benefits Act, and that the subordinate Court's did not have jurisdiction over Work Injury Benefits Act claims and that the Respondent had not lodged an appeal against the award by the Director of Occupational Health and Safety.

10. The Court has given due consideration to the material placed before it including the parties oral submissions.

11. The law regarding review and setting aside is now so well known that the Court will not recite the same in this ruling. However, the Court will keep at the back of its mind the legal principles enunciated over the years.

Was the application served?

12. When the initial motion was placed before Court on 20 April 2017, the Court directed that it be served and *inter partes* hearing was scheduled for 20 June 2017.

13. Before allowing the application to proceed, the Court had to satisfy itself that it had been served.

14. From the record, there is an affidavit of service sworn by Kennedy Wasonga Ngesa and filed in Court on 16 May 2017 attesting to service of the application upon a lady who introduced herself as a secretary and daughter of one of the directors of the Respondent.

15. In an attempt to support the contention that the initial application was not served, the Respondent's director in his supporting affidavit merely made general assertions that there was no service without replying to the specifics on the depositions about the secretary/daughter of the director accepting service and how the process server accessed the Respondent's premises.

16. In consideration of the lack of specific response and that the Respondent did not even apply for the process server to be cross-examined, the Court finds that service was effected upon the Respondent as deposed in the affidavit of service.

Right to fair hearing/natural justice

17. A court of law cannot force a party to appear in Court to defend his/her/its interest despite the right to fair hearing being entrenched in the Constitution of Kenya.

18. It cannot also be disputed that natural justice has been a fundamental precept within our judicial system.

19. What is expected of the Court is to ensure that a party is afforded an opportunity to state its side of the story when disputes are presented for adjudication.

29. When a party is served, essentially, it is being called upon to exercise its right to a fair hearing/natural justice and if the party snubs the opportunity, it should not cry denial of the right.

21. The Respondent in the instant case snubbed the opportunity it was afforded.

Limitation

22. It cannot be disputed that though the deceased on whose behalf the proceedings were commenced died on 23 May 2013, it was not until 19 August 2015 that the Director of Occupational Health and Safety made or assessed the compensation payable under the Work Injury Benefits Act.

23. In my view, the compensation became payable upon the assessment and not on the date of the injury or accident, as the injured party or legal representative could not purport to sue or claim where the Director had not yet performed his statutory role of assessing the compensation.

24. The proceedings to enforce the assessment were commenced on 19 April 2017 inside the 3 years prescribed by section 90 of the Employment Act, 2007.

25. And because the Respondent solely relied on section 90 of the Employment Act, 2007, the Court finds that the proceedings were not caught up by the said law of limitation.

Proceedings defective

26. The Work Injury Benefits Act has set out elaborate procedures to be followed in case of injury/accident in the workplace.

27. The Respondent reported to the Director of Occupational Health and Safety about the accident involving the deceased on 21 July 2013 using Form MLSSS/DOSH/FORM 1.

28. That was within the prescribed 12 months provided by sections 22 and 26 of Work Injury Benefits Act.

29. A certificate of dependency was issued by the District Commissioner on 27 November 2013 and the Director of Occupational Health and Safety assessed compensation and made a demand for payment on 19 August 2015.
30. The assessment/demand was followed up with a letter dated 19 January 2016 from the Director to the Respondent.
31. Despite failing to pay the compensation, the Respondent did not appeal against the assessment by the Director in terms of section 51 or 52(2) of the Work Injury Benefits Act
32. When no payment was made, the applicants approached the Court through a *Notice of Motion* and under a miscellaneous application.
33. Ordinarily, according to the rules of this Court (Employment and Labour Relations Court (Procedure) Rules, 2016, this Court is substantively moved through a *Statement of Claim/Memorandum of Claim* or Petition, depending on the nature of cause of action being presented.
34. Under the Rules, a suit is defined as suit means a claim, petition, application for judicial review, appeal or any proceedings before the Court for determination;..
35. In the same vein claim is defined as claim includes any claim, complaint, application, reference, motion or labour dispute referred to the Court by a party for adjudication under any written law;
36. Going by the definitions as set above, what the applicants presented can be treated as a claim, and so far so good.
37. The difficulty or confusion emerges when rule 4 is considered.
38. The Rule provides that when referring a dispute to the Court, a party should file a *Statement of Claim* which in turn is defined as a *Memorandum of Claim*.
39. That the *Statement of Claim/Memorandum of Claim* terminology would be confusing even to trained practitioners would be an understatement considering that the procedures and practices of this Court envisage cheap, simple and quick determination of disputes.
40. This Court also notes that although the Work Injury Benefits Act does not provide for the manner in which the Court should be moved to enforce an assessment of compensation by the Director of Occupational Health and Safety, the appropriate Court is the Employment and Labour Relations Court in terms of section 52(2).
41. The provisions of the Employment and Labour Relations Court (Procedure) Rules, 2016 are therefore implicated.
42. That the applicants did not file a *Statement of Claim/Memorandum of Claim* is not in dispute as they approached the Court through a Notice of Motion.
43. Now, despite faulting the manner the applicants moved Court, the Respondent did not in any clear way disclose what the appropriate mode of approaching the Court ought to have been used by the applicants.
44. With the lack of clarity within the statutory framework, the Court is of the view that such an enforcement claim should be commenced through a *Statement of Claim/Memorandum of Claim*.
45. Despite the manner of instituting claims before the Court being *Statement of Claim/Memorandum of Claim*, the Court is of the view that in the present case, the major consideration should be whether the mode used by the applicants allowed them and the Respondent an avenue to bring forth the issues in

dispute properly and fully.

46. The Respondent did not suggest that it was prejudiced or occasioned injustice by the manner the applicants moved Court.

47. On that ground, the Court would let substance triumph over form.

Interest of justice

48. The Respondents further asserted that the interest of justice fell in favour of reviewing or setting aside the order of this Court.

49. The Work Injury Benefits Act obligates an employer to pay compensation within set timelines after assessment by the Director of Occupational Health and Safety.

50. The Respondent did not appeal to the Director against the assessment or raise an objection with the Court.

51. The Respondent was afforded an opportunity to respond to the application by the applicants to enforce the assessment but did not take it up.

52. The compensation under Work Injury Benefits Act is a no- blame type of compensation in favour of an employee and employers are under a duty to insure for such purposes.

53. Considering all the foregoing, the Court finds no merit in the Respondent's application dated 26 October 2017 and orders that it be dismissed with costs to the applicants.

54. For clarity, unless the Respondent secures a stay of execution before the Court of Appeal on or before 14 December 2017, the monies deposited into Court should be released to the applicants and/or their advocates on record.

Delivered, dated and signed in Nakuru on this 1st day of December 2017.

Radido Stephen

Judge

Appearances

For applicants	Mr. Murimi instructed by Murimi, Ndumia, Mbago & Muchela Advocates
For Respondent	Mr. Okong'o instructed by Okong'o Wandago & Co. Advocates
Court Assistants	Nixon/Martin