



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT NAIROBI**  
**CAUSE NUMBER E710 OF 2021**

**BETWEEN**

**LAMECK NYAKUNDI ANYONA.....CLAIMANT**

**VERSUS**

**W.J.J KENYA CONSTRUCTION COMPANY LIMITED..... RESPONDENT**

**RULING**

1. The Claimant was an Employee of the Respondent.
2. He was injured at work, in December 2018.
3. He was granted work injury compensation in the sum of Kshs. 3,057,314.40 by the Director, under Work Injury Benefits Act [the Act].
4. He states that there was no objection or appeal against the award, in terms of Sections 51 and 52 of the Act.
5. The Respondent did not satisfy the award.
6. The Claimant therefore filed this Claim on 26<sup>th</sup> August 2021, asking the Court to compel the Respondent to pay the award with interest.
7. The Claimant simultaneously with the Claim, filed an Application, seeking certain orders to secure enforcement of the award. Prayers 1, 2, 3 and 7 of the Application, have been dealt with by the Court. The remaining prayers are: -

*[4]. That the Respondent be ordered to deposit into Court the sum of Kshs. 3,057,314 pending the hearing and determination of this Suit/ Claim.*

*[5]. That a temporary injunction do issue restraining the Respondent's Directors and more particularly BO JIANG and their translator one HUSHIYU, from leaving the jurisdiction of the Honourable Court pending hearing and determination of the Suit/ Claim.*

*[6]. That the Directorate of Immigration Services to enforce the orders in paragraph 2 and 5 for the purpose of maintaining law and order.*

*[8]. That an order do issue directing the Respondent to pay the Claimant a sum of Kshs. 3,057,314.40 plus interest and 14% per annum from 8<sup>th</sup> June 2021 to-date.*

*[9] Costs be borne by the Respondent.*

8. The Application is based on the Affidavit of the Claimant sworn on 26<sup>th</sup> August 2021, which restates the history of his work injury and award by the Director. He reiterates that the Respondent has adamantly declined payment, and BO JIANG and translator HUSHIYU, are flight risks, as they are Chinese Nationals. The Claimant filed a Further Affidavit sworn on 14<sup>th</sup> October 2021. He states that there was no valid objection filed by the Respondent against the award of the Directors made on 8<sup>th</sup> June 2021, within the stipulated time. The Director became *functus officio*, after making his award. The Claim herein is purely for enforcement of that award.

9. The Respondent filed a Notice of Preliminary Objection dated 8<sup>th</sup> August 2021. Its position is that the Court lacks jurisdiction. The relationship between the Claimant and the Respondent was a commercial one, not an employer-employee relationship. The Claimant was a subcontractor engaged by the Respondent to carry out plastering works. There was an agreement between the Parties, dated 22<sup>nd</sup> June 2018, establishing the commercial nature of the relationship. The Claim offends Article 162 [2] [a] of the Constitution, and Section 12 of the Employment and Labour Relations Court Act. The Respondent, in addition to the Notice of Preliminary Objection, filed a Replying Affidavit sworn by the Director BO JIANG, on 22<sup>nd</sup> December 2021. BO JIANG exhibits the agreement between the Parties, dated 22<sup>nd</sup> June 2021. He also exhibits an Objection Form filed with the Director, pursuant to Section 51 of the Work Injury Benefits Act. The Objection is indicated to have been received by the Director on 8<sup>th</sup> September 2021.

10. The Court ordered that the Application by the Claimant, and the Preliminary Objection filed by the Respondent, are joined and considered by way of Written Submissions. They confirmed filing of Submissions on 3<sup>rd</sup> November 2021.

**The Court Finds:** -

11. The Claim on the whole, is not properly before the Court.

12. There is no provision of the law, in the Work Injury Benefits Act, the Employment and Labour Relations Court Act, or the Employment Act, which allows the Court to enforce the compensatory awards of the Director of Work Injury.

13. Section 52 [2] of the Work Injury Benefits Act, invoked by the Claimant in pursuit of enforcement, only allows the Court to deal with Appeals arising out of the award of the Director.

14. In a leading decision on Work Injury Benefits Act, **Attorney-General v. Law Society of Kenya & Another [2017] e-KLR**, the Court of Appeal held that Sections 51 and 52 of the Act, provide for an appellate system. An objector is allowed to appeal the decision of the Director to the E&LRC.

15. Jurisdiction of the E&LRC under the law above, does not comprise enforcement of the Director's awards.

16. The Appellate Court under the Work Injury Benefits Act, cannot be the same Court which enforces, the award of Director.

17. In the view of the Court, the only enforcement the Court can exercise its jurisdiction upon, is on Judgments arising out of Appeals received by the Court, pursuant to Section 52 [2] of the Work Injury Benefits Act.

18. The Court has in recent decisions agreed, that there is no enforcement mechanism on awards made by the Director. It has in light of this legislative default, devised various modes of enforcement, to assist aggrieved Employees.

19. In **Ruth Wangui Mwangi & Another v. Alfaran Wholesalers Limited [2017] e-KLR**, cited by the Claimant, it was held that the appropriate Court in enforcement of the assessments made by the Director, is the E&LRC. The Court relied on Section 52[2] of the Act, which as observed above, is on Appeals, not enforcement.

20. In **Nakuru E&LRC Cause No. 4 of 2020, Richard Akama Nyambane v. Icg Maltuoro Spa** the Court agreed with the above decision, clarifying that enforcement should be pursued through a Claim, filed under Section 87 of the Employment Act.

21. In **E&RLC Cause No. 296 of 2018, Jared Ingling Obuya v. Handicap International** the Court assumed jurisdiction in enforcing an award of the Director, on the ground that it was obliged to give a purposive interpretation of the Work Injury Benefits Act, Section 12 [1] of the E&LRC Act, and Article 162[2] of the Constitution. It was the holding of the Court that it must step in, to bridge the lacuna.

22. This assumption of jurisdiction has been adjudged by the Supreme Court, in **Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 Others [2012] e-KLR**, to consist judicial craft or innovation. Jurisdiction is given by the Constitution or by Statute, and cannot be exercised to bridge a lacuna in the law.

23. Parties and their Advocates have been approaching this Court either through full-blown Claims, or through Miscellaneous Applications, asking the Court to adopt the awards of the Director.

24. The E&LRC jurisdiction in Work Injury Benefits Act, is limited to Appeals filed under Section 52 [2]. There is no other written law, which extends jurisdiction to this Court in work injury.

25. If Courts exercise jurisdiction to bridge legislative gaps or failures, what prevents the Claimant and other Employees coming from the Director with unenforced awards, from approaching the Chief Magistrate's Court seized of employment and labour relations jurisdiction, for enforcement?

26. In the Claim before the Court, Parties are regurgitating the same factual matters that were central to the investigation and assessment of the Director. Those matters ought to come before this Court through an Appeal.

27. Central to the Application filed by the Claimant and the Preliminary Objection by the Respondent, is a letter dated 13<sup>th</sup> October 2021, written by the Director to the Respondent's Advocates.

28. The Director writes:

*“ On 24<sup>th</sup> September 2019, the above-named [Claimant] presented himself to our offices and claimed he had been injured while in employment of W.J.J Construction Company Limited [Respondent]. One of our Officers proceeded to write to W.J.J, on 24<sup>th</sup> September 2019 to fill part 1 of DOSH WIBA 1 to enable us process his compensation, but this was not done. We wrote them several reminders but they did not fill the form, nor respond to our letters. On 26<sup>th</sup> May 2021 the Director of W.J.J, a Mr. BO JIANG, his Lawyer John Andati, the injured Lameck Nyakundi Anyona and his Lawyer Gitamo Onsombi honoured a meeting I called at DOSHS to resolve the issue.*

*At the meeting, Mr. BO JIANG insisted that Lameck Nyakundi was a subcontractor while Lameck Nyakundi insisted he was an Employee of W.J.J. Mr. BO JIANG did not have any documents to prove his case, while Mr. Lameck did produce some payment vouchers. In the absence of evidence from BO JIANG, that he [Claimant] was as subcontractor and not an Employee, I proceeded to compute the amount owed to him from his doctor’s assessment of his permanent disability.*

*It has now come to my attention that Mr. BO JIANG has objected to the award and produced documents to show that Mr. Lameck Nyakundi was a subcontractor and not an Employee.*

*In view of this development, I request that a Court of law should help determine if Lameck Nyakundi was an Employee or a subcontractor, based on the documents both sides have produced, and if the Court finds that he was an Employee, then he is liable for compensation under WIBA 2007 and Mr. BO JIANG should pay him his compensation, but if the Court determines he was a subcontractor, then he is not liable for compensation under Mr. BO JIANG’S insurance cover he has taken for his Employees. ‘*

29. The Court as stated above, cannot intervene in the process before the Director, in any other way, other than on Appeal. The Act as observed in various decisions of Superior Courts was designed to afford relevant Parties an independent work injury compensation legal regime, away from the pre-existing system where work injury claims were filed freely across the Judiciary. The tripartite partners – Labour, Employers and the Government argued that it was beneficial to the economy, to do away with what they called ambulance-chasers, in the workplace. Therefore, the role of the Court was reduced to Appeals filed to the Industrial Court [E&LRC] from the Director.

30. The Act does not create any opening for the Court to assist the Director in his investigations, assessment and enforcement.

31. The Director ought to have investigated if the Claimant was an Employee or a Contractor, examine the documents presented by both Parties, before making any award.

32. The assistance sought by the Director assumes, that the Court has jurisdiction to investigate, fact-find and reach conclusions like was the case before WIBA, when work injury was tried in Civil Courts. Under the Act, the Court is not a trier of facts, and cannot therefore assist the Director, to determine if the Claimant was an Employee of a Subcontractor.

33. The question whether the Claimant was an Employee or a Subcontractor, is in the view of the Court fundamental to the whole award. It cannot be wished away. There are documents from both sides, which the Director ought to have considered carefully.

34. With regard to the timelines given under Section 51 and 52 of the Act, the Court notes that award was made on 8<sup>th</sup> June 2021. The law states that any aggrieved person may lodge an objection within 60 days of the decision. 60 days ended around 8<sup>th</sup> August 2021. The Director shall within 14 days of receiving an objection, give a written answer. Within 30 days of receiving the answer, the aggrieved person may lodge an Appeal with the E&LRC.

35. There is an objection lodged by the Respondent, with detailed documents, received by the Director on 8<sup>th</sup> September 2021. Objection was about 30 days late. The Director did not decline objection. He instead wrote to Respondent’s Advocates, confirming that upon review of the evidential material before him, there was need to revisit the award. It is not clear if his response was a statutory answer to an objection. He sought the intervention of the Court in a manner the Court has concluded, is not legally feasible. Section 53 of the Act states that there shall be a Director of Work Injury Benefits, who shall be responsible for the management of the Act. The Director is to be assisted in fulfilment of his mandate by such other officers as are necessary, for the proper administration of the Act. Assistance is not to be provided by the Court, but by the Director’s officers.

36. And why does the Claimant pursue reliefs against a translator, HUSHIYU? What does HUSHIYU, an Employee of the Respondent, have to do with the corporate affairs of the Respondent?

37. In the end, the Court is satisfied that this matter should have been presented to it, by way of an Appeal. The Court does not have jurisdiction to enforce awards of the Director either through fresh Claims, or Miscellaneous Applications. Instead of dismissing the Claim outright, the Court shall, in the interest of justice afford the Parties and the Director, some time to ruminate, by making the following **orders**:

**a. The proceedings and all consequential orders herein are stayed.**

**b. The dispute is reverted to the Director of Work Injury to deal with all matters, the Director omitted to deal with in his award and in the objection received by him from the Respondent.**

**c. Parties shall, after the Director has dealt with all such matters, be at liberty to return to this Court in the prescribed manner.**

*d. The Claimant shall in the meantime, consider what to do with the Claim he has presented before the Court, in light of the Court's views on its jurisdiction.*

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 28TH DAY OF JANUARY 2022.**

**JAMES RIKA**

**JUDGE**