



**Ng'ang'a v Timsales Limited (Appeal E035 of 2023)  
[2024] KEELRC 13600 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13600 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
APPEAL E035 OF 2023  
DN NDERITU, J  
OCTOBER 17, 2024**

**BETWEEN**

**DANIEL NG'ANG'A ..... APPELLANT**

**AND**

**TIMSALES LIMITED ..... RESPONDENT**

*(Being an appeal from the ruling and orders of Hon. Emmanuel S. Soita dated and delivered on 7th November, 2023 in Nakuru Chief Magistrate's Employment and Labour Relations Court Misc. Application No. E163 of 2021 – Daniel Ng'ang'a V Timsales Limited)*

**RULING**

**I. Introduction**

1. In a memorandum of appeal dated 10th November, 2023 filed in court on 15th November, 2023 the appellant is seeking for – That the learned trial magistrate ruling dated 7<sup>th</sup> November, 2023 be reviewed and set aside.
  1. That this honourable court be pleased to adopt the award dated 20<sup>th</sup> July, 2020 for Kshs. 1,070,195.40 by the Directorate of Occupation Health and Safety in favour of the Appellant against the Respondent as an order of this court.
  2. That this honourable court be pleased to order the Respondent to forthwith pay to the Appellant a sum of Kshs. 1,070,195.40 as assessed and awarded by the Directorate of Occupation Health and Safety under the [Work Injury Benefits Act](#) WIBA 2007 in an award dated 20<sup>th</sup> July, 2020.
  3. That this honourable court be pleased to order the Respondent to pay to the Appellant interest on the said sum of Kshs. 1,070,195.40 at 14% per annum from 20<sup>th</sup> July, 2020 to date of full payment.



4. That the costs of this appeal and the costs of the cause before the lower court be borne by the respondent.
5. That such further or other relief as this honourable court may be pleased to grant.
2. A record of appeal was prepared and filed in court on 25th March, 2024.
3. The appeal is against the ruling and order referenced in the header above wherein the lower trial court issued the following orders –
  - i. The assessment by the Director of Occupational Safety and Health (DOSHS) dated 29<sup>th</sup> June, 2023 adopted as an order of the court.
  - ii. Each party to bear their own cost.
4. The gist of the appeal is that the lower court, unlawfully and un-procedurally, modified the award downwards from the initial Kshs1,070,195.40 to Kshs274,713.60 yet that initial award by the Directorate of Safety and Health (the Director) made under the *Work Injury Benefits Act* (WIBA) had not been properly appealed or challenged in accordance with law.
5. While the appeal was pending and before admission to hearing, the respondent filed a notice of motion (the application) dated 3rd June, 2024 seeking for the following orders –
  1. The appeal was lodged and filed before the honourable court without leave of the court as provided under Section 75 of the *Civil Procedure Act* and Order 43 Rule 1 of the *Civil Procedure Rules*.
  2. The appeal is grossly incompetent, bad in law and an abuse of this courts process.
  3. By virtue of the incompetent appeal, this court’s lack jurisdiction to entertain the matter.
  4. It is in the interest of justice that the orders sought herein are granted.
6. The application is expressed to be brought under Section 75 of the *Civil Procedure Act* & Order 43 Rule 1 of the *Civil Procedure Rules*. It is based on the grounds on the face of it and supported with the affidavit of Esther Waiya sworn on 3rd June, 2024.
7. In opposition to the application the appellant filed an affidavit sworn by his counsel, Naftaly Rubua Ngure, on 4th July, 2024.
8. By consent, the application was canvassed by way of written submissions. The respondent/applicant through Miss Kimathi filed written submissions on 4th July, 2024 while the respondent through Miss Kamau, holding brief for Mr. Ngure, filed on 8th July, 2024.

## II. Evidence

9. It is deposed in the supporting affidavit that the deponent Esther Waiya is a legal officer with ICEA Lion General Insurance Co. Ltd who had insured the respondent under a WIBA cover in which the insurer was obligated to settle awards made against the respondent by the Director.
10. It is deposed that on 7th November, 2023 the trial lower court awarded the appellant a sum of Kshs274,713.60 in compensation for injuries suffered at work following an award made by the Director on 29th June, 2023.



11. It is deposed that for the appellant to appeal as he did upon being dissatisfied with the ruling and order of the lower court he ought to have obtained leave of the court as the appeal of this nature does not lie as of right.
12. It is deposed that the appeal as filed, without the leave of court, is null and void and as such the court lacks the jurisdiction to entertain, hear, and determine the same.
13. In the replying affidavit in opposition to the application, sworn by counsel for the appellant, it is deposed that the [Employment and Labour Relations Court \(Procedure\) Rules](#) which are the procedural rules and law applicable to this court do not provide for leave before an appeal is filed.
14. It is further deposed that this court covers a special jurisdiction in which the Civil Procedure Rules do not apply. It is thus deposed that appeals on matters falling within the purview and jurisdiction of this court lie as of right without the need or requirement of leave to so appeal.
15. It is deposed further that even if leave was required, which is however vehemently denied, the appellant did not require such leave as the appeal lies as of right. It is deposed that the proceedings in the lower court did not yield interim or interlocutory orders but the final disposal of the matter which is technically a judgment adopting the award made by the Director for eventual enforcement.
16. It is thus deposed that the proceedings in the lower court were and even the appeal herein is sui generis and that the proceedings properly belong to those contemplated under Section 75(b) & (c) of the [Civil Procedure Act](#) for which leave is not a pre-requisite before filing of an appeal. It is deposed that the proceedings in the lower court related to a special case and that the ruling and the orders issued amounted to modification of the initial award by the Director.

### III. Submissions By Counsel

17. The applicant's counsel submitted on three issues – Whether there is a competent appeal before court; Whether the instant appeal ought to be dismissed; and, Whether the ruling given on 7th November, 2023 ought to be set aside.
18. On the first issue, it is submitted that the orders appealed are within those contemplated under Order 43(2) of the [Civil Procedure Rules](#) to the effect that “An appeal shall lie with the leave of the court from any other order made under these Rules”.
19. It is submitted that where an appeal does not lie as of right, leave of the court is a mandatory pre-requisite to filing of an appeal. It is submitted that in absence of leave the appeal as filed is a nullity. The court is urged to be persuaded by the holding in [Nyutu Agrovet LTD v Airtel Networks LTD](#) (2015) eKLR to the effect that an appellate court lacks jurisdiction where leave is required but not obtained. It is further submitted that failure to obtain leave where required is not a mere technicality but a fundamental issue for consideration by the court. Counsel cited several decisions on this issue, among them [Ita Nguru & Another v Josphat Njue](#) (2018) eKLR and [Serephen Nyasani Menge v Rispah Onsase](#) (2018) eKLR.
20. On the second issue, it is again submitted that for lack of leave before appeal there is no legitimate appeal for the court to hear and determine as the same as filed is incompetent, null, and void. The court is urged to follow the holding by the Court of Appeal in [Peter Nyaga Murake v Joseph Mutunga](#) Nairobi 86 of 2015. The court is further urged to be guided by the Court of Appeal holding in [National Bank of Kenya v Maurice Okon'o](#) (2018) eKLR.
21. On the third issue, it is submitted that since the appeal is incompetent, null, and void, the court lacks jurisdiction to adjudicate and pronounce itself on the same. It is thus submitted that the court should



not disturb the ruling and orders of the lower court made on 7th November, 2023. The court is urged to strike out the appeal for the foregoing reasons.

22. Counsel for the appellant took a diametrically opposed view from that of the counsel for the respondent as stated above. It is submitted that the appellant took out the proceedings in the lower court seeking enforcement of an award made to the appellant by the Director in the sum of Kshs1,070,195.40. However, and erroneously, unlawfully, and erroneously so, the lower court modified the award and granted to the appellant a paltry sum of Kshs274,713.60. Dissatisfied with the ruling and orders of the court the appellant filed this appeal commenced by way of a memorandum of appeal dated 10th November, 2023 filed in court on 15th November, 2023.
23. Counsel for the appellant condensed his arguments on the application into one issue – Whether the instant appeal is competently before this court.
24. It is submitted that the proceedings in the lower court were for enforcement of the award made by the Director as alluded to above. It is further submitted that the proceedings for adopting and enforcement of the award by the Director are sui generis as the resultant ruling and orders are final and technically amount to a judgment as they dispose of the matter with finality. It is further submitted that the ruling and the orders of the lower court are appealable as of right under Section 75(b) & (c) of the [Civil Procedure Act](#). It is submitted that what the lower trial court did was to modify the award of the director against the law, awarding to the appellant a lower amount than what the Director had initially and lawfully awarded as alluded to elsewhere in this ruling.
25. It is submitted that under Section 12(1) of the [Employment and Labour Relations Court Act](#) this court has exclusive original and appellate jurisdiction over all matters employment and labour relations.
26. It is further submitted that of all the authorities cited by counsel for the respondent none of them dealt with an employment and labour relations dispute and none is applicable to the facts and the circumstances of this appeal.
27. For all the reasons advanced in the submissions the court is urged to dismiss the application with costs.

#### **IV. Issues For Determination**

28. Upon thorough reading of the application, the supporting affidavit, the replying affidavit, and the written submissions by counsel for both parties, the court finds that there is only one substantive issue for determination – Whether the appeal herein is properly and competently before the court.
29. Central to settling the above issue is whether the appellant was in law required to seek and obtain leave before lodging the appeal in this court. The parties and counsel have taken diametrically opposed positions on this issue as processed in the foregoing parts of this ruling. The respondent takes the view that the appellant needed to first seek and obtain leave under Section 75 of the [Civil Procedure Act](#) and Order 43 of the [Civil Procedure Rules](#) before filing the appeal. The appellant takes the view that no leave was required and that he lodged the appeal as of right.
30. This court (ELRC) is created under Article 162(1) & (2)(a) of the [Constitution](#). As demanded and commanded by Article 162(3) of the [Constitution](#) the Parliament passed the [Employment and Labour Relations Court Act](#) (ELRC Act) the law that established the court.
31. In Section 12 of the [Act](#) the court is granted “exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the [Constitution](#) and the provisions of this Act or any other law which extends jurisdiction to the court relating to employment



and labour relations”. This section then goes on to list a non-exhaustive list of the matters that the court has jurisdiction over and the orders, reliefs, and remedies that the court may issue.

32. Section 12(5) of the [Act](#) provides as follows –

The Court shall have jurisdiction to hear and determine appeals arising from –

(a) decisions of the Registrar of Trade Unions; and

(b) decisions of any other local tribunal or commission as may be prescribed under any written law.

33. Disputes and awards under [WIBA](#) are undoubtedly matters of employment and labour relations. It is under that law and the provisions in the Magistrate’s Courts Act that the lower trial court dealt with and pronounced itself in the matter that was before it as alluded to elsewhere in this ruling and that jurisdiction is not in dispute in this application. What is in dispute is whether an appeal lies as of right from the ruling and orders of the lower trial court.

34. Upfront, it is important to appreciate that ELRC has its own rules of procedure in the [Employment and Labour Relations Court \(Procedure\) Rules, 2016](#) that were recently replaced with the 2024 version of the same that came into force on 16th August, 2024. In my considered view, these rules were and are intended to fully control and regulate the procedure of proceedings in the ELRC. In my view, these rules were and are intended to regulate the procedural aspects of proceedings in the court, which is a specialized court, thus eliminating the possibility of simultaneous and unfiltered application of the [Civil Procedure Rules](#). This view is buttressed by the fact that where those Rules intend to have the Civil Procedure Rules apply they specifically provide for the same. For example, under Rule 32 it is provided that execution of a decree or an order shall be in accordance with the [Civil Procedure Rules](#). Further, Rule 7(2) provides that Order 53 of the [Civil Procedure Rules](#) shall apply in ELRC in regard to judicial review proceedings. Likewise, it is intended that the court shall apply any other law of procedure in its proceedings where the Rules specifically provide as such. An example on this is in Rule 29(1) wherein the court is directed to apply [Advocates \(Remuneration\) Order](#) in assessing and awarding of costs. To crown it, Rule 38 grants this court the discretion to regulate its own procedure “subject to these Rules”.

35. In my considered view, and I so find and hold, unless specifically provided for, and the court has cited some of the instances above, the Civil Procedure Rules do not apply in proceedings before this court. If it was intended that they apply nothing would have been easier than for the law to specifically and categorically state so. Therefore, Order 43 of the [Civil Procedure Rules](#) and all the other rules of procedure not specifically invoked by the [ELRC Rules](#) do not apply to this court.

36. One may then wish to extend the argument and pose the question – If the Civil Procedure Rules do not apply to proceedings and procedure in ELRC, does the [Civil Procedure Act](#) as a statute apply? My simple answer is that the [Civil Procedure Act](#) is a statute of national application in Kenya and shall apply and operate as per the provisions therein. As noted above, the procedural rules made thereunder only apply to this court to the extent allowed by the rules of this court as alluded to and enumerated in the foregoing paragraphs. It is important to note that the [Civil Procedure Act](#) is very categorical in Section 1 that – “This Act applies to proceedings in the High Court and, subject to the Magistrate’s Courts Act, to proceedings in subordinate courts”. In my view the above provision somehow excludes application of the same to this court. The court is not aware of an amendment that may have extended the application of the same to this court.

37. Flowing from the foregoing and the reasoning therein, therefore, Section 75 of the [Civil Procedure Act](#) and Order 43 of the [Civil Procedure Rules](#) do not apply to this court. The manner, procedure, and style of filing appeals to this court is provided for under Rule 8 (of the 2016 Rules) and now Part III of the



ELRC (Procedure) Rules 2024 that came into operation on 16th August, 2024. That law does not provide for leave to be sought and or obtained before filing of an appeal to this court. Likewise, WIBA does not provide for any specific leave that need to be sought and obtained before a dissatisfied party files an appeal to this court – see Sections 26 & 52 of WIBA.

38. In the circumstances, therefore, the applicable law for consideration by the court in arriving at the right answer to the issue under consideration is Rule 8 of the *ELRC (Procedure) Rules* (the appeal was filed before the ELRC (Procedure) 2024 came into operation on 16th August, 2016). It is my finding and holding that the appeal was filed within 30 days of the impugned ruling and orders and a record of appeal has been filed and served and as such, in the interest of justice, the same should proceed to be heard and determined on merits.
39. The court has perused the memorandum of appeal and, without prejudice, noted the weighty issues raised to the effect that the Director made two awards to the appellant. It is alleged that the first award of Kshs1,070,195.40 was subsequently, allegedly unlawfully and un-procedurally, substituted with a second one of Kshs274,713.60. That of its own is a serious and weighty issue that commends itself for due consideration and determination by the court on merits.
40. For all the foregoing reasons, the notice of motion by the respondent dated 3rd June, 2024 is devoid of merits and the same is hereby dismissed. The costs thereof shall be to the appellant in any event.
41. The appeal shall as soon as practically possible be listed for mention before a judge for directions on the hearing and disposal.

**DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 17<sup>TH</sup> DAY OF OCTOBER, 2024.**

.....

**DAVID NDERITU**

**JUDGE**

