



REPUBLIC OF KENYA



KENYA LAW
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**Juma v David Engineering Limited (Appeal E299 of 2022)
[2023] KEELRC 337 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 337 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E299 OF 2022
L NDOLO, J
FEBRUARY 9, 2023**

BETWEEN

JOSEPH KAVUTHA JUMA APPELLANT

AND

DAVID ENGINEERING LIMITED RESPONDENT

RULING

1. On May 13, 2022, the claimant/appellant filed a memorandum of appeal, asking the court to find that he is entitled to compensation under the [Work Injury Benefits Act](#) as follows:
 - a. General damages for pain and suffering at 12% incapacity;
 - b. Direct loss of income at the monthly net salary of Kshs. 15,000.
2. Upon being served with the memorandum of appeal, the respondent filed a memorandum of response dated July 28, 2022 and a notice of preliminary objection of even date.
3. This ruling relates to the preliminary objection, which is premised on the following grounds:
 - a. That the appeal as filed offends the clear provisions of sections 51 and 52 of the [Work Injury Benefits Act](#);
 - b. That the appeal offends the clear provisions of section 12(5) of the [Employment and Labour Relations Court Act](#);
 - c. That the pleadings offend the clear provisions of rule 8 and the First Schedule (Form 1) of the [Employment and Labour Relations Court \(Procedure\) Rules](#) as well as order 42 rule (1) and (2) of the [Civil Procedure Rules](#);
 - d. That the sum total of the respondent's preliminary objection is that the appeal as filed is fundamentally defective, incompetent, lacking in legal legs and is an abuse of the court process;



- e. That the appeal ought to be struck out with costs.
4. Parties urged their respective positions by way of written submissions. For the respondent, it was submitted that the Appellant’s appeal is in fact a primary claim under the [Work Injury Benefits Act](#), over which this court has no jurisdiction. In this regard, the respondent made reference to section 51 and 52 of the [Work Injury Benefits Act](#) which provide:

51. Objections and appeals against decisions of the Director

- (1) Any person aggrieved by a decision of the Director on any matter under this Act, may within sixty days of such decision, lodge an objection with the Director against such decision.
- (2) The objection shall be in writing in the prescribed form accompanied by particulars containing a concise statement of the circumstances in which the objection is made and the relief or order which the objector claims, or the question which he desires to have determined.

52. Director’s reply

- (1) The Director shall, within fourteen days after receipt of an objection in the prescribed form, give a written answer to the objection, varying or upholding his decision and giving reasons for the decision objected to and shall within the same period send a copy of the statement to any other person affected by the decision.
- (2) An objector may, within thirty days of the Director’s reply being received by him, appeal to the Industrial Court against such decision.

5. The appellant argues that the failure by the director to act on his claim is a decision within the meaning of the foregoing provisions.
6. I disagree; although the appellant has crafted his pleadings as an appeal, what he has presented is an original claim, complete with final prayers, which he seeks from the court. Pursuant to the decision of the Supreme Court in [Law Society of Kenya v Attorney General & another](#) [2019] eKLR this court was divested of jurisdiction to deal with original claims under the [Work Injury Benefits Act](#).
7. The question to ask is what recourse is available to an aggrieved party in the event of inaction by the Director of Occupational Safety and Health, as in the present case. The answer to this question was provided by my brother Manani J in [Ezekiel Ombaso Onchieku v China Communications Construction Company Limited](#) (Cause No E693 of 2021) where he stated:

“The claimant may perhaps have a valid grievance following the director’s failure to formally respond to his lawyers’ letter of May 19, 2020. However, the way to address this inaction is not by filing a purported appeal under section 52(2) of the WIBA. Rather, the claimant can pursue the matter through a Judicial Review motion to compel the director to discharge his statutory mandate. In my view, the claimant is not rendered remediless as a result of the alleged director’s inaction.”



8. In the circumstances of this case, I find that there is no proper appeal before me. The respondent's preliminary objection is consequently upheld with the result that the purported appeal is struck out.
9. Each party will bear their own costs.
10. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 9TH DAY OF FEBRUARY 2023

LINNET NDOLO

JUDGE

Appearance:

Miss Omamo h/b Mr. Namada for the Appellant

Mr. Gakungu for the Respondent

