



Omondi v Kenya Kazi Security (Gardaworld) Limited (Cause E401 of 2021) [2022] KEELRC 3842 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEELRC 3842 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E401 OF 2021
NZIOKI WA MAKAU, J
JULY 28, 2022**

BETWEEN

VICTOR ODHIAMBO OMONDI CLAIMANT

AND

KENYA KAZI SECURITY (GARDAWORLD) LIMITED RESPONDENT

RULING

1. The respondent has raised a preliminary objection to wit:
 - a. That the present appeal violates the provisions of the *Work Injury Benefits Act* as at sections 51 and 52;
 - b. That the pleadings filed violate the requirements of rule 8 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016, rule 28 of the Workmen's Compensation Rules as well as order 42 rules 1 and 2 of the *Civil Procedure Rules*;
 - c. That this honourable court's jurisdiction has not been properly invoked.
 - d. That the present appeal is irreparably defective, unprocedural and an abuse of the process of the honourable court thus ought to be dismissed with costs.
2. By way of background, the claimant/appellant instituted the matter by a memorandum of appeal dated May 12, 2021 and suit claiming:
 - a) A declaration that the respondent is bound to compensate him in full for the injury suffered and the attendant short and long term effect of the injuries.
 - b) Special damages (Kshs 21,535/-)
 - c) The respondent to pay compensatory damages both under the WIBA and the common law as shall be assessed by the court.



d) The respondent pay the appellant/claimant's costs of this case.

He supported the claim/appeal with a verifying affidavit and a bundle of documents filed alongside his pleadings.

3. The respondent entered appearance on August 19, 2021 and thereafter raised a preliminary objection dated September 15, 2021 in respect to the proceedings herein which objection is the subject of these submissions.
4. The objection taken was articulated through written submissions. The respondent submits that the issues for determination include whether the memorandum of appeal filed by the claimant/appellant is properly before court. The respondent submits that the claimant/appellant filed an apparent appeal to seek compensation for an alleged injury suffered during the course of his employment with the Respondent. The respondent submits that the 'memorandum of appeal' as filed by the claimant/appellant on its face does not conform to the form of an appeal but rather resembles a claim as opposed to the former wherein the claimant/appellant goes on to state the summary of events leading to his claim. Furthermore, the title is labelled as "memorandum of appeal" but before the beginning of the statement of facts the same is labelled as "The claim". The respondent submits that under the *Employment and Labour Relations Court (Procedure) Rules*, 2016 an appeal is defined in the following terms,

“an appeal made to the court by a party against an order, decision or proceedings under any written law and includes appeals from the Cabinet secretary, Director of the Work Injury Benefits Authority, Registrar of Trade Unions, subordinate courts and tribunals;” (Emphasis Added)

The respondent further submits that the said rules at rule 8 provide at sub-rules (3) and (4) that,

- “(3) A memorandum of appeal shall be in form 1 set out in the first schedule with necessary modifications.
- (4) A memorandum of appeal shall be accompanied by copies of the proceedings, all documentary evidence relied on and a copy of the judgment from the proceedings of the matter being appealed against.”

The respondent further placed reliance on rule 28 of the Workmen's Compensation Rules which states that,

“Where any matter or thing is not specially provided for under these rules, the same procedure shall be followed and the same provisions shall apply, as far as practicable, as in a similar matter or thing under the *Civil Procedure Act* (cap 21) and the rules made thereunder:”

5. It submits that under the *Work Injury Benefits Act*, 2007 part viii sections 51 and 52 spell out the procedure where a party is aggrieved of a decision issued by the Director of Occupational Safety and Health Services. However, it does not go forward to elaborate on the format nor form of such appeal which instance is covered by rule 28 stated hereinabove to direct parties to apply provisions of the Civil Procedure. Notwithstanding the provisions of the *ELRC Rules*, 2016 as relied upon in the above paragraphs, the respondent invited the honourable court to note that the provisions of the Civil Procedure with regard to appeals which are outlined at order 42 rule 1. The said provision of the *Civil Procedure Rules*, 2010 clearly echoes the position that in a memorandum of appeal should as a



requirement precisely outline the distinct grounds upon which an appellant is objecting to a decision and/order being appealed against.

6. The respondent contends that the present 'appeal' is a claim brought under the guise of an apparent appeal. The said pleadings filed do not disclose any grounds nor reasons for appeal as should a standard appeal. Moreover, despite there being an outlined form for such appeal requiring the enjoining of the authority against whose decision the appellant is aggrieved against the pleadings herein have not met the said requirements.
7. It is the respondent's further contention that the apparent appeal is supported by a verifying affidavit which is a rather peculiar mode of filing an appeal. The same is also supported by a list of witnesses, witness statement and list of documents. We invite the court to note that the pleadings filed in this cause are indeed indicative of a claim and not an appeal. The respondent submits that an appeal is supposed to be comprised of a record of appeal which in its constitution produces pleadings, documents relied upon during trial as proceedings and the final decision of the determining authority as opposed to the manner in which the claimant/appellant has constructed his "appeal". The respondent posits that is no decision against which the claimant/appellant is appealing against has been annexed among his documents nor stated clearly in his pleadings nor is there any indication of an objection and subsequent response from the director as is required by section 51 and 52 of the *WIBA act*, provisions which are a necessary part of any appeal raising issues against a decision by the director. The respondent cites the case of *Douglas Shikoli Nasiali v Citam Schools Woodley* [2021] eKLR where the Employment court while pronouncing itself on the composition of an appeal from a decision of the director stated that the said decision alongside an objection from the opposing party as well as a response to the said objection from the director should be part of such an appeal. The court went ahead to dismiss the appellant's appeal following non-compliance with the legal requirements. It is the respondent's submission that should the claimant/appellant raise the issue that the form of an appeal should not be the basis of dismissing and/or rejecting the cause herein, the honourable court is implored to take notice this appeal is fatally defective for the reasons presented above. Further no modifications nor corrections can redeem the said cause as earlier said it is a claim veiled as an appeal filed ignoring the basic requirements of an appeal in the first place. Additionally, the respondent submits the claimant/appellant has indicated that there is a claim in which he has sued the respondent separately on grounds of alleged constructive dismissal in MCELRC E856/2020. The respondent submits that to allow these proceedings to proceed in the manner in which they have been advanced would allow the claimant/appellant to conduct litigation on multiple fronts in two different claims which is prejudicial to the respondent. It is the respondent's submission that arising from the above sentiments, legal provisions and authorities the 'appeal' herein is fatally defective having been improperly filed and constituted. Therefore, the jurisdiction of this honourable court has been improperly invoked and thus the appeal should be struck out with costs.
8. The claimant/appellant has not filed any submissions as at the time of writing this ruling. It is true that the court has jurisdiction to hear appeals from the Director of occupational safety and health as provided for under sections 51 and 52 of the *Work Injury Benefits Act*. the respondent asserts that the claimant/appellant has filed a claim disguised as an appeal.
9. The claimant/appellant has intituled his suit as follows:
Victor Odhiambo Omondi.....claimant/appellant
Versus
Kenya Kazi Security(gardaworld) Limited.....respondent
In The Matter Of The Wiba Section 23, 26 And 52



And In The Matter Of The *Occupational Safety And Health Act*
Being An Appeal From The Director Of The *Occupational Safety And Health Act*
Memorandum Of Appeal

Issues In Dispute

1. Failure and refusal by the director to ensure compensation is made to the claimant/appellant for injury while at work.
2. Failure to lawfully and fairly compensate an employee injured while at work.
3. Claim for compensation in damages for injury suffered while at work.
10. Immediately after the title is the words the claim and then averments on the same follow. The nomenclature applied by the claimant/appellant is somewhat confusing. He phrases some aspects as an appeal and yet others as a claim. It is apparent there is no decision from the director being appealed against as there would have been a direct attack of the assessment as provided for under sections 51 and 52 of *WIBA*. It is clear the claimant/appellant is unsure of what mode to approach the court. The respondent's preliminary objection has merit in so far as it seeks to have the amorphous suit disguised as an 'appeal' struck out. The 'appeal' herein is fatally defective and is ripe for striking out albeit with no orders as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY 2022

NZIOKI WA MAKAU

JUDGE

