



Makongeni Residents Association (MARA) v Kenya Railways Staff Retirement Benefits Scheme (KRSRBS); Attorney General & 5 others (Interested Parties); Ministry of Finance (Intended Interested Party); Kenya Railways Corporation (Intended Respondent) (Environment and Land Miscellaneous Application E067 of 2023) [2023] KEELC 20073 (KLR) (19 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20073 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E067 OF 2023
JA MOGENI, J
SEPTEMBER 19, 2023

BETWEEN

MAKONGENI RESIDENTS ASSOCIATION (MARA) PLAINTIFF

AND

KENYA RAILWAYS STAFF RETIREMENT BENEFITS SCHEME (KRSRBS) RESPONDENT

AND

THE ATTORNEY GENERAL INTERESTED PARTY

KENYA NATIONAL LANDS COMMISSION INTERESTED PARTY

THE COUNTY GOVERNMENT OF NAIROBI INTERESTED PARTY

RIFT VALLEY RAILWAYS WORKERS UNION INTERESTED PARTY

THE RETIREMENT BENEFITS AUTHORITY INTERESTED PARTY

MINISTRY OF TRANSPORT INFRASTRUCTURE HOUSING URBAN DEVELOPMENT AND PUBLIC WORKS INTERESTED PARTY

AND

MINISTRY OF FINANCE INTENDED INTERESTED PARTY

AND

KENYA RAILWAYS CORPORATION INTENDED RESPONDENT



RULING

1. Before me is an application dated 11/07/2023 brought by the 4th Interested Party seeking the following orders:
 - i. Spent
 - ii. That to allow for service of the Application and to preserve the substratum of the matter herein, the intended 9th Members Annual General Meeting purportedly convened by the Respondent on the 25th day of July 2023 be and is hereby Stayed until the issues in the application are heard and determined.
 - iii. That the application be served upon the parties and an earlier inter partes hearing date be set.
 - iv. That the intended 4th Respondent be and is hereby admitted in the matter as the 4th Respondent.
 - v. That the 5th Interested Party/3rd Respondent be directed to ascertain the Locus of the purported trustees' trusteeship by adducing/tabling the Trust Deed of appointment for each Trustee including the Chairman showing their respective dates of appointment to their respective offices.
 - vi. That the 1st Interested Party (The Attorney General) to produce the relevant Kenya Gazette Notice nominating Mr Martin Mogwanja as a Director Kenya Railways Corporation, the basis of his supposed nomination to the Respondents Board of Trustees (KRSRBS) as a Trustee.
 - vii. That the 4th Respondent be and is hereby directed to avail evidence of the Board Resolution meeting that resolved to have Mr. Philip Jamhuru Mahinga, Eng Martin Mogwanja, Mr Asava Kadima, Ms Jackline Mboga and Mr Elijah Mokaya employees of the Kenya Railways Corporation to the Board of Trustees Membership.
 - viii. That costs of the Application be in the suit.
2. The grounds of the application are contained on the face of the record. The applicant listed five grounds all of them addressing the issue of the meeting held by members at the instigation of the trustees and the differences between the members, trustees and the Kenya Railways Board of Directors.
3. It has emerged from the supporting affidavit that the applicant's Secretary General Munayi Opondo Isaac (MOI) is claiming that the Trustees of the 4th Intended Party purported to hold an annual general meeting but that they lacked the requisite authority to convene the meeting. That none of the trustees had a deed of appointment from the Regulator RBA.
4. That the Senate Committee on Labor and Social Welfare approved a governance structure with a Board of Trustees which takes precedence over what was being constituted by Trustees without authority. Further that the problems faced by over 8000 members of the Pension Trust, will only be resolved through the implementation of the Senate 2020 report which was a prayer made by the applicant in the Notice of Motion Application dated 14/03/2023 yet to be determined.
5. Further that the said annual general meeting is being held to illegal bequeath employees of the state corporation Deeds of Appointment yet the State Corporation Act Cap 446 prohibits employees to be members of the Board of Trustees.



6. Before the Application could be argued the Intended 4th Respondent, Rift Valley Railways Workers Union filed a Preliminary Objection dated 20/07/2023 against the Applicant's Application dated 11/07/2023 raising the following grounds:
 - a) This Honorable Court lacks the requisite jurisdiction to hear and determine the issues raised in the Application as drawn and filed herein.
 - b) The Applicant, Rift Valley Railways Workers Union is not a juridical person capable of filing and sustaining an Application before this Honorable Court in its name as is the case herein.
 - c) Mr Munai Opondo Isaac (MOI) is neither an Advocate of this Honorable Court nor a Party and as such he has no legal capacity to represent a party by filing pleadings and making submissions on behalf of such a party before this Honorable Court .
 - d) Mr Munai Opondo Isaac (MOI) continued representation of the 4th Interested Party before this Court in contravention of Section 31 of the Advocates Act as read together with Order 9 of the Civil Procedure Rules.
 - e) Mr Munai Isaac Opondo (MOI) the Applicant's Secretary General, is not an advocate and therefore cannot purport to represent parties nor draft and file documents on behalf of parties before this Honorable Court.
 - f) The purported Applicant is non-suited and with no legal capacity to lodge and/or sustain the Application herein .
 - g) The Application is nothing but an abuse of court processes and should therefore be struck out and dismissed with costs.
7. It is abit confusing noting that the applicant in the application dated 11/07/2023 alleges to be the Secretary General of the 4th Interested Party which is Rift Valley Railways Workers Union yet at the same time the Preliminary Objection has also been brought by the 4th Interested Party's Counsel from the Law Firm of Prof Albert Mumma Advocates.
8. The Notice of Appointment dated 20/07/2023 states that the 4th Intended Party has appointed the Law Firm of Prof. Albert Mumma Advocates to be its advocates. This being the case it is not clear how Munayi Opondo Isaac (MOI) being the Secretary General of the Applicant Trade Union can represent the same union that has appointed a Counsel. I also note that the suit filed by way of plaint was filed by Makongeni Residents Association.
9. The issue of jurisdiction being a matter of law, the court directed parties to canvass the Notice of Preliminary Objection first before considering the Application dated 11/07/2023.

Analysis and Determination

10. I have considered the Notice of Preliminary Objection, the affidavits both in support and opposition to it, the annexures thereto, the submissions, as well as the law and authorities relied on. I also considered the Pleadings. Whereas many issues could have been considered, I am convinced that since the applicant/4th Interested Party challenged the court's jurisdiction and also submitted that the applicant is not a juridical person to bring this suit, I would do well to consider the issue first since the success or otherwise of it determines the direction of both the instant Application and the suit. The issue of jurisdiction is a point of law which this Court is under the duty to determine first before any other.



11. The point of departure here is that whereas the Applicant did not file a Replying Affidavit in response to the Application dated 11/07/2023, they raised what is considered a preliminary point of law or objection. A preliminary objection was defined in the case of *Mukisa Biscuits Manufacturing Ltd. v West End Distributors Ltd.* Civil Appeal No. 9 of 1969 (1969) EA 696 where the Court held that:

“A preliminary objection consists of a point of law which has been pleaded, or which arises from a clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”

“A preliminary objection is in the nature of what used to be called demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or of what is sought is the exercise of judicial discretion.”

12. Also in the case of *Oraro v Mbaja* [2005] 1 KLR 141 the court held as follows:

“...A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point.... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence....” (Emphasis added).

13. The effect of the case law cited above means for one to succeed in putting up a Preliminary Objection, it must meet the following criteria; it must be pleaded by one party and admitted by the other; must be a matter of law which is capable of disposing off the suit; must not be blurred by factual details calling for evidence; must not call upon the Court to exercise discretion.

14. The Application dated 11/07/2023 was brought by the Secretary General of the 4th Intended Party. The Preliminary Objection filed on 20/07/2023 challenge the capacity of the applicant to bring the application before the court. Essentially the preliminary objection contests the Locus standi of the applicant to prosecute the application herein. The court in the case of *Alfred Njau and others v City Council of Nairobi* (1982) KAR 229, defined the word Locus Standi as follows;-

“the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.

15. Further in the case of *Law Society of Kenya ...v... Commissioner of Lands & Others*, Nakuru High Court Civil Case No.464 of 2000, the Court held that;

“Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”.

16. Locus standi is therefore the right to appear and be heard before a court. The issue of Locus Standi therefore raises a point of law and is one capable of disposing of the suit without determining it on it's



- merit. If a party lacks capacity to appear before the court, then the court lacks jurisdiction to entertain such a party or even the pleadings filed by the said party. The applicant in the preliminary objection has stated that the Applicant in the application dated 11/07/2023 contravenes section 31 of *Advocates Act* as read with Order 9 of the *Civil Procedure Rules*.
17. Further that the applicant is not an advocate of this court nor a party and therefore has no legal capacity to represent a party being non-suited with no legal capacity to lodge and/or sustain the application.
 18. There is jurisprudence that states that for a preliminary objection that raises the issue of locus to succeed, the objection raised is bad in law if it does not state the law violated. I do not agree with this view at all. In my view it is not necessary for a party to state the law that is contravened when raising a preliminary objection. What matters is that the ground raised must be a point of law to fit the description under the *Mukhisa case* (supra). As alluded to above the issue of capacity of a party is a point of law that is fit to be raised as a preliminary objection.
 19. In the preliminary objection the applicant has stated that the applicant lacks capacity to bring the application before the court. The application is seeking to stay the 9th Members Annual General Meeting convened by the respondent on 25/07/2023 which action is overtaken by events. Further that the 4th Respondent be admitted in the matter and the 5th Interested Party/3rd respondent be directed to ascertain the locus of the purported trustees' trusteeship through tabling of the Trust Deed of Appointment for each trustee and finally that the 1st Interested Party be directed to produce the relevant Kenya Gazette that nominated one Mr Mugwanja as director of Kenya Railways Corporation.
 20. Article 162 (b) of the *constitution* addresses the jurisdiction Environment and Land Court as being a court created by the *constitution* and being a superior court of record exercising exclusive jurisdiction to determine disputes related to the environment, the use and occupation of, and title to land.
 21. I note from my reading of the application dated 11/07/2023 that the issues raised in the application are best addressed in the Employment and Labour Relations Court which has jurisdiction to settle disputes related to running of institutions and retirement and pensions and trusts and trusteeship.
 22. The preliminary objection has challenged the legal capacity of the applicant in the application dated 11/07/2023 stating that the representation by the applicant contravenes Section 32 of the Advocates' Act as read with Order 9 of the Civil Procedure. Further that the applicant is not an advocate of this court and is non-suited with no legal capacity to lodge and or sustain the application.
 23. To practice as an advocate in Kenya, section 9 of the *Advocates Act* requires one to be admitted as an advocate, to have his name for the time being on the Roll, and to have in force a practicing certificate. This principle was held in the case of *Peterson Ndungu, Stephen Gichanga Gituro, N. Ojwang, Peter Kariuki, Joseph M. Kyavi & James Kimani v. Kenya Power & Lightning Company Ltd* (2018) eKLR. In this case it was observed that, for one to be a qualified as an advocate of the High Court of Kenya, he must possess the qualifications under; section 9 of the Act. That similar principle was held in the case of; *Pius Njogu Kathuri v. Joseph Kiragu Muthura & 3 others* (2018) eKLR.
 24. Similarly, the provisions of section 31 of the *Act*, further states that: -
 - “(1) No unqualified person shall act as an advocate, or as such cause any summons or other process to issue, or institute, carry on or defend any suit or other proceedings in the name of any other person in any court of civil or criminal jurisdiction.
 - (2) Any person who contravenes subsection (1) shall—



- a) be deemed to be in contempt of the court in which he so acts or in which the suit or matter in relation to which he so acts is brought or taken, and may be punished accordingly; and
- b) be incapable of maintaining any suit for any costs in respect of anything done by him in the course of so acting; and
- c) in addition, be guilty of an offence.

25. Further, the provisions under section 34 of the Act, states that: -

(1) No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument—

- a) relating to the conveyancing of property; or
- b) for, or in relation to, the formation of any limited liability company, whether private or public; or
- c) for, or in relation to, an agreement of partnership or the dissolution thereof; or
- d) for the purpose of filing or opposing a grant of probate or letters of administration; or
- e) for which a fee is prescribed by any order made by the Chief Justice under section 44; or
- f) relating to any other legal proceedings; nor shall any such person accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instruction or for the drawing or preparation of any such document or instrument:

Provided that this subsection shall not apply to—

- i. any public officer drawing or preparing documents or instruments in the course of his duty; or
- ii. any person employed by an advocate and acting within the scope of that employment; or
- iii. any person employed merely to engross any document or instrument.
- iv. Any money received by an unqualified person in contravention of this section may be recovered by the person by whom the same was paid as a civil debt recoverable summarily.
- v. Any person who contravenes subsection (1) shall be guilty of an offence.

(4) This section shall not apply to—

- a) a will or other testamentary instrument; or
- b) a transfer of stock or shares containing no trust or limitation thereof.

26. Finally, the provisions of; section 84 of the Act states that; nothing in the Act or any rules made thereunder shall affect the provisions of any other written law; empowering any unqualified person to conduct, defend or otherwise act in relation to any legal proceedings.

27. In instant application Mr. Munayi Isaac Opondo, in the application dated 11/07/2023 states that he is the General Secretary of the 4th Interested Party and therefore not qualified as an advocate of the



- High court of Kenya. He argues that being the Secretary General, he has authority to represent the 4th intended interested party herein.
28. I have considered the notice of motion application dated 11/07/2023, filed by the Intended Interested Party and signed by Mr. Munayi Isaac Opondo, as the Secretary General of the 4th Intended Interested Party. He states the same in the supporting affidavit of even date.
 29. Similarly, I note from the court record that, Mr. Munayi orally addressed the court on behalf of the 4th Intended Interested Party, on the following dates; 20/07/2023 but the question however, remains whether, Mr Munayi has authority to represent the 4th Intended Interested Party/Respondent and/or address the court on their behalf. The provisions of; section 2(a) and (c) of the *Labour Relations Act* and section 22 of the *Employment and Labour Relations Court Act*, grants a person who is not otherwise qualified as an advocate authority to representation another person and/or party, in the Employment and Labour Relations Court, in the strict sense thereof. The proceedings herein are in the Environment and Land Court.
 30. The Environment and Land Court and Employment and Labour Relations Courts have been established under different provisions of the *constitution* of Kenya with distinct jurisdiction. The Environment and Land Court is established under Article 162 (2) (b) while, the Employment and Labour Relations Court is established under Article 162(2) of the *constitution* 2010. As such, Mr. Munayi cannot rely on these provisions under the *Employment and Labour Relations Court Act* and the *Labour Relations Act* to claim right of audience before the Environment and Land Court.
 31. Further, Mr Munayi in filing his application did not produce in evidence, the authority allegedly granted to him by the 4th Intended Interested Party making it difficult for the court to be able to appreciate the scope thereof and/or its existence.
 32. Ultimately I am left with no choice but to find that Mr. Munayi does not qualify as an advocate under the provisions of; sections 31 of the *Advocates Act* and/or qualify to enjoy the exception under section 83 of the *Advocates Act*. As a result, I find that the preliminary objection is merited and I allow the same as prayed in terms of all the prayers.
 33. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF SEPTEMBER 2023.

MOGENI. J

JUDGE

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In the virtual presence of :-

Mr Munayi for the Applicant

Mr Ndirangu for the Respondent

Mr Omagwa 3rd Interested Party

No appearance for the Intended 4th Respondent

Ms. C. Sagina : Court Assistant

