



**Ngutu v Kenya National Highways Authority (Constitutional Petition E281 of 2021)
[2023] KEHC 1608 (KLR) (Constitutional and Human Rights) (10 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1608 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E281 OF 2021**

AC MRIMA, J

MARCH 10, 2023

BETWEEN

ABEL NGUTU PETITIONER

AND

KENYA NATIONAL HIGHWAYS AUTHORITY RESPONDENT

RULING

1. The Petitioner herein, Abel Ngutu, filed a Petition dated July 19, 2021 challenging a recruitment exercise undertaken by the Respondent.
2. Citing various contraventions of the Constitution and the law, the Petitioner sought for the following reliefs in the Petition: -
 - a. A declaration be issued to the effect that the process of recruitment being undertaken by the Respondent and the shortlisting thereof as advertised on November 17, 2020 vide Re No. KeNHA/&D/ADVERTS/Vol.4 (123) contravenes the Provisions of Articles 10 and 232 of the Constitution and is unconstitutional and void ab initio.
 - b. That an order be issued prohibiting the respondent from conducting and or continuing to conduct the scheduled interviews of shortlisted applicants and or deliberating over the same and/or making any appointments on the basis of the impugned recruitment process as advertised on November 17, 2020 vide Re. No. KeNHA/&D/ADVERTS/Vol.4(123).
 - c. That an order be issued compelling the Respondent to strictly adhere to the provision of the Constitution to ensure regional gender and ethnic balance



as well as equity, inclusiveness and good governance and undertake a fresh recruitment exercise in accordance with constitutional dictates.

- d. That the cost of this Petition be borne by the Respondent.
 - e. Any other relief or order that this Court may deem fit in the special circumstances of this matter.
3. The Petition was fiercely opposed by the Respondents on two fronts. First, by way of a Notice of Preliminary Objection dated July 28, 2021 and, second, by an evenly dated Notice of Motion.
 4. On the directions of this Court, the Notice of Preliminary Objection was first heard, hence this ruling.

The Objection:

5. The Notice of Preliminary Objection was tailored as follows: -
 1. This Honourable Court lacks requisite jurisdiction to take cognizance of entertain, hear, determine and or grant the orders sought I the Petition as it offends Article 165(5)(b) of the [Constitution of Kenya 2010](#).
 2. The suit offends section 67(a) of the [Kenya Roads Act 2007](#) as the Petitioner has not complied with the mandatory provisions therein.
 3. The Petition contravenes the Doctrine of exhaustion of available remedies.
 4. The Petitioner's suit is frivolous, vexatious and abuse of the process of this Honourable Court hence ought to be struck out an or dismissed with costs.
6. The objection was dealt with by way of written submissions. Each party duly obliged.

Analysis:

7. Given the length and nature of the submissions, I will not reproduce the same verbatim in this ruling. However, I will consider the parties' positions, arguments and decisions referred to in the discussion herein.
8. From the objection, the parties' pleadings, depositions and submissions, two issues arise for determination. They are: -
 - i. Whether the Preliminary objection is sustainable in law.
 - ii. If the answer to (i) is in the affirmative, whether the Court has jurisdiction over the instant dispute.
9. I will deal with the issues in seriatim.

Whether the objection is sustainable in law:

10. The validity of a preliminary objection is considered on the basis that it conforms with the long-standing legal principle that it is raised on a platform of agreed set of facts, it raises pure points of law and is capable of wholly determining the matter.



11. To that end, the locus classicus decision in *Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd* (1969) E.A 696 at page 700, comes to the fore. In that case, the Court defined a preliminary objection and discussed its operation in the following eloquent manner: -

...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.

...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.

12. The Supreme Court weighed in on the issue in *Aviation & Allied Workers Union Kenya -vs- Kenya Airways Ltd & 3 Others* [2015] eKLR and stated thus: -

.... Thus, a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.

13. Ojwang J, as he then was, emphasized the finding in *Mukisa Biscuit -vs- West End Distributors* case (supra) in Civil Suit No. 85 of 1992, *Oraro -vs- Mbaja* [2005] 1 KLR 141 when he observed as follows: -

..... I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified 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 processes of evidence. Any assertion which claims to be a preliminary objection, and 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....

14. In *John Musakali -vs- Speaker County of Bungoma & 4 others* (2015) eKLR the validity of a preliminary objection was considered in the following manner: -

.... The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law....

15. Finally, in *Omondi -vs- National Bank of Kenya Ltd & Others* {2001} KLR 579; [2001] 1 EA 177, guidance was given on what Courts ought to consider in determining the validity of preliminary objections. It was observed: -

... In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise



of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done *ex debito justitiae* (as of right) but as a matter of judicial discretion....

16. On whether the issue of jurisdiction is a pure point of law, the Supreme Court in Petition No. 7 of 2013 *Mary Wambui Munene v. Peter Gichuki Kingara and Six Others*, [2014] eKLR, stated that 'jurisdiction is a pure question of law' and should be resolved on priority basis.
17. The objection in this case is based on two main grounds. The first one is whether the appropriate Court to deal with the matter is the Employment and Labour Relations Court constituted pursuant to the provisions of Article 165(5)(b) of the *Constitution*, and second, on the basis of the doctrine of exhaustion. The doctrine rests on Section 67(a) of the *Kenya Roads Act*, No. 2 of 2007 (hereinafter referred to as 'the Act').
18. Having perused the Respondent's Notice of Motion dated July 28, 2021, it is apparent that jurisdictional issue on the basis of Article 165(5)(b) of the *Constitution* is one of the main grounds in that application. The application also seeks prayers on striking out or expunging some exhibits from the record. As such, and with a view of not pre-empting the said application, I will not deal with the Article 165(5)(b) objection and instead that objection shall stand subsumed in the application.
19. This ruling will, hence, be limited to whether the objection based on the doctrine of exhaustion is sustainable in law, and if so, whether it is merited.
20. Returning to Section 67(a) of the Act, the provision states as follows: -

67. Limitation of actions:

Where any action or other legal proceeding lies against an Authority for any act done in pursuance or execution, or intended execution of an order made pursuant to this Act or of any public duty, or in respect of any alleged neglect or default in the execution of this Act or of any such duty, the following provisions shall have effect—

- (a) the action or legal proceeding shall not be commenced against the Authority until at least one month after written notice containing the particulars of the claim and of intention to commence the action or legal proceedings, has been served upon the Director-General by the plaintiff or his agent;
21. The law, therefore, requires certain actions to be undertaken by a party which is aggrieved by any decision of the Authority prior to instituting a Court process. Such a party must serve a written notice containing the particulars of the claim and of the intention to commence the action or legal proceedings upon the Director-General. The notice must give a grace period of at least one month.
 22. On the basis of the said Section 67(a) of the Act, the Respondent believes that the Petition is a non-starter for failure to comply with such a provision.
 23. One of the cardinal legal principles governing preliminary objections is that the objection should not be based on contested facts. In this case, the fact is whether the Petitioner issued the requisite notice under Section 67(a) of the Act prior to instituting this matter.
 24. On his part, the Petitioner contended that the objection was based on unsettled factual issues and as such, it cannot pass the test of an objection in law.



25. It is unrivalled that whether the Petitioner issued the requisite notice or not is a fact. Being a fact, for an objection to be sustained on the background that it is raising a factual issue, the issue must be agreed upon.
26. In this case, the issue as to whether the notice was given or not is not settled. That being the case, the issue calls for evidence to be adduced for its settlement. Where evidence has to be called to settle an issue, then such an issue transcends the borders of a preliminary objection into a contested fact.
27. A contested fact, cannot therefore, be raised by way of a preliminary objection. It ought to be properly raised by way of an affidavit. This position was canvassed by the Supreme Court of Kenya in *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2021] eKLR. On the procedure for raising the plea of res judicata, the Supreme Court alluded to the position that since the plea of res judicata was anchored on evidential facts, then such facts ought to be properly raised through an oath, for instance by way of an affidavit.
28. As the contested matter herein was raised in the Notice of Preliminary Objection, which objection is not supported by any evidential facts, then the objection does not pass the proprietary test of being a valid preliminary objection in law.
29. The Notice of Preliminary Objection, therefore, fails for being raised on the basis of contested and unsettled facts.
30. As I indicated above, and in view of the foregoing finding of this Court, I wish to clarify that the issue of failure to adhere to the doctrine of exhaustion pursuant to Section 67(a) of the Act can still be taken up if raised in the appropriate manner. This ruling did not, hence, determine the issue on its merits.
31. Deriving from the above, the following final orders do hereby issue:
 - a. Limbs 2 and 3 of the Notice of Preliminary Objection dated July 28, 2021 are hereby struck out.
 - b. Limb 1 of the Notice of Preliminary Objection dated July 28, 2021 is hereby subsumed in the Respondent's Notice of Motion dated July 28, 2021
 - c. Costs of the objection shall be in the Notice of Motion dated July 28, 2021
 - d. The matter shall be placed before the Presiding Judge of the Division for further directions on the way forward.

Orders accordingly.

DELIVERED, DATED and SIGNED at NAIROBI this 10th day of March, 2023.

A. C. MRIMA

JUDGE

Ruling No. 1 Delivered Virtually inpresence of

Mr. Ochieng for Kimathi for the Respondent

Regina/ Chemutai Court Assistants

Ruling No. 1 – Nairobi High Court Constitutional Petition No. E281 of 2021 Page 6 of 6

