



REPUBLIC OF KENYA



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Uzel & 7 others v Gitonga & 5 others (As the Management Board of the Mombasa Parent's Club) (Civil Suit E047 of 2022) [2023] KEHC 27532 (KLR) (2 June 2023) (Ruling)

Neutral citation: [2023] KEHC 27532 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E047 OF 2022
F WANGARI, J
JUNE 2, 2023**

BETWEEN

**DR JEAN UZEL 1ST PLAINTIFF
DR KERICH MARY 2ND PLAINTIFF
DR MICHAEL MBINDYO MUNYWOKI 3RD PLAINTIFF
AHMED ALI TWAHIR 4TH PLAINTIFF
DOMNIC MUANGE 5TH PLAINTIFF
JOE MUTHUI 6TH PLAINTIFF
ALI ABDULSWAMAD 7TH PLAINTIFF
MRS MARYAM FAROUQ 8TH PLAINTIFF**

AND

**BENJAMIN GITONGA 1ST DEFENDANT
FEISAL ABEID 2ND DEFENDANT
P MUNYAO 3RD DEFENDANT
MICHAEL WANGAMATI 4TH DEFENDANT
KHADIJA KHALID 5TH DEFENDANT
JOSEPH WELOBA 6TH DEFENDANT**

AS THE MANAGEMENT BOARD OF THE MOMBASA PARENT'S CLUB



RULING

1. The Applicants moved the court through a chamber summons application dated 20th July, 2022 which sought the following orders: -
 - a. Spent;
 - b. Spent;
 - c. That pending the hearing and determination of the Arbitration proceedings between the Parties herein, the Court be pleased to grant interim protection measure staying the ongoing recruitment exercise by the Respondents for the position of school Principal, Nyali School as stated in the Press Advertisement of 8/6/2022;
 - d. That pending the hearing and determination of the Arbitration Proceedings between parties herein, the Respondents be restrained from spending an amount in excess of Kshs. 500,000/= unless approved by the Special General Meeting of the Mombasa Parents in accordance with the Clubs valid constitution;
 - e. That pending the hearing and determination of the Arbitration Proceedings between the parties herein, the court be pleased to restrain the 1st – 6th Respondents from conducting any management activities for and on behalf of Mombasa Parents Club and that there be a Caretaker Committee;
 - f. The Court be pleased to order the Respondents to supply to the Applicants the pertinent information relating to the Mombasa Parents Club and more particularly a copy of the current Club Membership Register, the Club's Notice for Annual General Meeting that called for the Amendment of the Club's Constitution, any minutes of the AGM where the changes to the Club's Constitution were approved, and the Consent of the Registrar of Societies as required under Section 20 of the *Societies Act* for the changes to *the Constitution*.
2. Upon service of the application, the Defendants/Respondents raised a notice of preliminary objection dated 24th October, 2022 on among others that the Court lacked jurisdiction to hear and determine the suit on the basis that *the Constitution* of Mombasa Parents Club provided that any differences or disputes between the Club and the member or members shall be referred to the decision of an arbitrator or arbitrators.
3. Directions were taken that the notice of preliminary objection be disposed off by way of written submissions. Both parties duly complied by filing detailed submissions as well as citing various decided cases in support of their rival positions. I have duly considered the said submissions and I am grateful to Counsel for their industry and time in preparing the submissions. They are a useful guide to the court in arriving at a just determination on the issues at hand.

Analysis and Determination

4. Having considered the notice of preliminary objection, written submissions, cited authorities and the law, the following are the issues for determination: -
 - a. Whether the court has jurisdiction to hear and determine the application and suit;
 - b. What is the order as to costs?



5. The parameters of consideration of a preliminary objection are now well settled. A preliminary objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd* [1969] EA 696. At page 700, Law, JA stated: -

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point 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.”

6. At page 701, Sir Charles Newbold, P added: -

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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...”

7. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit or application.

8. The basis of the Defendants'/Respondents' objection is article 49 of Mombasa Parents Club constitution which mandates that whenever there is a dispute between the club and members, such difference shall be referred to an arbitrator. According to the Respondents, the Applicants ought to have referred their dispute to an arbitrator instead of filing the suit. I am satisfied that the preliminary objection raised is a pure point of law. Is this court's jurisdiction ousted by virtue of article 49 of Mombasa Parents' Club Constitution? The case of *Mesback Kibunja Kaburi & 3 Others v Kirubi Kamau & 5 Others* cited by the Respondents espouses the correct position where there is an arbitral agreement. However, every case has to be determined on its own peculiar circumstances as there are no two (2) cases that are the same.

9. To answer the first issue, a deeper consideration of the application dated 20th July, 2022 is imperative. Prayer 2 of the application sought for interim protection measure. Prayers 3, 4 and 5 clearly leave no doubt that the Applicants were alive to the provisions of article 49 of the Club's Constitution. Section 7 of the *Arbitration Act* is categorical on this court's jurisdiction where there exists an arbitral agreement. Section 7(1) provides as follows: -

“It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.” (Emphasis added)

10. Therefore, the fact that there is an arbitration agreement does not of itself strip the court of the jurisdiction to issue interim measures. As was held in *Scope Telematics International Sales Limited v Stoic Company Limited & Another* [2017] eKLR, in ordering interim measure of protection, the court is exercising its discretion. I have no doubt in my mind that the application is properly before court as it is accompanied by a suit thus compliant with Rule 2 of the *Arbitration Rules*, 1997.



11. The interim protection measures sought by the Applicants was meant to stop recruitment of the school's principal pending arbitral proceedings. As held in *Scope Telematics International Sales Limited* (above), the court is called upon to strike a balance to ensure that the intended arbitration proceedings are not prejudiced either by failing to protect the status quo and or the subject matter of the intended arbitration and at the same time to ensure or avoid making an order that goes to resolving the dispute between the parties which ought to be left exclusively in the hands of the arbitrator.
12. To this end, I am satisfied that the application is well founded and I thus disallow the objection dated 24th October, 2022.
13. On the issue of costs, section 27 of the *Civil Procedure Act* decrees that the same follows the event. However, the court retains its discretion to either award or not to award costs. Considering that the preliminary objection was not an idle one, I see no reason to punish the Respondents and I thus direct that costs shall abide the outcome of the application dated 20th July, 2022.
14. Flowing from the foregoing, I proceed to make the following orders: -
 - a. The Notice of Preliminary Objection dated 24th October, 2022 is not merited and the same is dismissed.
 - b. Costs shall abide the outcome of the application dated 20th July, 2022.

Orders accordingly

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 2ND DAY OF JUNE, 2023.

F. WANGARI

JUDGE

In the presence of:

Muso Advocate h/b for Plaintiffs/ Applicants

N/A for Defendants/ Respondents

Guyo, Court Assistant

