



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 55 OF 2018

LABAN ONDITI RAO.....PETITIONER

- VERSUS -

KIPRONO KITTONY 1ST RESPONDENT

KENYA NATIONAL CHAMBER OF

COMMERCE & INDUSTRY.....2ND RESPONDENT

RULING

1. **Laban Onditi Rao** is the petitioner in this matter. It is not denied that on **14th July 2016**, the petitioner was elected at the annual general meeting of **Kenya National Chambers of Commerce & Industry**, the 2nd respondent as its national vice chairman.

2. This petition is directed to the petitioner's suspension from that office by the 2nd respondent. The petitioner alleges that his suspension and eventual removal from that office was a skim by **Kiprono Kittony**, the 1st respondent. Further, that the suspension was a violation of his fair administrative right and also was ultravires the powers in the articles of association of the 2nd respondent donated to the 2nd respondent's board of directors.

3. The respondents have filed preliminary objections to the action in the following terms:

“(1) The entire suit is a non-starter as it offends the principle of subjudice as the same issues between the same parties are currently before another court of competent jurisdiction.

(2) The entire petition as filed is an abuse of the due process of court and it's brought malafides.

(3) The suit is incompetent and born out of misapprehension of law because the writ prerogative orders sought in the petition are not available against the respondent.

(4) The petition and application are incompetent because the petitioner is withholding material facts.

(5) The prayers sought in the suit and application more specifically the conservatory orders cannot be granted as granting the same would be in vain the same having been overtaken by events”.

4. The supreme court in the case of **IEBC vs Jane cheperenger & 2 others [2015] eKLR** considered a preliminary objection raised before it and made a finding of whether it had merit. In that case it is stated thus:

*“As to whether a preliminary objection is one of merit, this court has already pronounced itself on the threshold to be met. The court endorsed the principle in **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors [1969]EA 696**, in the case of **Hassan Ali Joho & Another vs Suleiman Said Shahbal & 2 Others, Petition No. 10 of 2013 [2014]eKLR [paragraph 31]**:*

*“To restate the relevant principle from the precedent-setting case, **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors [1969]EA 696**:*

‘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....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.'

[15]The Joho decision has been subsequently cited by this court in *Hassan Nyanje Charo vs Khatib Mwashetani & 3 Others*, Civil Application No. 23 of 2014, [2014] eKLR; and in *Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 Others*, Application No. 50 of 2014, [2015] eKLR, in which the Court further stated [paragraph 15]:

“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. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

[16] it is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion; that the facts are incompatible with that point in law. (see *Hassan Nyanje Charo vs Khatib Mwashetani & 3 Others*, Civil Application No. 14 of 2014, [2014] eKLR.”

5. Bearing in mind what the Supreme Court stated in the above case, the objections numbers 2, 4 and 5, since they seek this court to exercise its discretion in their determination, they are not proper preliminary objection. To repeat what the Supreme Court stated, a preliminary objection may only be raised on a pure point of law.

6. With the above determination, only grounds no. 1 and 3 will be considered in this ruling.

7. But having stated so, I will add that the objection no. 1 which raises an issue that this petition is subjudice is also on the border line of being an improper preliminary objection. I say so because the respondents seek this court to engage in investigation of whether this petition is subjudice.

8. The respondents through their learned advocate submitted that the petitioner had previously filed another suit in this court, been **HCC no. 59 of 2017**, whose cause of action was what is in this petition. The learned advocate proceeded to submit that a ruling was delivered in that HCC no. 59 of 2017 whereby the petitioner’s application was dismissed. On being dismissed the learned advocate submitted that the petitioner filed a notice of appeal before the Court of Appeal intending to appeal against the ruling that dismissed his application. It is for that reason it was submitted that this petition is subjudice.

9. The petitioner responded by stating that the ruling in **HCCC 59 of 2017** was annexed to his petition. It was submitted that what was before the court in HCCC 59 of 2017 was an application for leave to file derivative suit on behalf of the 2nd respondent. The court by its ruling dated **29th May 2017**, dismissed that application. The petitioner confirmed that he filed a notice of appeal against that ruling but stated that he had not filed the substantive appeal within the prescribed period under the court of appeal rules. For that reason, the petitioner submitted that there being no appeal, this petition was not subjudice.

10. I did earlier say that this ground is on the border line of not been a proper preliminary objection. The reason is that, a part from the ruling in HCC 59 of 2017, annexed to this petition, I have no other document before me to confirm that the issues raised in the petition were the same as in HCC 59 of 2017. Although parties consented to this court perusing the file in HCC 59 of 2017, despite concerted effort to trace that file in the court registry, it could not be traced. Whose responsibility was it to provide evidence of subjudice? I would say the respondents. They failed to do so.

11. I am unable on the material before me to determine if this petition is caught by the rule of subjudice. The preliminary objection no. 1 is therefore overuled.

12. The respondents submitted that the petition is precluded from seeking orders of mandamus or certiorari as he sought in this petition because those orders are not available against the respondents who are private parties. The respondents relied on a decision of this court in the case of **Republic vs Kenya Association of Music producers (KAMP) & 3 others** Ex-parte pubs, Entertainment and **Restaurants Association of Kenya (PERAK)** [2014] eKLR.

13. I wish to state that the respondents did not supply the court with that authority. I had to do my own research and I am not sure whether the authority cited above is exactly the one the respondents relied on in their submissions. I say this because, contrary to their submissions, the court in that authority relied on the holding by **Nyamu J (as then was)** and that holding was in discussion of persons standing in an action for judicial review. The court in that holding was of the view that courts in entertaining judicial review should resist being straight jacketed and should permit a person who wants to challenge illegality, unreasonableness, arbitrariness, irrationality and abuse of hearing.

14. To the above, I would add that the petitioner seeks vindication of what he terms as violation of his constitutional right and violation of his right under the Fair Administrative Action Act No. 4 of 2015.

15. In my view the argument raised by the respondents that prerogative orders cannot be sought on an allegation of violation of constitutional rights and violation under act No. 4 of 2015 cannot be right. Merely by considering section 3 of act no. 4 of 2015, it seems to include any person as a party to who under the Act can be called to answer an allegation of violation under that Act.

16. Similarly, under Article 47 of the constitution it does not seem to have the restrictive look that the respondents seek to give it.

17. The preliminary objection no. 3 is also without merit in view of the above discussion.

18. In the end the preliminary objections dated **20th November 2017** are hereby dismissed with costs to the petitioner.

19. At the reading of this ruling the court will give directions on the hearing of the main petition.

DATED, SIGNED and DELIVERED at **NAIROBI** this **20th** day of **September**, 2018.

MARY KASANGO

JUDGE

Ruling read and delivered in open court in the presence of

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendant

MARY KASANGO

JUDGE