



Kenya Union of Road Constructors and Civil Engineering Workers v H. Young and Company (EA) Limited (Cause E904 of 2022) [2024] KEELRC 1806 (KLR) (15 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 1806 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E904 OF 2022**

JK GAKERI, J

JULY 15, 2024

BETWEEN

**KENYA UNION OF ROAD CONSTRUCTORS AND CIVIL ENGINEERING
WORKERS CLAIMANT**

AND

H. YOUNG AND COMPANY (EA) LIMITED RESPONDENT

RULING

1. Before the court for determination is the Respondent's Notice of Preliminary Objection dated 11th April, 2024 that;
 1. The Claimant union has no locus standi to present the claim on behalf of the grievants herein.
 2. The three grievants David Waiyaki Kamaru, Silas Mark Sangare and Joseph Cheruiyot are not members of the Claimant trade union and have never been members.
 3. No evidence has been tendered to demonstrate that the grievants were members of the Claimant trade union at any material time in the course of their employment with the Respondent and the suit should be struck out.
2. When the matter came up on 31st October, 2023, the court directed the Respondent to file and serve the Witness Statement and List of Bundle of documents within 30 days and a mention was slated for 11th December, 2023 to take a hearing date on which date counsel for the Respondent prayed for 10 days to comply and the court gave both parties 14 days to comply and hearing was scheduled for 21st March, 2024 when counsel for the Respondent informed the court that they had filed a Preliminary Objection and wanted a hearing date but the union had not been served and the court directed the Respondent to reserve the Preliminary Objection by close of business on 18th April, 2024 and it be responded to within 5 days and 17 days a piece for parties to file and exchange submissions.



3. On 6th May, 2024, counsel for the Respondent informed the court that service was effected that morning and prayed for 2 days to file and serve submission.
4. The court granted 7 days and ruling was scheduled for 15th July, 2024.
5. By 5th June, 2024 when the court retired to prepare this ruling, the CTS showed that the Respondent's submissions were filed on 30th May, 2024, 19 days after the 5 days granted by the court on 6th May, 2024.
6. The Respondent/Applicant's submissions were therefore filed out of time and were not taken into consideration in this ruling.

Claimant's submissions

7. As to what constitutes a Preliminary Objection, the union relies on the Court of Appeal decision in *Mukisa Biscuit Manufacturing V West End Distributors Ltd* (1969) EA 696 to urge that the Notice of Preliminary Objection has not met the threshold of a Preliminary Objection as it raises factual matters that call for evidence to establish.
8. The union submits that it derives its authority to sue on behalf of its members from the [Constitution](#) and applicable provisions of the [Labour Relations Act](#), 2007 and the Respondent stands to suffer no prejudice if the notice of preliminary is struck out.
9. Reliance was made on the decision in [Samuel Waweru V Geoffrey Muhoro Mwangi](#) (2014) eKLR to reinforce the submissions.
10. The singular issue for determination is whether the Respondent's Notice of Preliminary Objection is a competent Preliminary Objection.
11. It requires no emphasis that the locus classicus exposition of what constitutes a Preliminary Objection are the often cited sentiments of Law JA and Sir Charles Newbold V.P., in the celebrated decision of the Court of Appeal in *Mukisa Biscuits Manufacturing Co. Ltd V West End Distributors Ltd* (Supra) where 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 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. . .”
12. In the words of Sir Charles Newbold V.P.;

“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.”
13. Needless to belabour, a Preliminary Objection is a threshold question and when raised, it ought to be disposed of at the earliest instance as it has the potential to dispose of the suit before hearing and determination.
14. The pith and substance of the Respondent's Preliminary Objection is that the Claimant union lacks locus standi to institute the instant claim on behalf of the grievants as they are not and have never been its members as no evidence of membership has been availed by the union.



15. Clearly, the fact that the Notice of Preliminary Objection makes reference to non-availing of evidence by the Claimant union would appear to suggest that its foundation is not legal but factual.
16. It is axiomatic that whether a person is a member of a union or not is a question of fact provable by relevant documentation.
17. In a nutshell, the Respondent's Notice of Preliminary Objection raises questions of fact and thus fails to meet the threshold enunciated in *Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd (Supra)* and is for dismissal.
18. Consequently, the Respondent's Notice of Preliminary Objection dated 11th April, 2024 is dismissed.
19. The Respondent shall reimburse the Claimant the sum of Kshs.15,000/=.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 15TH DAY OF JULY 2024

DR. JACOB GAKERI

JUDGE

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

