



**Mwanga v nti Counterfeit Authority & 3 others (Employment and Labour Relations
Petition E037 of 2024) [2024] KEELRC 1735 (KLR) (5 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1735 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E037 OF 2024**

AN MWAURE, J

JULY 5, 2024

BETWEEN

MARTIN LURTHER MWANGA PETITIONER

AND

THE ANTI COUNTERFEIT AUTHORITY & 3 OTHERS RESPONDENT

RULING

1. The respondent did make an application for a preliminary objection seeking the following prayers.
 - a. That this honourable court given the specific relationship between the petitioner and the 1st respondent, is precluded from exercising its special constitutional jurisdiction in the subject matter of the petition.
 - b. That this honourable court, given the specific relationship between the petitioner and the 2nd, 3rd, 4th and 5th respondents is precluded from exercising its special constitutional jurisdiction in any alleged dispute the petitioner and the said 2nd, 3rd, 4th & 5th respondents.
 - c. That this honourable court is generally bereft of jurisdiction to entertain, hear and determine the subject matter of the petition.
2. The respondents in their submissions raises issue of this court's jurisdiction as provided under Article 165 of the Constitution of Kenyan 2010 and section 12 of Employment and Labour Relations Court Act. The respondent states the petitioner does not hold an employer and employee relationship with the 2nd to 5th respondent who are employees of the 1st respondent.
3. The other issue is that the petitioner has not exhausted the administrative procedures provided under HR and Procedure Manual 2021 of the respondent.



4. The respondents aver that the exhaustion principle applies in this cause and so the same should be entiled through the alternative dispute mechanism.
5. The petitioner by their submissions dated 3th May 2024 on the other hand avers that the preliminary objection raised does not rise a pure point of law as provided in numerous authorities he leading one being *Mukbisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) 4 E.A. 696.

Analysis and determination

6. Having considered the application, affidavits and submissions on record, the court will deal with the issue of whether the preliminary objection raises a pure point of law and so is it merited.
7. It is trite law that a preliminary objection is only merited if it enunciates pure point of law. If an application raises evidentiary matters that can only be determined upon analysis of evidence by the fact then clearly such does not justify the tenets of preliminary objection.
8. The famous *Mukbisa Biscuit Manufacturing Co Ltd v West End and Distributors Ltd* (1969) EA 696 the Court of Appeal emphasised that a preliminary objection should consist of a point of law which has been pleaded or which arises by clear implication out of the pleadings. If the court would need to call for evidence or to use its discretion to determine an application that applicant fails to merit being a preliminary objection.
9. In this case the respondent has raised two issues in its application.
10. The issue of whether the 2nd to 5th respondents are petitioners employers is worthy of consideration but it can as will be handled during the main haring seeing the 1st respondent is an employer of the petitioner, the court is satisfied the 2nd, 3rd, 4th and 5th respondents are not employers of the petitioner and their names should be struck out from the suit as per prayer b of the preliminary objection. Their costs will be in the cause.
11. The plea of the doctrine of exhaustion as per the Human Resource and Procedure Manual 2021 of the respondent is not a pure point of law and it ought to be litigated in full in order to arrive at a clear determination.
12. The court persuaded by numerous authorities inclusive Civil Suit 021 of 2021 *DJC v BICL* the court again reiterated that a preliminary objection as argued disposes the suit. Such examples would pertain to jurisdiction of court or limitation plea or contracts with an arbitration clause.
13. In this case, the issue of doctrine of exhaustion raised is not on pure law and so the court finds this does not justify to be a pure point of laws as it will require evidence to be adduced. Therefore, the preliminary objection application dated 2nd April, 2024 is not merited and is dismissed accordingly and case should proceed for hearing.
14. Costs in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 5TH DAY OF JULY, 2024.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

