



**Gwakou v Consolata Primary School (Cause E286 of 2023)
[2025] KEELRC 834 (KLR) (14 March 2025) (Ruling)**

Neutral citation: [2025] KEELRC 834 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E286 OF 2023
SC RUTTO, J
MARCH 14, 2025**

BETWEEN

WINNEYFRED ANYANGO GWAKOU CLAIMANT

AND

CONSOLATA PRIMARY SCHOOL RESPONDENT

RULING

1. Through a Memorandum of Claim filed in this court on 23rd June 2023, the Claimant sued “Consolata Primary School” whom she averred was her employer with effect from 1st September 1990 until her retirement on 31st July 2021. In this regard, the Claimant sought inter alia, an order that the Respondent pays her Kshs 8,586,616/= being pension arrears from 1st September 1990 to December 2012.
2. Upon being served with the Memorandum of Claim, Consolata Primary School through its Advocates, filed a Notice of Preliminary Objection dated 13th July 2023 in which it has contended that:
 - a. That the Respondent as sued lacks capacity to sue or to be sued in its own name.
 - b. That the entire dispute is incompetent, bad in law and should be struck out with costs to the Respondent.
3. Subsequently, the Claimant amended the Memorandum of Claim on 1st July 2024 thereby substituting “Consolata Primary School” with Father Zachary Kariuki, Father Peter Ochieng, Brother Clarence Lukungu and Father Joakim Njani (being sued as the representatives of Consolata Fathers Society) as Respondents in the suit.



4. Following the amendment, the Respondents/Applicants moved the Court through a Notice of Motion dated 18th July 2024, seeking the following principal order:

That this suit as instituted in the Amended Memorandum of Claim against the Respondents/Applicants be struck out.

5. It is that Application which now comes up for determination.

6. The Motion is premised on the grounds set out in the Application and the Supporting Affidavit sworn on 18th July 2024 by Brother Clarence Lukungu, the 3rd Respondent/Applicant herein.

7. Grounds in support of the Motion are that having sued the wrong party in the first instance, the suit was a non-starter, is fatally defective and cannot be cured by way of an amendment.

8. It is further averred that the 1st to 4th Respondent/Applicants are not representatives of Consolata Fathers Society and are strangers to the purported Society. That they are not aware that there exists a Society by the name Consolata Fathers Society. That the Claimant has not joined the proper Respondents.

9. In response to the Application, the Claimant filed a Replying Affidavit dated 9th December 2024 in which she avers that on 1st September 1990, she entered into a fixed employment contract with Consolata Fathers as a teacher in Consolata Primary School, Westlands, from 1 August 1990 to 30th June 2000. The employment contract was consequently renewed yearly until her retirement in 2021.

10. The Claimant further avers that the Respondents/Applicants herein are the officials of the Consolata Fathers Society and are necessary parties to the suit herein. It is the Claimant's assertion that the 1st Applicant is the Regional Superior, while the 2nd Applicant is the Director, the 3rd Applicant being the Regional Finance Administrator, and the 4th Applicant serving as the Human Resource Department Director of Consolata Fathers.

11. The Claimant further contends that she was employed by Consolata Fathers, and that the individual Applicants are liable for the actions of Consolata Fathers.

12. That on 21st March 2024 through her advocates on record, she conducted a search for Consolata Fathers in the Registrar of Societies which identified the Society's office bearers.

13. The search failed to give them the full particulars of the officials since the Consolata Fathers Society had not been filing returns. She was therefore unable to know the persons who registered the school.

14. Consequently, on 16th April 2024, she wrote a letter to the Director, Ministry of Education, State Department for Basic Education requesting for the details of the registered proprietors of Consolata Primary School, Westlands.

15. She was advised by the Director, Ministry of Education to seek such information from the Regional Director, Nairobi County, Ministry of Education. She did as much through her Advocates on 6th May 2024, but did not get a response.

16. They followed up the matter physically and the Regional Director confirmed that the Consolata Fathers Society is on record as the registered managers of Consolata Primary School.

17. It is the Claimant's contention that contrary to the Applicants' allegations that neither of them is a representative of the Consolata Fathers Society or are aware that there exists such a society, she confirms that they are privy and aware of the Society named herein.



18. The Claimant further contends that a letter dated 3rd August 2021, signed by the 4th Respondent as the Director of the Consolata Fathers Kenya, sent to the National Social Security Fund (NSSF) informed them that she had retired from employment with Consolata Fathers in Consolata Primary School Westlands.

Submissions

19. On 15th October 2024, the Court directed that the Applicants' Notice of Preliminary Objection dated 13th July 2023 and the Notice of Motion dated 18th July 2024 be canvassed together by way of written submissions. Pursuant to these directions, both sides filed written submissions which the Court has considered.

Analysis and Determination

20. Arising from the Notice of Preliminary Objection dated 13th July 2023 and the Notice of Motion dated 18th July 2024, the Court has singled out the following issues for determination:
- a. Whether the Preliminary Objection is competent;
 - b. Whether the Applicants are proper parties to the suit herein;

Competency of the Preliminary Objection

21. The main ground raised in the instant Preliminary Objection, is that the Consolata Primary School, lacks the capacity to sue or be sued in its own name. It is worth pointing out that at the time the Objection was filed, the Claimant was yet to amend her Memorandum of Claim, hence Consolata Primary School had been sued as the Respondent.
22. It is apparent from the record that the Claimant amended the Memorandum of Claim subsequent to the Notice of Preliminary Objection. In this regard, the Claimant substituted "Consolata Primary School" with the Applicants as Respondents in the suit. Still, the Applicants have maintained that the said amendment did not cure the Memorandum of Claim.
23. On this issue, the Applicants have submitted that the Preliminary Objection was not defeated since any suit instituted against the wrong party is a non-starter and a nullity. In support of this position, the Applicants sought to rely on the case of Janto Construction Company Ltd v Enock Sikolia & 2 others [2020] eKLR and Media Max Network Ltd v William Momanyi & 2 others [2022] eKLR.
24. The Applicants have further submitted that Consolata Primary School has no legal capacity to sue or to be sued in its own name and that it is a non-existent entity and the proceedings and any judgment arising therefrom will be a nullity. According to the Applicants, this kind of defect cannot be cured by an amendment and the entire suit ought to be struck out.
25. On her part, the Claimant has averred that she has annexed contracts of employment as well as her pay slips to her Replying Affidavit showing that she was employed by Consolata Fathers as a teacher at Consolata Primary School, Westlands.
26. The Claimant further referenced the Certificate of Registration of Consolata Primary School Westlands which indicates Consolata Fathers as its registered managers.
27. To this end, the Claimant has submitted that the Applicant's denial despite what she termed as overwhelming evidence, cannot be determined through a Preliminary Objection.



28. It is imperative to first start by describing what a proper Preliminary Objection is. The law is now settled on this issue, hence I will not reinvent the wheel.

29. In the celebrated case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, a Preliminary Objection was described in the following manner: -

“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”.

30. As per Sir Charles Nebbold, JA: -

“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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

31. Similarly, the Court in the case of *Avtar Singh Bhamra & Another v Oriental Commercial Bank, Kisumu HCCC No.53 of 2004*, held that; “A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

32. What is discernible from the aforementioned precedents is that for a Preliminary Objection to pass muster, the following elements ought to be satisfied: -

- a. It should raise a pure point of law;
- b. It is argued on the assumption that all the facts pleaded by the other side are correct; and
- c. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

33. It is evident in the case herein that the bone of contention is the capacity of Consolata Primary School to sue or to be sued in its own name. This being the case, it goes without saying that to establish the legal capacity of Consolata Primary School, certain facts have to be ascertained through evidence. Differently expressed, this is an issue that can only be resolved by resorting to facts and evidence. Therefore, to this extent, the instant Notice of Preliminary Objection as raised, does not raise a pure point of law.

34. As can be discerned from the precedents cited herein, a Preliminary Objection should be based on a pure point of law and should not be marred with issues of facts and evidence as the case herein.

35. As to the distinction between a question of law and fact, the Court adopts the position of Mativo J (as he then was) in the case of *J N & 5 others v Board of Management, St. G School Nairobi & another* [2017] eKLR, where the learned Judge held that: -

“14. In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts.



15. In law, a question of fact, also known as a point of fact, is a question that must be answered by reference to facts and evidence as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant legal principles. The answer to a question of fact (a "finding of fact") usually depends on particular circumstances or factual situations."
36. Applying the above precedent to the case herein, it becomes apparent that the instant Preliminary Objection cannot be determined without undertaking a factual evaluation of the evidentiary material on record to determine the legal capacity of Consolata Primary School to sue or to be sued in its own name. Indeed, the Claimant annexed to her Replying Affidavit, a copy of a certificate of registration with respect to Consolata Primary School. As such, this is evidence that the Court has to consider in determining the legal capacity of Consolata Primary School to sue or to be sued in its own name.
37. Needless to say, the Notice of Preliminary Objection raised herein has not met the legal threshold of a proper Preliminary Objection.
38. In view of the reasons set out above, the Notice of Preliminary Objection dated 13th July 2023 cannot be sustained and is overruled.
39. I must also add that to strike out the entire suit on the basis that the Claimant had initially sued Consolata Primary School which it contends lacks the capacity to sue or to be sued in its own name, would be a draconian act as the net effect would be to drive away the Claimant from the seat of justice in an arbitrary manner.
40. I say so bearing in mind that the Claimant amended the Memorandum of Claim on 1st July 2024 thereby substituting Consolata Primary School with the Applicants as Respondents in the suit.

Whether the Applicants are proper parties to this suit

41. The crux of the Applicants' Notice of Motion dated 18th July 2024 is that they are not representatives of Consolata Fathers Society and are strangers to the purported Society.
42. In her Replying Affidavit, the Claimant has averred that she was employed by Consolata Fathers in 1990 and that Consolata Fathers Society are necessary parties to this suit.
43. According to the Claimant, the 1st Applicant is the Regional Superior, the 2nd Applicant being the Director, the 3rd Applicant, the Regional Finance Administrator while the 4th Applicant is the Human Resources Department Director of Consolata Fathers. It is worth pointing out that the Applicants have not disputed this position.
44. In support of her position, the Claimant annexed to her Replying Affidavit copies of her contracts of employment and pay slips issued by Consolata Fathers.
45. Further annexed to the Claimant's Relying Affidavit is a copy of a letter dated 3rd August 2021 addressed to the NSSF by the 4th Applicant in which he states as follows;
- "This is to certify that Madam Winneyfred Anyango Gwako, holder of National identity card number...has retired from employment with the Consolata Fathers in the Consolata School Westlands, where she worked for 31 years until 31/07/2021."
46. For good measure, the Claimant annexed to the same Replying Affidavit a copy of a letter dated 7th December 2021, emanating from the 4th Applicant to the Central Bank of Kenya with the subject



under reference being “Complaint Against Absa Bank Kenya Plc In Respect Of Consolata Primary School Provident Fund A/C.” Notably, the letter is cosigned by Brother Clarence Lukungu, the 3rd Applicant herein.

47. The Claimant further annexed to the Replying Affidavit a copy of a letter dated 21st February 2022 from the 4th Applicant to the Retirement Benefits Authority. The letter which is referenced as “Update On Complaint By Winneyfred A. Gwakou Against Consolata Fathers Staff Retirement Benefits Scheme Rba/13/2/559”, reads in part:

“...there was a physical meeting between the HR Department Director, Fr. Joakim K. Njani, the Regional Finance Administrator, Br. Clarence Lukungu...”

48. Worthy to note is that in all the correspondence cited above, the 4th Applicant has signed off as Director of the Consolata Fathers Kenya/Uganda Regional HR Department.
49. In further support of her case, the Claimant annexed to her Further Replying Affidavit sworn on 29th January 2024, a copy of a Certificate of Registration 47P12000714 with respect to Consolata Primary School. As per the said Certificate of Registration, Consolata Primary School is under the management of Consolata Fathers.
50. In light of the foregoing, the question that begs for an answer is whether the Applicants are proper parties to this suit.
51. The answer to this question lies in Section 2 of the *Employment Act*, 2007 which defines the term “Employer” to mean any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.
52. From the foregoing statutory definition, it is evident that the term “Employer” has been interpreted liberally in the *Employment Act* to incorporate other parties who are not strictly parties to the contract of service.
53. This position was amplified by the Court in the case of Daniel Mutisya Masesi v Romy Madan & another [2013] eKLR, where it was held as follows: -

“The *Employment Act* defines the term ‘employer’ expansively, and does not suggest anywhere that directors cannot be joined with their corporate business vehicles in redressing employment wrongs. The Court looks at the whole economic enterprise, not the legal and business reincarnations behind the enterprise.”

54. In light of the foregoing, it is apparent that the Applicants are not completely distinct from Consolata Fathers. As to whether the Applicants are affiliated to the “Consolata Fathers Society” is not material in my view, seeing that they have been sued in their individual capacities. Therefore, the expression that they have been sued as the representatives of “Consolata Fathers Society” does not take away their capacity to be sued in light of the statutory definition assigned to the term “Employer” under Section 2 of the *Employment Act*.
55. For the foregoing reasons, the Court returns that the Applicants, being managers of Consolata Primary School are proper parties to this suit.



Orders

56. The total sum of my consideration is that the Applicants’ Notice of Motion dated 18th July 2024, is declined with an order that costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF MARCH 2025.

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STELLA RUTTO

JUDGE

In the presence of:

Ms. Wekesa instructed by Mr. Odhiambo for the Claimant/Respondent

Mr. Githara instructed by Mr. Wamae for the Respondents/Applicants

Millicent Court Assistant

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 had 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.

STELLA RUTTO

JUDGE

