



**Nyamota v Kariobangi Matatu Owners Sacco Ltd (Employment and Labour Relations Cause E700 of 2022) [2024] KEELRC 469 (KLR) (1 March 2024) (Ruling)**

Neutral citation: [2024] KEELRC 469 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E700 OF 2022**

**AN MWAURE, J**

**MARCH 1, 2024**

**BETWEEN**

**JOHN ONGIRI NYAMOTA ..... CLAIMANT**

**AND**

**KARIOBANGI MATATU OWNERS SACCO LTD ..... RESPONDENT**

**RULING**

1. The Claimant filed a Notice of Preliminary Objection dated 26<sup>th</sup> October 2023 in opposition to Respondent's counter claim dated 4<sup>th</sup> August 2023 as that the Honourable Court lacks jurisdiction to hear and determine the counter claim as it raises issues that are either of criminal nature and/or civil nature.
2. The Notice of Preliminary Objection was canvassed by way of written submissions.

**Claimant's Submissions**

3. The Claimant submitted that the Respondent's counter claim is either of a civil nature if they claim a refund or criminal nature where they believe that fraudulent transactions took place and allegedly funds were lost. The Respondent requires to get into the right forum either a civil or criminal court. It is the Claimant's submission that it raises points of law capable of being entertained by this court.
4. The Claimant submitted that this court lacks jurisdiction to determine the counter claim as it offends the provisions of Section 12 of the *Employment & Labour Relations Court Act*. The question raised and relief sought in the counter claim does not in any way fall within the categories of classes captured in section 12 of the *Act*.
5. The Claimant submitted that whether or not there were occurrences of fraud lies with investigations being conducted by the Police Fraud Unit and the evidence presented in a court of law seized with jurisdiction to hear and determine the matter which is a preserve of either the civil or criminal court.



## Respondent's Submissions

6. The Respondent submitted that anything that purports to be a preliminary objection must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.
7. The Respondent submitted that the counter claim arose in the course of the Claimant's employment hence this Court has jurisdiction to handle the same on merit.
8. Further, the Respondent conducted a forensic audit that discovered that the Claimant had not accounted for the sum of Kshs 731,650 which is claimed by way of counterclaim.

## Analysis and Determination

9. In *Peter Mungai v Joseph Ngaba Kuria & another; Leah Njeri Ndichu (Interested Party)* [2022] eKLR the court held:

“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.”

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...”

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.”

10. The paragraph that relates to the counter claim is paragraph (d) that partly states the respondent's treasurer Luka Soso Dula noted discrepancies in the respondent's bank account over money that ought to be collected over a period of 19 months. The same amounted to Kshs 731,560/. Further, the respondent states the matter was reported to Kariobangi Police Post under OB No 50/21/07/2022. The claimant was arrested at some point and later released as investigations were still ongoing.
11. The court would not consider the above as a pure point of law that would not require the court to exercise its discretion or to litigate the matter. The matter raised therefore does not satisfy to be regarded as a preliminary objection. The PO is therefore is not merited and is dismissed accordingly.



**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 1<sup>ST</sup> DAY OF MARCH, 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

