



**Gesore v Aga Khan University Hospital (Cause E413 of 2024)
[2024] KEELRC 2029 (KLR) (29 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2029 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E413 OF 2024
NZIOKI WA MAKAU, J
JULY 29, 2024**

BETWEEN

DR. EDNAH KEMUNTO GESORE CLAIMANT

AND

THE AGA KHAN UNIVERSITY HOSPITAL RESPONDENT

RULING

1. The Claimant filed this suit and a chamber summons application dated 30th May 2024. This prompted the Respondent to raise a preliminary objection to the effect that:
 - a. This Honourable Court has no jurisdiction to entertain these proceedings.
 - b. The Memorandum of claim does not disclose any or any reasonable cause of action against the Respondent.
 - c. This Honourable Court has no jurisdiction to grant relief as sought in the May 2024 Application whether under the provisions cited or at all.
2. In reply to this challenge, the Claimant filed a replying affidavit sworn on 11th June 2024. In it, she asserts that the Respondent has raised issues about the jurisdiction of this court but has not availed anything to back that up. She depones the court has jurisdiction to deal with a matter arising out of the contract of employment involving her and the Respondent. The Claimant deponed that there is a reasonable cause of action herein including her effort to have the letter of 23rd May 2023 quashed. She thus urged the dismissal of the preliminary objection.
3. The matter was disposed of by way of written submissions. First and foremost, the Court regrets the delay in delivery of the Ruling which was brought on by various extraneous and unforeseen factors which interrupted the delivery of Ruling earlier in the month.



4. The Respondent submits that there are three propositions, none of which is (or at any rate ought to be) controversial, conclusively determine the preliminary objections, taken on behalf of the Respondent. Spelling doom to these proceedings as well as the requested interim relief. It was submitted since it is not one over employment and labour relations, a dispute between a private practitioner and a private hospital over the renewal of now lapsed clinical privileges (i.e. admission rights) styled "in the matter of attempted irregular cancellation of clinical privileges of the Claimant by the Respondent herein" does not come within this Honourable Court's jurisdiction; nothing in the Memorandum of Claim shows a violation of the Claimant's employment rights giving rise to any reasonable cause of action against the Respondent; as awesome as the powers of this Honourable Court are, they do not extend to suspending a letter reminding a practitioner that a three-year period for which her clinical privileges had been granted would lapse at the end of the those three years. It matters not whether such relief is characterised as "be pleased to suspend the letter from the Respondent herein dated 23rd May 2024 to the extent it purports to cancel clinical privileges of the Claimant dated 31st May 2024" or something else. The Respondent went on to submit that there was a Constitutional Petition between the Claimant and the Respondent being ELRC Petition No. 105 of 2019 – [*Dr. Ednah Gisore v Aga Khan University Hospital*](#) now alleged to be pending for determination in the Court of Appeal. The Respondent submits that the jurisdiction of the Court is as spelt out in section 12 of the [*Employment and Labour Relations Court Act*](#). It submits that there is no dispute relating to or arising out of employment between an employer and an employee. The Respondent asserts the court is bereft of any jurisdiction to deal with the matter of renewal of the admission privileges of the Respondent. The Respondent asserts the Claimant's claim does not come near, let alone, within the terms of section 12 of the *Act*. The Respondent submitted that guided by the findings in the case [*In Re The Matter of the Interim Independent Electoral Commission*](#) [2011] eKLR where the Supreme Court stated that

“The *Lillian 'S'* case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity”

5. The Respondent submits that the two cases relied on by the Claimant are context-dependant, fact-specific decisions. It proceeds to analyse the facts in those two cases at page 5 of the submissions. The Respondent submits that there is no cause of action and asserts the claim does not disclose any or any reasonable cause of action. It submits that prayers in a claim do constitute a cause of action. It submits the Claimant must show a recognised right which has been wrongfully invaded or likely be invaded by the Respondent and cause a legally recognised injury with respect to which as sought is available from this Court. The Respondent posits that would there be jurisdiction to stay a negative order which does not require anyone or do anything to prevent them from doing something else? It referenced the Court of Appeal decision in [*China Wu Yi Co. Ltd v Belgo Holdings Ltd*](#) (Civil Application E239 of 2021) [2023] KECA 190 (KLR) (17 February 2023). The Respondent submitted that it in the absence of a cause of action, this Honourable Court lacks jurisdiction to grant any interim relief. It submits that such relief is granted only to protect an identified right threatened by wrong invasion pending trial. It asserts an application for interlocutory relief cannot, as it were, float in the air. It must be founded on proceedings disclosing, on its face a reasonable cause of action. The Respondent submits that even overlooking this, the Honourable Court does not have jurisdiction to grant relief as sought in the May 2024 application which is expressed to have been brought under sections 1A, 1B and 3A of the [*Civil Procedure Act*](#), order 50 rule 1 of the [*Civil Procedure Rules*](#), the [*Employment Act*](#) and all enabling provisions of the law. It was submitted none of these provisions authorise the Court to grant orders



suspending the letter from the Respondent to the extent that it purports to cancel the clinical privileges of the Claimant on 30th May 2024. It was submitted that there is a question as to whether the Civil Procedure Act and Civil Procedure Rules apply to proceedings before this Court. The Respondent submits that the bulk of caselaw from this Court and the High Court have held that they do not. It cited the cases of Vincent Mwatsuma Nguma & 5 others v Kilifi Mariakani Water & Sewerage Co. Ltd (KIMAWASCO) [2021] eKLR and Prisca Jepng'etich v Generation Career Readiness Social Initiative Limited [2021] eKLR.

6. The Respondent submits there is one decision TNT Express Worldwide (Kenya) Limited v Timothy Graeme Steel (Civil Appeal E365 of 2018) [2022] KECA 881 (KLR) (10 June 2022) (Judgment) from the Court of Appeal that certain provisions of the Civil Procedure Act and Civil Procedure Rules can apply as gap-fillers in the event of established lacunae in the ELRC Act and/or the Employment and Labour Relations Court (Procedure) Rules. The Respondent submits that this holding assists the Claimant in that there are no such gaps as section 12(3)(i) of the Employment and Labour Relations Court Act confers this Honourable Court jurisdiction to grant interim preservation orders including injunctions in the case of urgency while Rule 17 of the ELRC Rules prescribes the process of such interim relief as well as additional ancillary procedure. The Respondent submits that sections 1A and 1B of the Civil Procedure Act are salutary interpretative provisions informing how an already existing jurisdiction conferred by another provision should be exercised. Neither purport to confer jurisdiction to do anything, let alone, power to grant interim injunctive relief. It submits that section 3A preserves the inherent jurisdiction of a Court and that it is well settled that inherent jurisdiction does not apply where there is an express provision conferring jurisdiction which in this case is Order 40, Civil Procedure Rules as authorized by section 63 of the Civil Procedure Act. The Respondent submitted that what the Claimant characterizes as a suspension is for all intents and purposes a quia timet injunction. It submits that inherent Jurisdiction cannot displace, restrict or expand this Honourable Court's power to grant injunctions as provided for in Order 40. It cited the case of APA Insurance Company v Vincent Nthuka [2018] eKLR where it was held

“ 22. As regards section 3A of the Civil Procedure Act, the provision simply reserves the Court's inherent jurisdiction. It must however be noted that the Court's inherent jurisdiction is not a substitute for the jurisdiction conferred upon the Court under the Constitution or by statute. The Court's inherent jurisdiction is a reserve upon which the Court draws to ensure the ends of justice are met and to prevent abuse of its process. As was held in Industrial & Commercial Development Corporation v. Otachi [1977] KLR 101; [1976-80] 1 KLR 529, section 3A is not a panacea for all ills. It was therefore held in Elephant Soap Factory Ltd v. Nahashon Mwangi & Sons Nairobi HCCC No. 913 of 1971 that the court will not invoke its inherent jurisdiction when there is an express provision dealing with the matter since the court may not nullify an express provision by invoking its inherent powers. Similarly, it is my view that where the Court has been deprived of jurisdiction it will not draw upon its reserve under the inherent jurisdiction to confer upon itself such non-existent jurisdiction.”

7. The Respondent submits that Order 50, rule 1 merely prescribes the mode by which applications authorized in other orders of the CPR are to be instituted. No provision in the Employment Act (and the Claimant cites none), donates power to this Honourable Court to grant any interim relief, let alone suspending a letter, while the expression all other enabling provisions, while ubiquitous, a singularly unilluminating, one should be banished from our legal obligations. The Respondent submits that this



is not idle technicality. The grant of any form of interim relief pending trial or anything else is serious violation, however temporary, of the affected party's right yet there is no final determination thus, it must, as of necessity be circumscribed and those restrictions respected. It therefore urged the Court to find that the preliminary objection is well taken and strike out both these proceedings as well as the May 2024 application with costs.

8. The Claimant on her part submits that courts have frowned upon the improper raising of preliminary objections. It was submitted that in the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd*. [1969] EA 696 Charles Newbold P. held that a proper preliminary objection constitutes a pure points of law. The Learned Judge then held that:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer 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 in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

9. The Claimant cites the case of *Attorney General & another v Andrew Mwaura Gitbinji & another* [2016] eKLR where the Court explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection *inter alia*:-

- i. A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
- ii. A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and; the improper raising of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

10. The Claimant submitted that from the above, a Preliminary Objection cannot be raised where the facts of a case have been disputed. It was argued that where the facts are disputed or there is need to exercise discretion, the Preliminary Objection cannot stand. She submits that in this case, the Respondent proceeded to reply to the Claimant's application dated 29th May 2024 and in responding to the Claimant's application, the Respondent proceeded to dispute various facts as raised by the Claimant. The Claimant submits that to the extent the facts as raised by the Claimant have already been disputed by the Respondent completely renders the Preliminary Objection unmerited as delineated in the locus classicus case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (supra)*. The Claimant urged the Court to hold as so and proceed to determine the Preliminary Objection as unmerited. To buttress the position that the Preliminary Objection is unmerited on the basis of disputed facts and or facts that need to be ascertained, the Claimant submits that the issue in contention as per the Claimant's memorandum of claim is the alleged cancellation of Clinical rights. The Claimant submits that to establish the scope of the Clinical Privileged one must of necessity have a look at the Aga Khan University Hospital Medical Staff By-Laws, Fourth Edition, 2023 (as evidenced in the Claimant's preliminary list and bundle of document) which provides at clauses 2.1 and 2.3.2 in part as follows:

The Medical Staff consists of licensed Medical and Dental Practitioners permitted by law and by the Hospital to provide patient care services in the Hospital within the scope of



Privileges granted. The Medical Staff shall be divided into the following Groups that are to be appointed in accordance with the provisions of Chapter 3 of these By-Laws.

11. It was submitted for the Claimant that it is not in dispute that the Claimant herein was a staff of the Respondent prior to the promulgation of the fourth edition of Aga Khan University Hospital Medical Staff By-Laws, Fourth Edition, 2023. In that regard by virtue of clause 2.3.2, the Claimant was a medical staff of the Respondent. Being a medical staff, all issues as regards, the termination and or cancellation of her privileges affect her right as a medical staff of the Respondent. The term "staff" has been defined in the Macmillan Dictionary to mean: a group of persons, as employees, charged with carrying out the work of an establishment or executing some undertaking. The Claimant argued that this being the position, would it be right to hold that this court does not have jurisdiction, when all the terms of the Respondent's rules as guiding the relationship between the Respondent and all its staff, clearly point to this court being the point of reference for any dispute arising between them. To this extent the Claimant urged the court to dismiss the preliminary objection as being unmeritorious and a guise to clog the timely hearing of the case herein. It was submitted that it is also not in dispute that a preliminary objection should be raised on a pure point of law and therefore the preliminary objection as raised clearly has not pure point of law. Indeed, from the face of it, no point of law or provision of law breached by the entire claim has been put forth by the Respondent. It is trite law that whether a claim has a cause of action or not is an issue of discretion, which court should be cautious in striking out.
12. The Claimant cites the case of *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* Civil Appeal 37 of 1978 (1980) eKLR where Madan JA (as he then was) held thus:-

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of court. At this stage the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery without oral evidence tested by cross examination in the ordinary way"

Seller L.J. (*supra*) as far as possible, indeed not at all, there should be no opinion expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right. If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally, a law suit is for pursuing it.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of the case before it."
13. It was submitted that by virtue of the preliminary objection, the Respondent has commenced on the tirade of seeking this court to proceed to determine the merits of the suit at this preliminary stage. It is this that the Court of Appeal determined is not practical. The court should not be invited to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed. We urge the court to hold as so and proceed to dismiss the Preliminary Objection. In any case, the cause of action argument further buttresses the position that the Preliminary Objection as raised is unmeritorious as the cause of action argument requires the court



to analyze the evidence as presented. From the above, the Preliminary Objection as raised deserves to be dismissed and parties proceed to deal with the substantive application and suit. The Claimant urged the court to hold as so.

14. The preliminary objection by the Respondent is one worth dismissing peremptorily. The Respondent raised an objection and to buttress it raised facts that are contested by the Claimant. Recalling the dicta in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd*. [1969] EA 696 where Charles Newbold P. held that a proper preliminary objection constitutes a pure points of law. The Learned Judge then held that:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer 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 in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

15. The Respondent has not comprehended the import of this decision and has ignored its tenets in the submissions before the Court. It is trite law that an objection of such nature as the Respondent purports to propound should be on pure points of law. It ought not be raised if facts have to be ascertained. It does not matter how many times a party repeats the expression "facts" when submitting or making an argument. It does not make them any less contested if they are contested. Having filed a misplaced preliminary objection, what remedies can the Court grant? The most obvious one is to dismiss the purported preliminary objection with costs to the Claimant. The Claimant's motion will be placed for hearing before the Judge who will be sitting at Nairobi in my place or as will be directed by the Presiding Judge, Claims Division.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JULY 2024

NZIOKI WA MAKAU

JUDGE

