



Mutiso & 4 others ((Suing on their own behalf and on behalf of members of KCPA) v Gikonyo & 12 others (Cause E688 of 2024) [2024] KEELRC 13286 (KLR) (21 November 2024) (Ruling)

Neutral citation: [2024] KEELRC 13286 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E688 OF 2024
S RADIDO, J
NOVEMBER 21, 2024

BETWEEN

JORUM MWEI MUTISO 1ST CLAIMANT
DAVID NDUNGU 2ND CLAIMANT
BOSCO MURIITHI 3RD CLAIMANT
MARGARET KANAKE 4TH CLAIMANT
RAPHAEL MAGANGA 5TH CLAIMANT
(SUING ON THEIR OWN BEHALF AND ON BEHALF OF MEMBERS OF KCPA

AND

PETER GIKONYO 1ST RESPONDENT
TOM WANAMBISI 2ND RESPONDENT
JOSEPHINE NDIKWE 3RD RESPONDENT
STELLA THUO 4TH RESPONDENT
JOSEPH MWAURA 5TH RESPONDENT
BONFACE MWANGANGI 6TH RESPONDENT
WIFENZIO NJERU 7TH RESPONDENT
BONFACE NJOROGE 8TH RESPONDENT
JIMMY SIMBI WAMALWA 9TH RESPONDENT
NICHOLAS ONDIMU 10TH RESPONDENT
JOSEPH KIMEMIA 11TH RESPONDENT
REGISTRAR OF TRADE UNIONS 12TH RESPONDENT



RULING

1. The Claimants sued the Respondents on 22 September 2024, alleging that the Respondents had breached *the Constitution* of the Kenya Coffee Producers Association by failing to call an Annual General Meeting, and calling an unlawful Annual General Meeting where they were purportedly re-elected as officials.
2. Filed together with the Memorandum of Claim was a Notice of Motion seeking interim reliefs.
3. When the Motion was placed before the Court on 3 September 2024, the Court directed the Claimants to serve ahead of further directions on 18 September 2024. The Court did not sit on 18 September 2024 and the Cause was rescheduled to 15 October 2024.
4. On 15 October 2024, Mr Kanyoko advocate informed the Court that he had instructions to act for the Respondents. He also stated he had filed and served through email a Notice of Preliminary Objection.
5. However, the Claimants informed the Court that they had not been served with the Notice of Preliminary Objection.
6. The Court also directed the Claimants to file and serve their submissions on or before 8 November 2024 ahead of Ruling on 21 November 2024.
7. On 22 October 2024, the Court delivered a Ruling granting a temporary injunction restraining the Respondents from operating the Association's bank accounts at Cooperative Bank of Kenya Ltd (the reasons for and background to the orders are set out in the Ruling).
8. The 1st to 11th Respondents filed a Notice of Appointment and Notice of Preliminary Objection on 22 October 2024.
9. In the Notice of Preliminary Objection, the Respondents contended:
 - i. That the purported Claimants do not the locus standi to institute a claim against all the members of Kenya Coffee Producers Association. There was no general meeting held where all the members of the Association passed a resolution to allow the Claimants herein to represent them in these proceedings.
 - ii. That the purported Claimants herein are not paid up members of Kenya Coffee Producers Association hence cannot purport to be members of the Association.
 - iii. That the purported Claimants are not paid up members hence cannot purport to be members of the Association.
 - iv. That the purported Claimants are strangers to Kenya Coffee Producers Association and therefore cannot purport to be members or representatives of the Association.
 - v. That the claim is a gross abuse of the court process and ought to be dismissed with costs.
10. The 2nd Respondent filed a replying affidavit in opposition to the Motion and submissions on the Notice of Preliminary Objection on 23 October 2024.
11. The Registrar of Trade Unions filed a replying affidavit on 28 October 2024.



12. On 29 October 2024, the Respondents filed a Motion under a certificate of urgency seeking an order setting aside/vacating the temporary injunction issued on 22 October 2024.
13. Pursuant to Court directions, the following were filed:
 - i. Claimants' submissions on the Preliminary Objection on 1 November 2024.
 - ii. Claimants' submissions on their Motion on 2 November 2024.
 - iii. Claimants' replying affidavit in opposition to the setting aside Motion on 4 November 2024.
14. On 13 November 2024, the firm of Kivuva Omuga & Co Advocates came on record for the 6th, 7th and 8th Respondents.
15. The Court has considered the Claimants Motion, Preliminary Objection, affidavits and submissions.

Preliminary Objection

16. What constitutes a Preliminary Objection was set out in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696 as follows:

....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.

.....

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...

17. The Respondents' Notice of Preliminary Objection challenges the locus standi of the Claimants to sue on the grounds that they are not paid-up members of the Association and that the membership of the Association did not pass a resolution authorising the Claimants to sue.
18. Addressing whether the Claimants are paid-up members of the Association or were authorised to sue would demand that the Court engage in a fact-finding exercise.
19. The Court thus is of the view and finds that the Notice of Preliminary Objection fails the test of a true Preliminary Objection and is for dismissal.

Claimants' Motion

20. The main prayers sought by the Claimant in their Motion were:
 - i. ...
 - ii. ...
 - iii. ...
 - iv. An order of temporary injunction do issue against the Respondents by themselves, their servants and/or agents restraining them from interfering with the accounts of the applicants



held at Cooperative Bank Wakulima House branch and any other accounts in the name of KCPA held by any other bank pending the hearing and determination of the main suit.

- v. Costs of the application be borne by the Respondents.
21. The primary grounds in support of the Motion were that the Respondents had been elected in 2019 but had refused to hold elections after 1 year as required by the clause 6 of *the Constitution* of the Association; that on 7 June 2024, the Respondents put a Notice for an Annual Delegates Meeting instead of an Annual General Meeting and caused themselves to be elected; the Registrar of Trade Unions did not preside over the purported elections and that interventions made to the Registrar of Trade Unions had not succeeded.
 22. The Court gave directions on the Claimants' Motion on 3 September 2024. The Respondents were given 5 days after service to file a response. The timeline was not complied with.
 23. When the Motion next came up on 15 October 2024, the Respondents informed the Court that they had filed a Notice of Preliminary Objection (it had not been filed by then).
 24. The Court has now dealt with the Preliminary Objection.
 25. The Respondents filed any replying affidavit to the Motion on 23 October 2024.
 26. In the affidavit, it was deponed that elections were held on 10 July 2024 during an Annual General Meeting and a Board duly elected and got recognised by governmental agencies.
 27. The Respondents also averred in the affidavit that the action was premature because the Claimants ought to have approached the Registrar of Trade Unions in the first instance.
 28. In her replying affidavit, the Registrar of Trade Unions stated that she was aware of the meeting held on 10 July 2024 and she received notification of the elected officials on 23 July 2024, but she was yet to register the officials.
 29. The Registrar further stated that she had not exercised the powers granted her by section 34(5) of the *Labour Relations Act*.
 30. The Court has looked at *the Constitution* of the Association. Clause 6(ii) provides for the election of Chairperson, Vice-Chairperson and other 7 Board members at an Annual General Meeting to hold office for 1 year.
 31. The said provision, however, also refers to Board members serving two terms of three years each.
 32. There is an inconsistency in the clause.
 33. The Claimants grouse was that the Respondents had been elected in 2019, an assertion that was not controverted.
 34. Under section 35(3) and (4) of the *Labour Relations Act*, an official of a trade union cannot act until registered by the Registrar of Trade Unions. The Registrar has stated in black and white that she has not registered the Respondents.
 35. In the circumstances, the Court finds that the Claimants have demonstrated a prima facie case.

Orders

36. In light of the above, the Court confirms the order granted on 22 October 2024.



- i. An order of temporary injunction is hereby issued restraining the Respondents by themselves, servants and or agents from carrying out any transactions for and on behalf of the Kenya Coffee Planters Association, a trade union or its accounts held at Cooperative Bank Wakulima House Branch pending the hearing and determination of the Cause.
- ii. Costs in the cause.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 21ST DAY OF NOVEMBER 2024.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Claimant Musee Manyalo & Associates

For 1st – 5th and 9th – 11th

Respondents Kanyoko Lewis & Co Advocates

For 6th – 8th Respondents Kivuva Omuga & Co Advocates

Court Assistant Wangu

