



Tonui & another v Kenya Union of Post Primary Education; Registrar of Trade Unions (Interested Party) (Petition E045 of 2024) [2024] KEELRC 13328 (KLR) (5 December 2024) (Ruling)

Neutral citation: [2024] KEELRC 13328 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E045 OF 2024
JK GAKERI, J
DECEMBER 5, 2024
IN THE MATTER OF ARTICLES 10, 19, 20, 22, 23, 27, 28, 36, 41(1)(2)(C) & (5), 159(1) & (2), 162(2), 165, 230(4) & (5) AND 237 OF THE CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT
AND
IN THE MATTER OF THE KENYA UNION OF POST PRIMARY EDUCATION TEACHERS
BETWEEN
RONALD KIPROTICH TONUI & ANOTHER & ANOTHER PETITIONER
AND
KENYA UNION OF POST PRIMARY EDUCATION RESPONDENT
AND
REGISTRAR OF TRADE UNIONS INTERESTED PARTY

RULING

1. It is common ground that the Petitioners filed the instant suit on 8th October, 2024 under Certificate of Urgency and the Notice of Motion dated 7th October, 2024 came up on 9th October, 2024 and the Court granted prayer No. 2 of the Notice of Motion which temporarily restrained the Respondents from implementation and or enforcement of the letter dated 2nd October, 2024.
2. When the matter came up for hearing on 23rd October, 2024 Mr. Ayai informed the Court that they had filed Grounds of Opposition and intended to file a Notice of Preliminary Objection which they did, and which is the subject matter of this ruling.



3. The Respondent's Notice of Preliminary Objection seeks the striking out of the suit on the grounds that:
 1. The Petitioner Petition and Application do not have a reasonable cause action.
 2. The Petitioners have not exhausted the 1st Respondent's internal mechanisms/procedures for resolving any disputes arising between the 1st Respondent and the Petitioners.
 3. The Petitioners claim against the Respondent is full of conjecture, subjective opinions and personal convictions which are not supported by any evidence.
 4. The Petitioners Application and Petition dated 7th October, 2024 lack merit and should be dismissed with costs.
4. In their response vide a Replying Affidavit sworn by Mr. Ronald Kiprotich and Samuel Orwa the Petitioners contend that the Respondents Notice of Preliminary Objection does not meet the threshold in *Mukisa Biscuits Manufacturing Co. Ltd V West End Distributors Ltd* [1969] EA 696 (herein after *Mukisa's Biscuit's case*).
5. They also cite the sentiments of the Court in *Oraro v Mbaja* [2005] eKLR on Preliminary Objections.
6. The Petitioners argue that their case relates to violation of Constitutional rights and are thus justified in filing a suit before exhausting the internal disciplinary mechanisms that Article 21.3.0 of the KUPPET Constitution which sets out the disciplinary process does not address the issues of how a party claiming improper composition and bias of the committee may seek redress internally.
7. That grounds 1, 2 and 4 of the Notice of the Preliminary Objection require evidence.
8. In sum, it is the Petitioners case is that the Respondent's Preliminary Objection lacks merit, and is an abuse of Court process and ought to be dismissed.

Respondent's Submissions

9. As to whether the Petitioners had exhausted all measures or provisions available of resolving the disputes before the filing the instant suit, Counsel submitted that the Preliminary Objection was grounded on the proposition that where a dispute resolution mechanism exists outside the Court, the mechanism should be exhausted before the Courts jurisdiction is invoked as held in *Geoffrey Muthinja Kabiru & 2 Others V Samuel Munga Henry & 1756 Others* [2015] eKLR.
10. That the principle of exhaustion is constitutional under Article 159 of *the Constitution* of Kenya and as the Petitioners are members of the 1st Respondent they are bound by its constitution which has a dispute resolution process they and they had not adhered to it before rushing to Court.
11. Counsel wonders how the Petitioners are aggrieved by a process the Petitioners are yet to subject themselves to and the suit is premature.
12. Reliance was made on the Court of Appeal decision in the *Alice Mwera Case* to urge that Courts are forums of last resort and dispute resolution procedures ought to be respected. Counsel submitted that the Petitioners have jumped the gun and the suit ought to be struck out.
13. As to whether the Application discloses a reasonable cause of action Counsel cites Order 2 Rule 15 of the Civil Procedure Rules and the decision in *DT Dobie & Co. (K) V Muchina* [1982] KLR where the Court explained the meaning of reasonable cause of action.



14. Reliance was also made on the sentiments of the Court in *Crescent Construction Co. Ltd V Delphis Bank Ltd* on the discretionary nature of the Court's power to strike out a suit.

Petitioners Submissions

15. Counsel submitted that guided by the rendition of the Court of Appeal in *Mukisa Biscuit's Case (Supra)* the Respondent's Notice of Preliminary Objection does not meet the threshold of a Preliminary Objection and is for dismissal as grounds 1, 3 and 4 calls for evidence for a determination to be made and thus not a Preliminary Objection.
16. Counsel submitted that the Petitioners case was that there was duplicity of the disciplinary committee and thus one is illegal and conflicted.
17. Counsel cites the Replying Affidavit filed in response to the Petition that one Akelo Misori which stated that there was only one committee which was not conflicted.
18. Reliance was made on the decision in *Catherine Mwihaki Ngambi V International Leadership University [2022] eKLR* and *Orara V Mbanja (Supra)* to submit that the instant suit related to violations of the Constitutional rights by the Respondents and cannot be ousted by a Preliminary Objection.
19. Reliance was also made on the decision in *William Odhiambo Ramogi & 3 Others V Attorney General & 4 Others [2020] eKLR* on the import of Article 165(3) of *the Constitution* of Kenya to submit that the Petitioners can only enforce their rights in Court.
20. Counsel prays for dismissal of the Preliminary Objection.
21. Having considered the Notice of Preliminary Objection, Replying Affidavit and submissions, the issues for consideration are:
 - i. Whether the Respondents Notice of Preliminary Objection meets the threshold of a Preliminary Objection; and depending on the answer to (i) above.
 - ii. Whether the Preliminary Objection is merited.
22. On the first issue, it is not in dispute that the locus classicus rendition of the meaning of a Preliminary Objection are the sentiments of the Court of Appeal in *Mukisa Biscuit Manufacturing Co. Ltd V West end Distributors Ltd (Supra)* where the Court stated 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 of the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

Sir Charles Newbold P stated.

“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 has to be ascertained, or if what is sought is the exercise of discretion...”

23. As the Petitioners have not argued that the issue of exhaustion does not raise a point of law but argued that the case involves violation of constitutional rights, it is the finding of this Court



that the Respondents Notice of Preliminary Objection meets the threshold in the Mukisa Biscuit Manufacturing Case (Supra) as restated by the Supreme Court in Hassan Nyanje Charo V Khatib Mwanashetani & 3 Others [2014] eKLR.

24. See also Nitin Properties Ltd V Singh Kalsi Said Shabal and Others [1995] eKLR.
25. Having so found, I will now proceed to consider and determine whether the Preliminary objection is merited.
26. The gravamen of the Respondent's Preliminary Objection is inter alia that the Court should strike out the suit on account that the Petitioners invoked the Courts jurisdiction prematurely as they are yet to exhaust the internal disciplinary mechanism.
27. It is common ground that there is disharmony between the Petitioners and the Respondents and others not included in this suit, occasioned by circumstances which are far from clear as exemplified by the reliefs sought in the main petition.
28. It is similarly, not in dispute that the Respondent's Constitution and Rules dated 20th November, 2017 set out an internal dispute resolution mechanism.
Article 21.1.0 provides that;
 - a. There shall be established a standing disciplinary committee of the National Executive Board comprising five members appointed by the National Executive Board.
 - b. The National Vice chairperson shall be the chairperson and the Deputy Secretary General shall be the Secretary to this Committee.
 - c. This committee shall have exclusive jurisdiction of all cases of breach of the provision of this constitution and rules therewith or any other gross misconduct by a member, official or a Branch of the union.
29. Additionally, under Article 21.2(a) only the National Executive Board have the powers to initiate disciplinary proceedings against union officials who commit offences.
30. Finally, *the Constitution* and the rules prescribe the disciplinary process which has inbuilt safeguards to ensure due process and legitimacy.
3. Documents on record show that the Petitioners were by separate letters dated 2nd October, 2024 (which are not attached to the hard copy in Court nor is the Petition) invited to appear before the Disciplinary Committee on Friday 11th October, 2024 at 9:00am to respond to various allegations and 2:00pm respectively at the unions Head Office and the letters state that the two Petitions were enclosed.
31. In addition, the letters informed the Petitioners that they were entitled to adduce evidence and call witnesses.
32. The letters were signed by Mr. Akelo Misoi, the Secretary General of the union and copied to the chairman and Secretary of the standing Disciplinary Committee.
33. There is no evidence on record to show that any of the Petitioners responded to the invitations or raised any issue with Respondent or any other person or request for clarification or documents.
34. What is not in contest is that the Petitioners filed the instant suit on 8th October, 2024 before the scheduled hearing.



35. Puzzlingly, the Petitioners are raising issues which in the first instance ought to have been raised with the Respondents and there was sufficient time to do so.
36. A detailed or any response on any misgivings they may have had with the proposed course of events may have changed the dynamics and possibly yielded a more efficacious and efficient outcome.
37. A response to the invitation would, in the Court's view have bolstered and embellished the Petitioners case as it is now exposed, which explains the Respondent Preliminary Objection. The refusal to engage the Respondents on the concerns the Petitioners had could prove to be the waterloo of their case.
38. The Court is to a large extent in agreement with the Respondent's counsel that the Petitioners are complaining about a process in theory as opposed to grounding their complaints on facts on account of having interacted and engaged in it.
39. An objection can be raised on the composition of a committee and the committee is obligated to make a determination on the issue.
40. On conflict of interest, accusers are typically insiders and are witnesses. Internal dispute resolution processes are not expected to function like Courts of law but are bound to ensure fairness.
41. In *Republic V Commissioner General, Kenya Revenue Authority Ex Parte Sanofi Aventis Ltd* [2019] eKLR, the Court held that;

“The doctrine of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks Judicial Review of that action without pursuing available remedies before the agency itself. The court must decide whether to review the agency's action or to remit the case to the agency, permitting Judicial Review only when all available administrative proceedings fail to produce a satisfactory resolution. This doctrine is now of esteemed juridical lineage in Kenya. It was felicitously stated by the Court of Appeal in *Speaker of National Assembly vs Karume...*”
42. Similarly, in *Geoffrey Muthinja Kabiru & 2 Others V Samuel Munga Henry & 1756 Others* (Supra) the Court of Appeal was emphatic that:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be of a last resort and not the first port of call the moment a storm brews..... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.”
43. Having been invited to appear before the disciplinary committee, it was incumbent upon the Petitioners to respond to the invitation and raise any grievancies and/or any another misgivings they may have had on the process in lieu of running to Court as they did.
44. The Respondent has an elaborate and robust process which includes the right of appeal including how decisions are made at both levels.
45. It requires no belabouring that being members of the Respondent the Petitioners were bound by its constitution and rules.



46. The Petitioners' on the other hand submitted that since their case is grounded on violation of constitutional rights by the Respondent, they qualify for an exemption from the doctrine of exhaustion.
47. It is trite fact that violation of constitutional rights is involved does not perse qualify as an exception.
48. More significantly, the instances where a party may be exempted from the exhaustion doctrine are not clearly demarcated as held in Republic V Independent Electoral and Boundaries Commission (I.E.B.C) & Others Ex Parte the National Super Alliance (NASA) Kenya that;
- “What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it.
49. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake.”
50. Similarly, in Republic V Dedan Kimathi University of Technology Ex Parte Muia Stephen Mutuku [2022] KEHC 358 (KLR) JN Njagi J stated;
- “What constitutes exceptional circumstances depends on the facts and circumstances of the case. Thus, where an internal remedy would not be effective or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile”
51. From the evidence on record and submissions by the Petitioners the Court is not persuaded that this case falls under the exceptions to the exhaustion requirement.
52. The reasoning of the Court is fortified by the reality that dispute between the parties is amenable to resolution through other dispute resolution mechanism including conciliation and/or mediation.
53. The disputes affects some members of the leadership of the union and ought to be resolved at that level.
54. Flowing from the foregoing, it is clear that the Petitioners have not exhausted the internal dispute resolution mechanisms or engaged it as necessary.
55. In the premises, it is the finding of the Court that the instant suit was filed prematurely and offends the doctrine of exhaustion of internal remedies.
56. In the upshot the Respondent's Notice of Preliminary Objection is merited and the suit herein is struck out with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 5TH DAY OF DECEMBER, 2024.

DR. JACOB GAKERI

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 *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.

DR. JACOB GAKERI

JUDGE

