



**Brava Food Industries Limited v Bakery, Confectionary, Food Manufacturing
and Allied Workers' Union [Kenya] (Miscellaneous Application
E060 of 2022) [2023] KEELRC 46 (KLR) (20 January 2023) (Ruling)**

Neutral citation: [2023] KEELRC 46 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E060 OF 2022**

**K OCHARO, J
JANUARY 20, 2023**

BETWEEN

BRAVA FOOD INDUSTRIES LIMITED APPLICANT

AND

**BAKERY, CONFECTIONARY, FOOD MANUFACTURING AND ALLIED
WORKERS' UNION [KENYA] RESPONDENT**

RULING

Introduction

1. On the April 26, 2022, the Applicant herein filed a Notice of Motion application dated April 26, 2022, seeking the following orders:
 - i. That the Application be certified urgent and heard *ex parte* in the first instance.
 - ii. That the Honourable court be pleased to issue an order of temporary injunction stopping and or suspending negotiations, execution or registration of the Collective Bargaining Agreement between the Applicant and the Respondent on the basis of the impugned Recognition Agreement dated June 23, 2020 pending the hearing and determination of this application.
 - iii. That the Honourable court be pleased to issue an order of injunction stopping and or suspending negotiations, execution or registration of the Collective Bargaining Agreement between the Applicant and the Respondent on the basis of the impugned Recognition Agreement dated June 23, 2020 pending constitution and or sitting of the National Labour Board, the interested party herein in order to preserve the substratum of the application for revocation of the Recognition Agreement dated July 9, 2020 filed before National Labour Board.



- iv. That costs of this application be in the cause.
2. The application is premised on the grounds obtaining on the face of the application and the supporting affidavit sworn on the April 26, 2022, by Osman Abdi Salat.
3. In opposition to the application, the Respondent filed a replying affidavit, contemporaneously with a notice of preliminary objection. The notice of preliminary objection raised the following grounds:
 - i. There is no suit before the court upon which the orders sought are anchored.
 - ii. The application is fatally defective and an abuse of the court process as it offends the provisions of Rule 6 and 7 of the *Employment and Labour Relations [Procedure] Rules*, 2016, and ought to be struck out forthwith with costs.
 - iii. The application for revocation is a disguised appeal against the decision in ELRC cause No 431 of 2019, *Bakery Confectionery Food Manufacturing & Allied workers Union [K] versus Brava Food Industries Limited* and offends the principle of Judicial hierarchy of courts and therefore an abuse of the court process.
4. On the May 5, 2022, this court gave directions that the preliminary objection be disposed of first. The parties were directed to file their respective files for and against the preliminary objection.

The Respondent's Submissions

5. Counsel for the Respondent submitted that the preliminary objection herein meets the test of what constitutes a preliminary objection as it raises issues of law for interrogation, which if determined in favour of the Respondent will lead to the striking out of the Applicant's application. As to what constitutes a properly raised preliminary objection, counsel placed reliance on the holding in *Mukhisa Biscuits vs West End Distributors Limited* [1969] EA
6. Counsel submitted further that the application herein is not anchored on any suit. Considering the provisions of the *Employment & Labour Relations Court [Procedure] Rules* 2016, the application is a non-starter therefore. In order for this court to exercise its jurisdiction to grant an application for injunction, there must be a suit in existence. In support of this submission, he placed reliance on the provisions of Rule 17 [5] which states:

“In a suit where an injunction is sought, a Claimant or Applicant, may at any time in the suit, apply to the court for an interim or temporary order of injunction to restrain the Respondent from committing a breach of contract or an injury of alike kind arising out of the same contract or relating to the same property or right.”
7. According to the Respondent, a suit means a claim, petition, application for Judicial Review, appeal or any proceedings before the court for determination. Rule 6, 7 and 8 provide on how the various types of suits should be commenced.
8. It was further submitted that the notice of motion filed herein is neither a claim, a petition, an appeal or an application for judicial review, it is not a suit. To buttress this point, reliance was placed on the decision in *Margaret Rachel Mbogo & another v Robert Njoka Muthara & another* [2021] eKLR where the court stated:

“In the present case, the proceedings were commenced by way of a motion on notice. The motion was not anchored in any suit. Every interim proceeding must be anchored on a substantive suit as is prescribed by law or under the rules. There is no suit here wherein the



motion could be anchored. There can be no proceedings, hanging in the air. The motion is misconceived, fatally defective and cannot stand. It is for striking out.”

9. Further reliance was placed on the holding in [Revival Holdings Limited v Grande Afrique consulting](#) [2021] eKLR, thus:

“The Applicant approached the court by way of a Miscellaneous application. There is no suit backing the application. The application dated March 5, 2021 is seeking orders of injunction against the Respondent pending the conclusion of any arbitration proceedings between the parties. The Applicant ought to have filed a plaint, seeking orders of injunction. Rule 2 of the [Arbitration Act](#) and rules on the simple ground that a party did not make reference to those provisions.

The said issue was discussed at length in *Scope Telematics v Stock company Limited & another* [supra] where the High Court held that the fact that the application was not anchored on a suit did not render it fatal so as to send the 1st Respondent the right to seek interim relief. However, on appeal they found that Rule I touched in mandatory terms and procedure should therefore be strictly followed. The application should have been anchored on a suit and discretion cannot be used to override a mandatory statutory provision.”

10. The Applicant’s application herein calls upon the court to adjudicate over rights of parties and as such it is a matter that cannot be dealt with under a Miscellaneous application. To bolster this point, reliance was placed on the case of [Joseph Kibowen Chemlor v William C Kiseru](#) [2013] eKLR.

11. It was further submitted that the application is expressed to be under the provisions of Articles 25 [c] 47, 48, 50 [1] and 159 [2] of the [Constitution](#) yet there is no constitutional petition before this court for adjudication. Invocation of Article 159 [2] of the [Constitution](#) can only be in deserving case. The court addressing itself on this in [Joseph Kibowen Chemlor v William C Kiseru](#) [2013] eKLR [supra], stated:

“I am alive to the provisions of Articles 159 [2] of the [Constitution](#) which provides that justice shall be administered without undue regard to technicalities. My view is that the commencement of a suit in a manner in which the instituting documents cannot be held to be “pleadings,” goes beyond a mere technicality. It is different where the document filed can be assumed and be regarded as a particular pleading. The purpose of having rules of procedure is to have proceedings controlled in a logical sequence so that justice can be done to all parties, it is incumbent upon parties and counsels to follow the procedures laid out. This of course does not imply that a court has no discretion to permit some sort of deviation especially where the deviation is minimal, and no prejudice is caused to the other party.”

12. Counsel for the Respondent further submitted that the Applicant’s application before the interested party [National Labour Board] dated July 6, 2020 which seeks to revoke the recognition agreement, is basically an appeal against the court’s decision in ELRC Cause 431 of 2021 – [Bakery Confectionary Food Manufacturing & Allied Workers Union \[K\]](#), where the issue of the recognition agreement was addressed and the court rendered itself, thus:

“In absence of any other evidence on the number of its unionsable employees as at the date of seeking recognition, it is my finding that the Claimant has met a simple majority threshold as set under section 54 of the [Employment Act](#) for purposes of recognition.”

The Judgment in the stated matter was delivered on the May 22, 2020.



13. In the stated Judgment the court directed that the recognition agreement be executed within 30 days from the date the recognition agreement was executed on the June 23, 2020.
14. In the circumstances, the Applicant wants to overturn the decision by this court in a forum subordinate to the court, on the issue of simple majority. The decision can only be challenged through an appeal or an application for review.

The Applicant's Submissions

15. The Applicant identifies two prime issues as those that render themselves for determination thus:
 - a. Whether the preliminary objection dated May 12, 2022 raises a pure point of law in line with the position in *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited* 1969 EA 696.
 - b. Whether there is a proper suit before the court to warrant grant of the orders sought.
16. On the 1st proposed issue, the Applicant submits that the preliminary objection dated May 12, 2022 is not on a pure point of law. According to the Applicant, the defence of res-judicata cannot be raised as a preliminary objection. In support of this point the Applicant places reliance on the case of *Mukisa Biscuit Manufacturing Co Limited v West End Distributors* [supra].
17. On the decision in ELRC Cause No 431 of 2019, *Bakery Confectionary Food Manufacturing & allied workers Union [K] v Brava Food Industries Limited* and its relationship with the instant matter and more specifically the similarity or otherwise in the issues raised in both, can only be ascertained upon evidence being taken. The aspect is contested.
18. The Applicant submits further that the preliminary objection flows from a misapprehension of the matter herein. The Respondent has failed to distinguish between an application seeking to preserve substratum of a suit pending before the interested party and a fresh cause of action. The application before the court does not in any manner seek adjudication of the rights of the parties, but only preservation of the substratum of competent proceedings pending before the interested party.
19. It is further submitted that a preliminary objection can only succeed if the following conditions are present thus: It raises a pure point of law; must not deal with disputed facts, and it must not derive its foundation from factual information which require testing by Rules of evidence; it is being argued on the assumption that all facts pleaded by the other side are correct and; the court is not called upon to exercise its discretion.
20. To buttress the above Submission, the decision in *St Mary's Hospital High School v St Mary's Mission Hospital Limited & another* [2018] eKLR was cited, thus:

“..... A preliminary objection, correctly understood, is now well identified as and declared to be a point of law which must not be blurred with factual details liable to be contested, and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling proof, or seeks to adduce evidence for the authentication, is not as a matter of legal principle, a true preliminary objection which the court should allow to proceed”
21. On the 2nd issue, it is submitted that it is clear from the grounds on the face of the application herein and the affidavit in support thereof, that there is a suit pending before the interested party and that the application herein is only intended to secure the substratum of the stated suit.



22. According to the Applicant since the matter before this court is not for adjudication of rights between the parties, it was not therefore necessary for it to be instituted by way of either a petition or a statement of claim. The court should give the matter the approach established in *Joseph Kibowen chemjor v William C Kisera* [2013] eKLR, that:

“There are times when all that a person wants is an order of court where the rights of the parties are not going to be determined. There is no “action” being enforced or being found. In many such instances, it is the discretion of the court is being sought or a procedural issue sought to be endorsed. The court in such a case is not being asked to determine any rights of the parties. Now, the *Civil Procedure Rules* do not specifically provide for the procedure to be followed where there is no “action.” In such instances, I think it is permissible for such person to file a miscellaneous application because the court is not asked to determine any issues between the parties. This is common and permissible where all that a party wants is a mere order from court which does not settle any rights or obligations of the parties.”

23. Further reliance is placed on the holding in *Abdi Abdurabi Somo v Ben Chikamai & 2 others* [2016] eKLR, that:

“In my life as a Judge, I have in the past heard similar arguments being advanced that Notice of Motion cannot commence substantive proceedings. But it should be understood that, as a matter of general principle, a notice of motion is a competent way of initiating substantive proceedings in court. It will all depend on the particular statute governing particular proceedings in question. Therefore, where the law provides for a manner of commencing a suit or proceedings in court, then the procedure applies. For instance, proceedings for appointment of inspectors under the *companies Act* are commenced by way of Notice of motion yet they are substantive proceedings. Close to the proceedings at hand, substantive judicial review proceedings under order 53 rule 3 of the Civil Procedure Rules are commenced by a Notice of motion. Before I conclude on this point, I should say that the *constitution* seems to seek keeping of formalities especially on applications based on a denial or violation or infringement or threatening of fundamental rights and freedoms, to bear minimum. On this see Article 22 [3] [b] of the *Constitution*. I need not say more about this objection. It fails flat.”

24. The preliminary objection should be dismissed.

Determination

25. From the material placed before this court by the parties, the following issues emerge for determination on the Respondent’s preliminary objection.

- a. Whether the preliminary objection raised by the Respondent meets the legal threshold.
- b. Whether the matter herein is properly initiated.
- c. If the answer to [b] above is in the negative, what is the fate of the application.

26. The Applicant contended that the Respondent’s preliminary objection herein is not a preliminary objection properly raised. It meets not the legal threshold for a proper preliminary objection. The Respondent sees it differently. This notwithstanding the parties are in concurrence that in order for a preliminary objection to be considered properly raised, certain conditions must be present. The court agrees with them on this.



27. The threshold for a valid preliminary objection in Civil proceedings was set out in the case of *Mukisa Biscuit Manufacturing Company Limited v West End distributors Limited* [1969] EA 696.

“So far as I am aware, 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 dispose of the suit. Examples are an objection to the jurisdiction. The court or a plea of limitation for 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 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 had to be ascertained or if what is sought is the exercise of judicial discretion

28. In *Oraro v Mbaja* [2005] eKLR Justice Ojwang [as he then was] stated on what constitutes a preliminary objection, thus:

“..... A preliminary objection, correctly understood, is now identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested, and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence of its authentication, is not a matter of legal principle, a true preliminary objection which the court should allow to proceed”

29. To my mind in order for a preliminary objection to be successfully raised;

- a. It must be on a pure point of law;
- b. It should not be anchored on facts that shall require to be proved through interrogation of evidence.
- c. Must be argued on the assumption that all facts pleaded by the other side are correct;
- d. It has to be without a situation where any fact has to be ascertained from elsewhere or the court is called upon to exercise judicial discretion.

Imperative to state that I agree with the Applicant’s submissions on this point.

30. In my view, where a party raises various grounds of preliminary objection, under one notice, the various grounds constitute independent objections to be considered separately to ascertain whether they meet the legal threshold for a proper preliminary objection. As shall come out hereinafter, when interrogating whether the matter herein is properly instituted, the objection[s], are properly raised.

Whether the matter herein is properly instituted.

31. The Respondent contended that the application before the National Labour Board is a disguised appeal against the decision of this court in ELRC 431 of 2020 [*supra*]. In the said Judgment which is on record herein and whose existence the Applicant has not denied, the subject matter of the claim the basis of the Judgment was a recognition agreement which from the Applicant’s own material herein, was executed by the parties on the June 3, 2020 pursuant to the Judgment.



32. It is not contested that the matter initiated before the interested party seeks revocation of the agreement upon premise that the simple majority threshold for recognition was absent, and I have not lost sight of the finding of the court in ELC Cause No 431 of 2019 *inter alia*:

“In the instant suit the Respondent has not refuted the allegations that the Claimant has recruited a simple majority. The list of the Respondent’s / employee’s as at October 2017 produced by the Claimant indicates that the Respondent has 52 employees. From the check off forms submitted by the Claimant, it has recruited 21 employees. It avers that the Respondent has 31 unionsable employees. That 21 of the 52 employees are in management and thus not unionsable. The Respondent has not opposed this and has not produced any evidence on the number of its employees at the time the Claimant sought recognition.

..... In the absence of any other evidence on the number of its unionsable employees as at the date of seeking recognition, it is my finding that the Claimant has met a simple majority threshold as set under section 54 of the *Employment Act* for the purposes of recognition.”

33. By reason of this holding and the consequential order *inter alia*:

“2. That the Respondent do sign recognition agreement within 30 days from the date of Judgment.”

I am of a very strong view that by seeking to have the agreement revoked by the Interested Party, the Applicant is without expressly saying so, seeking to vary or quash the Judgment of the court.

34. The Interested Party is an entity subordinate to the court and in fact subject to the supervisory powers of the court. It cannot therefore have the powers to deal with the agreement in the manner sought by the Applicant.

35. If the Applicant was in any manner aggrieved by the Recognition Agreement and its execution, in the circumstances of the Judgment above-stated, the proper forum for them was an application for review to the court or an appeal against the Judgment.

36. In sum, this court lacks jurisdiction to entertain an application as is the instant one which flows from proceedings that are pending before an improper forum.

37. As jurisdiction is a matter of law, I find the objection properly raised. The application is not properly instituted before this court.

38. The Applicant contended that the issue of *res-judicata* cannot be raised as a preliminary objection. They placed reliance on *Margaret Nyiba Gatembu & 2 others v Penninah Ngechi Njaaga & 3 others*. I do not take the view, that the Judge in the matter, laid a hard and fast principle on how a court should be approached on an objection to validity of a suit on basis of the doctrine of *res judicata*. As to how the court should be approached depends on the circumstances of each case. The same can be raised through a Notice of motion application or by a Notice of preliminary objection, depending on the particular circumstances of each case. For instance, where the existence of the ingredients of the plea of *res judicata* are not contested at all or reasonably contested, it shall be an abdication of the court’s duty to expeditiously and fairly dispense justice and the obligation to honour the overriding objective of the court, to decline the plea upon reason that it was not raised through a Notice of motion application.

39. In this matter, considering, the Judgment referred to hereinabove, the fact that the pertinent holdings hereinabove brought forth are undisputed, and the contents of the affidavit by the Applicant, the



ingredients necessary for a plea of res-judicata to succeed are manifest. The Respondent needed not to raise the plea through a Notice of Motion application as submitted by counsel for the Applicant.

40. The Respondent contended that the application herein does not find fountain in a suit as contemplated in this court's procedure Rules 2016. According to the Respondent a party instituting a matter before this court has to, in one of the ways provided for in the Rules not as the Applicant did in this matter through a Miscellaneous application.
41. Further, according to the Respondent, an application for injunction as the instant one can only be sought and granted within a suit.
42. The Applicant took a contrary position. Both parties buttressed their respective positions by the various decisions that I have mentioned hereinabove.
43. In order to render itself adequately on this contested issue, the question that comes into this court's mind and that should be answered is, do the Rules contemplate that every matter brought before this court be commenced via the modes provided in therein, only? In my view, the answer to the question is in the negative. There are matters which get to this court in a manner outside the modes provided for by the Rules and justifiably so, as their nature do not allow them to be properly instituted under any of those modes. For instance, where the law dictates that a matter be first lodged before a particular forum as a first port of call, before it gets its way to the courts, but for one reason or the other, the justice of the case demands that the matter cannot be adequately dealt with in that forum, a concerned party can through a miscellaneous application approach the court for leave to institute the same in court. I can only but agree with the reasoning in the case of *Abdi Abdurabi Somo v Ben Chikamai & 2 others* [supra].
44. Therefore, this Court does not agree with the Respondent that the application herein was improperly instituted merely because it was not via the modes hereinabove stated. In fact, looking at the orders sought in the application and the purpose for which they were, one can comfortably state that the circumstances of the matter required that it be so originated. However, this finding does not in any manner change the conclusion that the matter was improperly instituted before this court, for the reason brought out hereinbefore.

If the answer to [b] above is in the negative, what is the fate of the application?

45. Having found that the application herein is improperly instituted before this court, I hereby sustain the preliminary objection and as a consequence strike out the same with costs.
46. Orders accordingly.

READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF JANUARY, 2023.

OCHARO KEBIRA

JUDGE

Delivered in presence of:

Mr. Amalemba for Respondent.

Mr. Lesargor for the Applicant.

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 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.

OCHARO KEBIRA

JUDGE

