



**Muthiani v Women’s Link Worldwide (Petition E193 of 2021)  
[2023] KEELRC 358 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 358 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E193 OF 2021  
AN MWAURE, J  
FEBRUARY 9, 2023**

**BETWEEN**

**LYDIA MUTHIANI ..... PETITIONER**

**AND**

**WOMEN’S LINK WORLDWIDE ..... RESPONDENT**

**RULING**

1. The application for consideration is the respondent’s notice of motion dated the August 17, 2022 said to be brought under rules 3, 18 and 19 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*. The application seeks to amend the notice of preliminary objection dated February 15, 2022 in terms of the draft amended notice of preliminary objection annexed to the affidavit in support of the application.
2. The applicant’s case is that the petitioner filed her petition on the November 30, 2021 setting out grievances relating to her engagement with the applicant through consultancy agreement dated February 1, 2017 annexed to her affidavit in support of the petition.
3. The respondent/applicant raised a notice of preliminary objection on account of provisions in a consultancy agreement that conferred jurisdiction over any dispute arising in the matter to mediation and arbitration. The said clause also appointed the High Court as the court with exclusive jurisdiction.
4. The petitioner/respondent then filed its submissions to the preliminary objection and argued that the P O is centred around a contract that was not applicable to the petitioner prior to the constructive dismissal from employment and filing of the petition.
5. The applicant then averred that with the introduction of the 2018 agreement between the parties, it had become necessary to amend the notice of preliminary objection to include the provisions of the said contract, which were, in any event the same as those in the 2017 agreement save for the numbering



of one clause. The said clauses according to him buttressed the conferment of jurisdiction to mediation and if that fails to arbitration.

6. The applicant further said that the amendment was necessitated by the petitioner's shift in what her case is really about and it would assist the court to fully and finally determine the matter.

### **Respondent's Case.**

7. The respondent/ petitioner in the replying affidavit says that on the June 21, 2022, this honourable court issued directions requiring the respondent to file its submissions on the notice of preliminary objection and the petitioner to file her documents thereafter.
8. The respondent/petitioner filed a replying affidavit dated the June 30, 2022 in response to the notice of preliminary objection, alongside their submissions and stated that the PO is centred on a contract that was not applicable to the petitioner prior to the constructive dismissal from employment.
9. The court allowed the respondent/applicant to file supplementary submissions to address any necessary issues raised under their replying affidavit.
10. The respondent failed to file the said supplementary submissions as directed by the court and instead filed the present application seeking to amend its notice of preliminary objection on grounds that the petitioner introduced a new document, namely the employment contract dated the February 1, 2018. He said that paragraph 6 of the petition states that the petitioner entered into two consecutive one year consultancy agreements with the respondent, the 1<sup>st</sup> one being dated the February 1, 2017 and the second dated February 1, 2018, to work in a full-time capacity at 40 hours a week as a senior attorney. The respondent says that it annexed acceptance of resignation' addressed to the petitioner by the respondent whereby the respondent acknowledged the applicable agreement dated the February 1, 2018.
11. The respondent/petitioner further says that a preliminary objection should raise a pure point of law and that matters raised in the application are matters which could be argued under the respondent's supplementary submissions as intended by the honourable court.
12. The parties did not file submissions on the application dated the August 17, 2022. The submissions on record are for the application dated the February 15, 2022.

### **Analysis and Determination**

13. The only issue for determination in this application is whether the amendment of the notice of preliminary objection dated the February 15, 2022 should be allowed.
14. Order 8 rule 5 of the *Civil Procedure Rules* on amendment of pleadings provides: "(1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and, on such terms, as to costs or otherwise as are just. (2) This rule shall not have effect in relation to a judgment or order."
15. *Andrew Wabuyele Biketi v Chinese Centre for the Promotion of Investment Development & Trade in Kenya Limited & 2 others* [2015] eKLR, the court stated as follows "...the court has discretion to order amendment at any stage before judgment. And amendment should be freely allowed provided it is not done mala fide, and does not occasion prejudice or injustice to the other party which cannot be compensated by award of costs".



16. In Civil case No 7 of 2017, *St. Patrick's Hill School Limited v Bank of Africa Kenya Limited* [2018] eKLR where the court was faced with establishing whether amending the plaint would occasion substantial injustice and prejudice, the court held that: "on the contention by the respondent that if the amendment sought is allowed, substantial injustice will be occasioned on them and the same would defeat its defence, this court finds to the contrary. As I have mentioned earlier, the amendment sought herein is not a novel issue and it's not at all introducing a new cause of action which is substantially different from the already existing one. The case by the plaintiff and reliefs sought against the defendant is expressly pleaded in the plaint." The court has discretionary powers to allow amending of pleadings.
17. What can be deduced from the forgoing authorities is that an amendment should be allowed so long as the same is made in good faith and no substantial injustice will be occasioned by allowing the application.
18. Having said so, the court is well aware that a preliminary objection is an application on a point of law that must determine a suit to its conclusion. Preliminary objection will usually deal conclusively with the suit like in issue of jurisdiction of a court or any other point of law where no evidence need to be adduced.
19. It is trite that a preliminary objection should not be amended. It is either at the heart of a suit application or it is not. In other words being a point of law there is no issue of filing pleadings and amending the said pleadings. Even the filed replying affidavit filed by the petitioner was irrelevant. The only acceptable documents in support of a preliminary objection in the view of this honourable court is submissions and relevant authorities.
20. In the case of Misc Application No 8 of 2021 *Peter Mungai v Joseph Ngara Kuria, Stephen Thuo Gitao & Leah Njeri Ndicho* the court had this to say:
  - " The parameters of consideration of a preliminary objection are now well settled. A preliminary objection must only raise a point of law. The principles that the court is enjoined to apply in determining the merits or otherwise of the preliminary objection were set out in the Court of Appeal the case of *Mukhisa Biscuit manufacturing Co Ltd v West End distributors Ltd* (1969) EA 696 where it states:
    - " a preliminary objection consist 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 jurisdiction of the court or plea of limitation or a submission that the parties are bound by a contract giving rise to a suit to refer the dispute to arbitration."
21. At page 701 Sir Charles Newbold added:
  - " A preliminary objection is by nature of what used to be a demurer. It raises a pure point of law which is usually on the assumption that all 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 an exercise of judicial discretion."
22. Flowing from the above the court finds there are no legal grounds to amend a preliminary objection and so the application is rejected. The replying affidavit filed by the petitioner is also of no value in a preliminary objection. The applicant can either proceed with the preliminary objection as it is if he so wishes or alternatively withdraw it and file it afresh. The choice is on the applicant otherwise the



application dated August 17, 2022 seeking to amend the preliminary objection is devoid of merit and is dismissed accordingly. Costs are in the cause.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 9<sup>TH</sup> DAY OF FEBRUARY 2023.**

**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**

