



Kenya Petroleum Oil Worker’s Union v Pristine Energy Limited (Cause E465 of 2022) [2023] KEELRC 878 (KLR) (18 April 2023) (Ruling)

Neutral citation: [2023] KEELRC 878 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E465 OF 2022
JK GAKERI, J
APRIL 18, 2023**

**BETWEEN
KENYA PETROLEUM OIL WORKER’S UNION CLAIMANT
AND
PRISTINE ENERGY LIMITED RESPONDENT**

RULING

1. Before the court for determination is a notice of preliminary objection by the respondent dated October 17, 2022 that;
 1. The instant memorandum of claim is defective, bad in law, untenable and contrary to order 1 rule 13 of the *Civil Procedure Rules, 2010* as it was filed without written authority by the claimant to plead on behalf of the grievant, one Luciana Awinja.
 2. The memorandum of claim discloses no legal relationship or cause of action between the claimant and the respondent and is frivolous, vexatious and an abuse of the court process.
 3. The memorandum of claim and application both dated June 14, 2022 be dismissed with costs.

Claimant/Respondent’s Response

2. In its response dated December 14, 2022, the respondent stated that the preliminary objection was incompetent as it did not raise a pure point of law capable of determining the claim as it required ascertainment of facts and was not pleaded in the response to the memorandum of claim.



3. That the secretary general of the claimant had authority to swear and sue on behalf of the claimant as provided by section 2 (a) of the *Labour Relations Act*, 2007.
4. That the preliminary objection is frivolous and an abuse of court process.
5. That since the union is the claimant, it does not require any authority to plead for the grievant in this cause.
6. The affiant deposes that since the grievant was an employee of the respondent and she was a member of the union, the relationship between the parties is implied.
7. That the preliminary objection invites the court to determine the claimant's case on pure technicalities something outlawed by article 159 of the *Constitution* of Kenya, 2010, as the court is enjoined to dispense justice without undue regard procedural technicalities.
8. That the preliminary objection should be dismissed with costs.

Submissions

9. Counsel for the respondent submitted that the court had no jurisdiction in this matter as the claimant was earning the sum of Kshs 16,000/= per month. Reliance was made on the decision in *David Maina Kiarie v Palm Oil Transporters Ltd* where Rika J. transferred the suit to the Chief Magistrates Court as the claimant's salary was Kshs 25,000/=.
10. Counsel urged that the claimant required written authority to plead the grievant's case as ordained by order 1 rule 12 of the repealed *Civil Procedure Rules*.
11. Reliance is placed on the decision in *John Kariuki & 347 others v John Mungai Njoroge & 8 others* HCCC No 152 of 2003 unreported as well as *Ndungu Muguya & 473 others v Stephen Wangombe & 9 others* (2005) eKLR to urge that written authority to plead must be in writing.
12. That the claimant's case fell short of the requirements of order 1 rule 13 of the *Civil Procedure Rules, 2010* and could not be cured by article 159 of the *Constitution* of Kenya, 2010.
13. That allowing the suit to proceed as filed would expose the respondent to costs in case the suit was dismissed.

Claimant's Submissions

14. The claimant addressed two issues, namely;
 - i. Whether the notice of preliminary objection meets the legal threshold.
 - ii. Whether the suit offends order 1 rule 13 of the *Civil Procedure Rules, 2010*.
15. On whether the preliminary objection meets the legal threshold, the claimant relied on the decision in *Mukisa Biscuit Manufacturing Ltd v West End Distributors Ltd* (1969) EA 696 to urge that the respondent had not raised a pure point of law as envisaged by the decision of the Court of Appeal. It was submitted that the respondent had raised factual matters.
16. As to whether the suit offends order 1 rule 13 of the *Civil Procedure Rules, 2010*, the claimant submitted that its secretary general had authority to plead, swear and sue on behalf of the grievant as provided by section 2 (a) of the *Labour Relations Act*, 2007.



17. Reliance was also made on article 41 (1) and (2) (c) of the *Constitution* of Kenya, 2010 on the right of every employee to fair labour practice and to join, form and participate in the activities and program of a trade union.
18. The claimant submitted that the preliminary objection dated October 17, 2022 lacked merit and ought to be dismissed.

Determination

19. The singular issue for determination is whether the preliminary objection by the respondent is merited.
20. Before delving into the issue, it is essential to dispose of the peripheral but basic issue of jurisdiction of the court raised by the respondent in its submissions. Although this court has jurisdiction to hear and determine the suit herein, it is not in dispute that the suit ought to have been filed in the Magistrates Court as a matter of course and the same is hereby transferred to the Chief Magistrates Court for hearing and determination.
21. As regards the preliminary objection, there is no doubt that the leading decision is that of the Court of Appeal in *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors* (1969) EA 696 where Law J.A stated as follows;

“So far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which raises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection on 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.”
22. In the words of Newbold P.;

“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 judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse the issues. This improper practice should stop.”
23. The Supreme Court of Kenya has broadly affirmed the sentiments of the learned judges of the Court of Appeal on the contours of a preliminary objection.
24. A preliminary objection generally raises a threshold question which must be determined at the earliest opportunity as it has the potential to terminate the case before the parties are heard and a decision made on merit.
25. Courts are enjoined to tread cautiously so as not to deny the parties the opportunity to have their matter determined on merit and simultaneously protect itself from abuse of its processes.
26. In the instant case, the respondent’s preliminary objection, on the one hand questions the relationship between the claimant and the grievant which is a union membership issue which is one of fact not law in the context of a preliminary objection.
27. Similarly, the respondent urges that order 1 rule 13 of the *Civil Procedure Rules, 2010* has not been complied with.



28. Similarly, order 1 rule 13 provides that;
1. Where there are more plaintiffs than one, any one or more of them may be authorised by any other of them to appear, plead or act for such other in any proceedings, and in like manner where there are more defendants than one or more of them may be authorised by any of them to appear, plead or act for such other in any proceedings.
 2. The authority shall be in writing signed by the party giving it and shall be filed in the case.
29. A plain reading of order 1 rule 13 of the [Civil Procedure Rules, 2010](#) reveals that the rule is only applicable to instances in which there are more than one claimant or respondent in a case. The claimants or respondents may authorize one or more of their number to plead and appear on behalf of the others.
30. The instance dispute involves the grievant and the employer i.e only one party as opposed to the circumstances contemplated by order 1 rule 13 of the [Civil Procedure Rules, 2010](#).
31. In light of the foregoing, the court is satisfied and finds that order 1 rule 13 of the [Civil Procedure Rules, 2010](#) is inapplicable to the instant case. This finding disposes off issue number 2.
32. In the instant case, the claimant is a duly registered trade union and the grievant was its member, a fact the respondent has not contested. The union is suing on behalf of its member. The trade union may be regarded as the nominal claimant since it urges the case as the representative of its members derived from the fact of membership of the union.
33. Similarly, the general secretary of the claimant union is an authorised represent as ordained by the provisions of section 2 (a) of the [Labour Relations Act, 2007](#).
34. More significantly, section 73(1) of the [Labour Relations Act](#) provides;
- If a trade dispute is not resolved after conciliation, a party to the dispute may refer it to the industrial court in accordance with the rules of the industrial court.
35. In addition, sub-section (3) provides;
- A trade dispute may only be referred to the industrial court by the authorised representative of an employer, group of employers, employers' organization or trade union.
36. Section 2 of the [Labour Institutions Act, 2007](#) defines a trade dispute as “a dispute or difference or an apprehended dispute or difference, between employers and employees” among others.
37. It is not in dispute that the dispute herein was subjected to conciliation and a certificate of unresolved trade dispute is on record.
38. In light of the foregoing provisions of the [Labour Relations Act, 2007](#), only the claimant, trade union could refer the dispute to court and did so, in a representative capacity and did not require written authority of the grievant.
39. For the above-mentioned reasons, the court is satisfied and finds that the notice of preliminary objection dated October 17, 2022 does not meet the threshold of a preliminary objection as by law prescribed and is accordingly dismissed with costs.
40. The suit herein be and is hereby transferred to the Chief Magistrates Court for hearing and determination.



Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18TH DAY OF APRIL 2023

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

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