



**Sahani v Ngaira & 3 others (Appeal E229 of 2022)  
[2023] KEELRC 1637 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1637 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E229 OF 2022  
AN MWAURE, J  
JULY 6, 2023**

**BETWEEN**

**FESTUS SAHANI ..... APPELLANT**

**AND**

**PATRICK NGAIRA ..... 1<sup>ST</sup> RESPONDENT**

**MOSES ONDEGO ..... 2<sup>ND</sup> RESPONDENT**

**JOYCE KISIA ..... 3<sup>RD</sup> RESPONDENT**

**DENNIS ASHIONO ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. This ruling relates to the Respondents' Notice of Preliminary Objection dated the 17<sup>th</sup> day of December, 2022. The said objection is on grounds that;
  - a. This Court lacks jurisdiction to entertain the matter in terms of section 12 of the *Employment and Labour Relations Act*, 20 of 2011 as the suit subject matter of the Appeal is not an employment or labour dispute as envisaged under the *Act*.
  - b. This court has no statutory jurisdiction to deal with the issues raised in the application and the Appeal herein.
2. Related to this, the court is to decide whether the Appeal is spent in light of the orders given by the subordinate court which the parties do not agree whether they are still in place.
3. The Notice was canvassed by way of written submissions by the appellant dated 9<sup>th</sup> March 2023. Submissions for the Respondents are not in the Court file.



4. The Appellant argues that the Respondent’s preliminary objection falls short of the test required of preliminary objection as it delves in factual matters and thus deviates from the legal form of a preliminary objection which should be purely on points of law. He relied on the case of *Engineer E.M Kinuthia T/A Associates Consulting Engineers v Attorney General and Another* 2014 eKLR where it was held that, ‘a preliminary objection was clearly delineated in the case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* 1969 E. A where law JA stated the following:

“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 may dispose of the suit. ‘Where a court needs to investigate facts, a matter cannot be raised as a preliminary point’”.

5. The Appellant asked the Honourable Court to find that the Respondent’s preliminary objection cannot stand the legal test of a preliminary objection as it calls for proof and evidence which will lead the court to investigate the facts and as such it cannot be sustained. The Appellant argues that the issue of transfer of an employee is purely an employment and labour issue which falls within the jurisdiction of this court and has to be determined by this Court with no emphasis on the employee-employer relationship.

#### **Determination**

6. The court has considered the submissions of the appellant as pertains to the preliminary objection. The 1<sup>st</sup> issue for determination is whether the court has the jurisdiction to entertain the appeal in light of what the statute decrees under section 12 of the [Employment and Labour Relations Court Act](#) 2012.
7. In my view the pleadings used to institute suit before the subordinate court could have been instrumental in the determination as to whether the issue falls within section 12 of the Employment and Labour Relations Court Act and therefore can be handled by this court. The court has not been privy to the said pleadings which have not been availed herein and so cannot speculate whether the matter falls within section 12 of the [Employment and Labour Relations Court Act](#) simply by looking at the Application before court and making suppositions on the parties’ relationships. This also points to the fact that the issue at least as presented before the Court cannot be construed as a pure point of law as enunciated in the celebrated case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors Ltd* 1969 EA 969. The said issues would require to be proved. The Respondents who raised the preliminary objection have not filed the submissions and have therefore deprived the court of the opportunity to see their arguments going to the merits of the Notice of Preliminary Objection.
8. The court is unable to make a decisive determination as to whether it has jurisdiction to hear and determine this case or not as the pleadings of CMCC E 6055/2022 have not been availed to court in order to determine if they are employees of the respondent or not. The court is not decisive if it has jurisdiction to hear this suit or not and in the absence of concrete evidence the preliminary objection is accordingly dismissed. The case should be mentioned on 31/7/2023 to give directions on the appeal as the same has not been heard and are not in court so they should be availed. Costs will be in the cause.
9. The parties are ordered to attempt to sort the matter amicably however this being a church dispute. Mention on 31/7/2023.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 6TH DAY OF JULY, 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

