



Thuo & 4 others v Kenya Union of Commercial Food and Allied Workers; National Hospital Insurance Fund & another (Interested Parties) (Employment and Labour Relations Cause E049 of 2023) [2023] KEELRC 1973 (KLR) (4 August 2023) (Ruling)

Neutral citation: [2023] KEELRC 1973 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E049 OF 2023
AN MWAURE, J
AUGUST 4, 2023**

BETWEEN

ANTONY NJUGUNA THUO & 4 OTHERS CLAIMANT

AND

KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS RESPONDENT

AND

**NATIONAL HOSPITAL INSURANCE FUND INTERESTED PARTY
CABINET SECRETARY MINISTRY OF LABOUR INTERESTED PARTY**

RULING

Introduction

1. There is a preliminary objection by the respondent and the prayers sought were as follows:
 1. The application and petition filed herewith is filed out of a time and contrary to the provision of section 30 of the *Labour Relations Act*, 2007.
 2. The petitioner's have not pleaded with particularity the alleged fundamental rights which have been violated in relation to them and in what manner.
 3. The petitioners have not exhausted the internal dispute handling mechanism in the union before resorting to filing this suit.
2. The 1st and 2nd interested parties equally filed a preliminary objection dated April 4, 2023 and prayed as follows:



1. That the petitioners have filed the suit out of the time prescribed by section iv of the [Labour Relations Act, 2007](#).
2. The application and petition are equally incompetent for reason that the applicant/petitioners have not pleaded with clarity how their constitutional right as listed in the petition and application have been violated by the respondent and interested parties.
3. Consequently, the suit as presented is fatally defective and thus cannot be sustained.
3. The petitioner on behalf of the other 4 petitioners deponed via his affidavit dated April 18, 2021 avers that by their petition they are challenging a gazette notice published by the minister for labour (Cabinet Secretary) and so nowhere have they alluded to any decision made by the Registrar of trade unions.
4. The submission by the 1st and 2nd interested parties dated 11th April 2023 and respondents submissions dated 8th May 2023 were all considered by the honourable court.

Determination

5. The court is being requested by the 1st respondent and the interested parties to determine on matters of preliminary objection. In particular they are alleging the petition filed by the notice of motion dated March 13, 2023 and so allege was filed after 30 days had expired and that is against section 30 of [Labour Relations Act](#).
6. The law relating to granting of preliminary objection it is provided that it must be clearly on a point of law which if proved is capable of terminating the suit in its entirety. Example of such points are issue of court's jurisdiction and time limitation. The matters raised in the preliminary objection would not require evidence to be adduced or the court to exercise its discretion. It is in other words self explanatory points of law.
7. The points raised by the applicants in this matter are not pure points of law and one can see the applicants are trying to persuade the court. They have raised the issue of time bar and the issue of the uncertainty of constitutional issues raised and the third one is that the petitioner did not exhaust the dispute resolution mechanism before filing the suit.
8. The first issue the petitioner are praying for a temporary injunction to restrain implementation of a gazette notice no 7 of 2021. The gazette notice was not published by the Registrar of trade union but by the Ministry of Labour. Hence that preliminary objection is not merited.
9. The other two matters raised are also not pure points of law and they all need to be proved. In the case Misc. 8 of 2021 Joseph Ngara Kuria vs Stephen Thuo Gitau the court held:

“for a preliminary objection to succeed the following ought to be satisfied firstly it should raise a pure point of law, secondly it is argued on the assumption that all facts pleaded by the other side are correct and finally it cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion. A valid preliminary objection should if successful dispose of the suit.”
10. The court has considered this case, the pleadings and submissions and is not convinced the issues raised in the two preliminary objections by the respondent and interested parties satisfy the provision of a valid preliminary objection. As such the two are held not to be merited and are accordingly dismissed.
11. Costs will be met by the respondents and interested parties.



12. The parties to ensure the pleadings are filed and closed and the suit to be fixed for hearing 60 days from today's date.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 4TH DAY OF AUGUST 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 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.

ANNA NGIBUINI MWAURE

JUDGE

