



Letangule & another v Chief Executive Officer - National Health Insurance Fund & 2 others (Cause E330 of 2023) [2023] KEELRC 2330 (KLR) (2 October 2023) (Ruling)

Neutral citation: [2023] KEELRC 2330 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E330 OF 2023
JK GAKERI, J
OCTOBER 2, 2023

BETWEEN

JAMES LEIRO LETANGULE 1ST CLAIMANT

DOUGLAS ODHIAMBO OWINO 2ND CLAIMANT

AND

**CHIEF EXECUTIVE OFFICER - NATIONAL HEALTH INSURANCE
FUND 1ST RESPONDENT**

**THE NATIONAL HEALTH INSURANCE FUND BOARD OF
MANAGEMENT 2ND RESPONDENT**

**DR SAMSON KUHORA KARANG'A (ACTING CHIEF EXECUTIVE OFFICER -
NATIONAL HEALTH INSURANCE FUND) 3RD RESPONDENT**

RULING

1. Before the court for determination is the Respondent's Notice of Preliminary Objection dated 8th May, 2023 objecting to the Claimant's two Memorandums of Claim and the Application dated 19th April, 2023 on the grounds that;
 1. The Honourable Court lacks jurisdiction to entertain the instant suit and the application.
 2. The suit was filed prematurely and in violation of the express provisions of Section 9(2) and (3) of the *Fair Administrative Action Act*, the 2nd Respondent's Human Resource Manual at Clause 13.2 and the principles of exhaustion.



3. The suit as filed, is incompetent and go against known procedure laid down in law. The suit offends the provisions of Rules 2, 4, 9, 10(5) of the Employment and Labour Relations Court Rules, 2016 by purporting to file two separate sets of pleadings in the same suit under the same serial number.
4. The Application is incompetent, fatally defective, misconceived, frivolous and an abuse of court process as it negates the principles and essence of rules governing the institution of suits generally.

Response

2. The Claimants filed Replying Affidavits in opposition to the Respondent's Notice of Preliminary Objection.
3. The 1st Claimant deponed that the Preliminary Objection should be declined, that a case based on facts and law cannot be determined on a Preliminary Objection. The sentiments of Sir Charles Newbold P. in *Mukisa Biscuits Manufacturing Co. Ltd V West End Distributors Ltd (1969) EA 696* at 701 are relied upon.
4. The affiant deposes that not every suit is a Judicial Review and the provisions of Section 9(2) and (3) of the *Fair Administrative Action Act* are inapplicable to the instant suit.
5. That ground 3 of the Notice of Preliminary Objection is misapprehension of the Rules.
6. The decisions in *Independent Electoral and Boundaries Commission V Jane Cheperenger & 2 others (2015) eKLR*, *Aviation and Allied Workers Union Kenya V Kenya Airways Ltd & others (2015) eKLR* and *Jamii Bora Kenya Ltd V Esther Wairimu Mbugua & another (2019) eKLR* were relied upon to buttress the desposition.
7. The 2nd Claimants Replying Affidavit is similar to that of the 1st Claimant and adopts a similar tone of urging the law as opposed to facts.

Respondent's submissions

8. On failure to exhaust alternative dispute resolution mechanisms, under the doctrine of exhaustion, counsel urged that since the Claimants filed an appeal against the transfer, the same was active before the appeals tribunal, board.
9. Reliance was made on the provisions of Section 9(1), (2) and (3) of the *Fair Administrative Action Act* as well as the decision in *Geoffrey Muthinja & another V Samuel Muguna Henry & 1756 others (2015) eKLR* on the need to exhaust other mechanisms before invoking the court's jurisdiction.
10. Counsel submitted that Clause 13.2 of the 2nd Respondent's Human Resource Manual prescribed details on the appeals availed to an aggrieved employee to the immediate Chief Executive Officer through the Head of Human Resource and if dissatisfied to the Fund.
11. That the Claimants have not demonstrated that they had exhausted the internal levels of appeal before filing the instant suit.
12. That the Claimants wrote to the Chief Executive Officer by letters dated 6th April, 2023 and did not accord him ample time to address their grievances before rushing to court in less than 14 days, a demonstration of bad faith.



13. That even if the Chief Executive Officer failed to address their grievance, the Claimants had the final appellate level, the 2nd Respondent's Board.
14. That the 2nd Claimant's email dated 9th April, 2023 was responded to, that the appeal was being addressed.
15. That the 2nd Respondent's previous appeal in 2019 was allowed.
16. Counsel submitted that the Claimants anonymously raised the issue with the Ombudsman and the 2nd Respondent responded.
17. Counsel further submitted that the Claimants invoked the court's jurisdiction prematurely and contrary to the provisions of the [Fair Administrative Action Act, 2015](#).
18. Regarding violation of the rules of procedure, counsel submitted that the Claimants application was incompetent, fatally defective, misconceived, frivolous and an abuse of the court process as it negated the principle and essence of the rules on institution of suits, the Employment and Labour Relations Court (Procedure) Rules, 2016.
19. Counsel relied on Rules 2, 4(1), 9, 10(5) and 13(1) to urge that suit meant one claim in this case and a single dispute and a single statement of claim whether comprising one or more Claimant's and one serial number is given after payment of the prescribed fees but the Claimants had filed two (2) sets of claim in one suit and the suit is not a representative one as one set of pleadings was required.
20. Counsel submitted that the Claimants violated the foregoing provisions by filing one suit with two Memorandums of Claim and the same have the same serial number and the Respondents were prejudiced.
21. Counsel urged that the Claimants application dated 19th April, 2023 was a joint application for interlocutory orders grounded on two claims and was thus null and void.
22. Counsel further urged that the Preliminary Objection met the threshold in *Mukisa Biscuits Manufacturing Ltd V West End Distributors (Supra)* as it related to a pure point of law. Since the 2nd Respondent's Human Resource Manual had a comprehensive internal appeals mechanism which the Claimants did not exhaust and thus the court had no jurisdiction to hear and determine the suit as the suit was premature.

Claimant's submissions

23. Counsel submitted that a case based on mixed issues of facts and law cannot be determined on a Preliminary Objection. Reliance was made on the sentiments of Sir Charles Newbold P. in *Mukisa Biscuits Manufacturing Ltd case (Supra)*.
24. Further, reliance was made on the holding in *Independent Electoral and Boundaries Commission V Jane Cheperenger & 2 others (Supra)*, *Kenya Airways Ltd V Aviation and Allied Workers Union Kenya (2015) eKLR* and *Jamii Bora Kenya Ltd V Esther Wairimu Mbugua & another (2019) eKLR* to urge that the Respondents Preliminary Objection be dismissed with costs.
25. According to the Claimants, the appeal took too long before it was heard and the doctrine of exhaustion did not apply since courts had the jurisdiction to intervene in exceptional circumstances.
26. Counsel submitted that the Preliminary Objection could not be raised and sustained as there was a dispute as to whether the Claimants reported to the new stations among other contested facts.



27. For unexplained reasons, the Claimants did not respond to the issues of exhaustion of internal mechanisms and filing two claims in one file.
28. The court is left wondering whether it was an over-sight or that was how the Claimants intended to prosecute the matter.

Findings and determination

29. The issues for determination are;
 - i. Whether the Respondent's Notice of Preliminary Objection meets the threshold.
 - ii. Whether the Claimants suit was filed in violation of the doctrine of exhaustion of internal dispute resolution mechanisms.
 - iii. Whether the Claimants suit violates the Employment and Labour Relations Court (Procedure) Rules, 2016.
30. As to whether the instant Notice of Preliminary Objection meets the threshold of a Preliminary Objection as enunciated in the Mukisa Biscuits Manufacturing Co. Ltd case (Supra), the homeport are the sentiments of Law JA as follows;

“ . . . a Preliminary Objection consists of a pure 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 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 . . . ”
31. It is not in dispute that the Respondents are objecting to the jurisdiction of the court on the premise that its jurisdiction was invoked prematurely and the Claimants Application dated 19th April, 2023 was incompetent for being grounded on two separate and distinct memorandums of claim under one serial number.
32. In the court's view, the Respondents' Notice of Preliminary Objection fits the bill as exemplified by Law JA in the Mukisa Biscuits Manufacturing Ltd case (Supra) and the court has jurisdiction to determine its sustainability or not based on the grounds relied upon.
33. As to whether the instant suit by the Claimants was filed in violation of the doctrine of exhaustion of internal grievance handling mechanisms, the Respondent maintains that the Claimants did not at in accordance with the 2nd Respondent's Human Resource Manual as they did not exhaust the available appellate processes. A regurgitation of the relevant provisions and propositions of law is necessary in order to contextualize the issue.
34. It requires no gainsaying that the law on exhaustion of internal grievance resolution mechanisms is well settled. In Geoffrey Muthinja & another V Samuel Muguna Henry and 1756 others (Supra), the Court of Appeal stated as follows;

“It is imperative that where a dispute resolution mechanism exists outside courts the same be exhausted before the jurisdiction of the court is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that



a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of *the Constitution* which commends courts to encourage alternative means of dispute resolution.

We find and hold that the exhaustion doctrine applies even where, as was argued by the appellants herein, what is sought to be challenged is the very authority of the organs before whom the dispute was to be placed . . .

By failing to do so and quite apart from the force of their apprehensions, the appellants effectively failed to exhaust their remedies and essentially short-circuited the process by filing suits prematurely.”

35. According to the Respondent’s counsel, the transfer of the Claimants was an administrative action as defined in Section 2 of the *Fair Administrative Action Act* and compliance with its provisions was imperative.
36. The provisions of Section 9 of the *Fair Administrative Action Act* are explicit on the need to exhaust internal mechanisms for appeal or review before the court’s jurisdiction was invoked.
37. Section 9(2) provides that;

The High Court or a Subordinate Court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanism of appeal or review and all remedies available under any other written law are first exhausted.
38. Section 9(3) states that;

The High Court or a Subordinate Court shall, if it is not satisfied that the remedies referred to in Sub-section (2) have been exhausted, direct that the applicant shall first exhaust such remedy before instituting proceedings under Sub-section (1).
39. In *Krystalline Salt Ltd V Kenya Revenue Authority* (2019) eKLR, Mativo J. (as he then was) expressed himself as follows;

“A proper construction of Section 9(2) and (3) above leads to the conclusion that they are couched in mandatory terms. The only way out is the exception provided by Section (9(4)) . . .

The person seeking exemption must satisfy the court, first that there are exceptional circumstances and second, that it is in the interest of justice that the exemption be given. Section 9(4) of the *Fair Administrative Action Act* postulates an application to the court by the aggrieved party for exemption from the obligation to exhaust any internal remedy. My reading of the said provision is that the appellant must first apply to the court and demonstrate the existence of exceptional circumstances.”
40. The court is guided accordingly.
41. In the instant suit, it is common ground that the Claimants were transferred by the 2nd Respondent to new stations, Kangemi Branch and Southern Region respectively vide letters dated 3rd April, 2023 and both appealed the decision by letters dated 6th April, 2023. The 1st Claimant’s letter was addressed to the Acting Chief Executive Officer being his immediate supervisor.
42. As alluded to elsewhere, the instant suit was filed on 19th April, 2023 less than 14 days after lodgement of the appeal.



43. As correctly submitted by counsel for the Respondents, the 2nd Respondent's Human Resource Policy and Procedures Manual August 2020 prescribe detailed provisions on grievance resolution including appeals.
44. Clause 13 entitled handling of grievances embodies the relevant provisions.
45. Under Clause 13.2.2, an employee who has an individual problem or grievance other than matters of discipline is required to approach the immediate supervisor for resolution who may handle it or refer the same to the Head of Directorate for appropriate action.
46. If the employee is dissatisfied with the proposed decision, he may appeal to the Chief Executive Officer through the Head of Human Resource.
47. The Claimants addressed their letters directly to the Chief Executive Officer, as their supervisor vide their letters dated 6th April, 2023.
48. Evidently, the Acting Chief Executive Officer was obligated to respond to the concerns raised by the Claimants but had not done so by 19th April, 2023 when the Claimants came to court.
49. Was the Chief Executive Officer's delay in responding to the appeal inordinate?
50. Taking into consideration all the circumstances obtaining at the time, it is the finding of the court that the 12 days delay was neither unreasonably long nor inordinate.
51. Undoubtedly, the Claimants invoked the court's jurisdiction before determination of their appeal and cannot possibly intimate to the court how the same would have been determined. Neither of the Claimants allege that the 3rd Respondent was either incapable of handling the appeal and/or would be partial, having been part of the decision in the first place.
52. In the court's view, a few more days wait, a remainder or inquiry would have buttressed the Claimant's case and demonstrated the Claimants inclination to have the matter resolved internally.
53. The allegation that the internal mechanism "is marred by illegality and irregularities" was not proved or demonstrated.
54. The Court of Appeal decision in Geoffrey Muthinja & another V Samuel Muguna Henry & 1756 others (Supra) is explicit on this issue and cannot avail the Claimants.
55. Finally, Clause 13.2.9 of the Manual provides that;

“Where the aggrieved party is dissatisfied with the decision made he/she shall be accorded the right to appeal to the Fund.”

Fund is operated and managed by the board.
56. Whereas the Chief Executive Officer is the Head of Management, all statutory bodies analogous to the 2nd Respondent have a higher authority as their policy and decision making body, where typically the Chief Executive Officer sits as an ex officio member with no voting rights.
57. The board is the Supreme organizational decision maker and takes responsibility for the success or failure of an organization. Since boards represent a wide spectrum of professionals, views, insights, interests and perspectives, it is only fair that they be and are accorded the final say on all matters relating to grievances resolution and discipline for accountability and this is the reasoning behind Clause 13.2.9 of the 2nd Respondent's Human Resource Manual, 2020 which is a standard clause.



58. There is no gainsaying that Organizational Human Resource instruments are an integral part of the employment package and bind all employees during the currency of their employment. They are the internal constitutions and ought to be complied with to promote orderliness and harmony at the work place or space.
59. In the instance case, it is common ground that the Claimants did not appeal to the Fund as ordained by Clause 13.2.9 above.
60. Even assuming that the Claimants had challenges with the Acting Chief Executive Officer dealing with the appeal, they had the right to appeal to the Fund itself and the board of directors would have dealt with the appeal
61. None of the Claimants opted to appeal to the Fund and none has faulted the board on that score.
62. In sum, the Claimants refused, failed and/or neglected to exercise their right of appeal as mandated by Clause 13.2.9 of the 2nd Respondent's Human Resource Manual and thus denied the board of the 2nd Respondent an opportunity to resolve the dispute internally to obviate court proceedings.
63. Having found that 13 days delay by the Acting Chief Executive Officer of the 2nd Respondent was neither unreasonable nor inordinate and having further found that the Claimants invoked the court's jurisdiction before appealing to the Fund as required by the Human Resource Manual, the inescapable conclusion is that the Claimants had not exhausted the internal grievance resolution mechanisms before coming to court and must be accorded the opportunity to do as it is not too late to comply with the procedural requirements.
64. As deponed by the Claimants, the doctrine of exhaustion notwithstanding, courts have residual jurisdiction to intervene in exceptional circumstances.
65. Whereas the foregoing is legally sound, before the court exercises the residual jurisdiction, the party alleging that there were exceptional circumstances is obligated to demonstrate that indeed the circumstances were exceptional.
66. Regrettably, no attempt has been made to bring the circumstances of the instant suit within the recognised exceptions.
67. None of the requirements captured in *Krystalline Salt Ltd V Kenya Revenue Authority (Supra)* or *William Odhiambo Ramogi & 3 others V Attorney General & 4 others (2020) eKLR* were demonstrated.
68. Neither the suitability of the appellate mechanism nor the adequacy of audience was convincingly challenged by the Claimants.
69. In the circumstances, it is the finding of the court that the suit herein was instituted pre-maturely as the Claimants had not exhausted the internal grievance handling procedures as required.
70. As to whether the Claimants suit violates the Employment and Labour Relations Court (Procedure) Rules, 2016, the homeport are the contrasting positions of the parties. While the Claimants deponed that the Respondents misapprehended the relevant Rules, the Respondents maintain that the suit violated the rules in that the Claimants filed two Memorandums of Claim as one suit.
71. It is common ground that the Claimants filed two Memorandums of Claim dated 19th April, 2023. These are claims not a statement of claim are ordained by Rule 4(1) and the claims were allocated one serial number after payment of fees and none is representative of the other as no letter of authority was filed.



72. It is unclear to the Respondent as to how many responses they were supposed to file since the Rules provide for a response to the suit.
73. Surprisingly, the Notice of Motion dated 19th April, 2023 appears to combine the suits and seeks reliefs for both Claimants.
74. Puzzlingly, the Claimants counsel did not explain why they filed two Memorandums of Claims under one application.
75. It is also unclear to the court whether it was by mistake or inadvertence or deliberate.
76. It need not be belaboured that the suit as filed is irregular and requires rectification as and when circumstances permit.
77. For the above stated reasons, the court is satisfied that the suit herein was filed prematurely and ought not to proceed in the face of a pending and outstanding appellate process which the Claimants were duty bound to invoke.
78. Accordingly, the suit is hereby struck out with no orders as to costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 2ND DAY OF OCTOBER 2023

DR. JACOB GAKERI

JUDGE

