



**Kenya Hotels and Allied Workers Union v Nyanza Club (Cause E004 of 2021) [2023] KEELRC 3025 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3025 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE E004 OF 2021  
CN BAARI, J  
NOVEMBER 23, 2023**

**BETWEEN  
KENYA HOTELS AND ALLIED WORKERS UNION ..... CLAIMANT  
AND  
NYANZA CLUB ..... RESPONDENT**

**RULING**

1. Before Court is the Claimant's Preliminary Objection dated 15<sup>th</sup> October, 2023, seeking to have the Respondent's application dated 29<sup>th</sup> September, 2023, struck out on the premise that the Court does not have jurisdiction to entertain the same, and that the *ex parte* order granted on 2<sup>nd</sup> October, 2023, is null and void having been granted by a court without jurisdiction.
2. The preliminary objection was urged orally 18<sup>th</sup> October, 2023. The claimant through one John Simiyu argued that they rely on rule 33 (6) of the *Employment and Labour Relations Court (Procedure) Rules* and the case of Brian Muchiri Waihenya v. Jubilee Hauliers Co. Ltd for the holding that an order made or review of a decree shall not be subjected to further review.
3. It is Mr. Simiyu's submission that this Court's order of 27<sup>th</sup> April, 2023, ought not to have re-engaged into further application for review and hence the court lacks jurisdiction to either review or enjoin a party at this stage. It is his submission that this Court lacks jurisdiction and ought to down its tools.
4. The Respondent in opposition to the preliminary objection submitted that a preliminary objection must cite pure points of law and that where facts need to be ascertained, the preliminary objection cannot be raised.
5. It is the Respondent's submission that no law has been cited as preventing the Court from enjoining a party to the suit at this stage and that the issues subject of the preliminary objection are not issues of law.



6. It is Counsels submission that what the Respondent seeks vide their application is review of this court's orders issued on 26<sup>th</sup> September, 2023, and not review of orders that were already reviewed. It is their submission that it is the first time it is seeking those orders and had not sought similar orders before.
7. The Respondent prays that the preliminary objection be dismissed with costs.

### **Determination**

8. The orders subject of the preliminary objection herein, relates to the dismissal of the Respondent's application dated 31<sup>st</sup> July, 2023, which was dismissed on 26<sup>th</sup> September, 2023, for non-attendance of both the Respondent and their advocates.
9. The Claimant contends that this Court does not have jurisdiction to entertain the Respondent's application dated 29<sup>th</sup> September, 2023, wherein, the Respondent seeks orders of temporary injunction against sale of its assets proclaimed by the Claimant's agents and which in the view of the Claimant, amounts to review of the orders of dismissal issued on 26<sup>th</sup> September, 2023.
10. The court clearly set out the centrality of jurisdiction in *Owners of Motor Vessel Lilian "S" v Caltex Oil* (1989) eKLR in the following words:

“Jurisdiction is everything and without which, the Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

11. The Claimant contends that the orders sought in the Respondent's application of 29<sup>th</sup> September, 2023 are review orders and which cannot be issued a second time.
12. The orders issued by this Court in this matter on 27<sup>th</sup> April, 2023, are those allowing the Respondent to pay the decretal sum in instalments, while those sought to be reviewed by the respondent's application dated 29<sup>th</sup> September, 2023, are the dismissal orders of the application of 31<sup>st</sup> July, 2023.
13. There are no review orders granted to the Respondent earlier in relation to the dismissal of their application of 31<sup>st</sup> July, 2023. Further, the issues raised by the Claimant in the preliminary objection are matters of facts, which facts must be ascertained.
14. In *Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd* [1969] EA 696, the Court described a preliminary objection in the following words: -

“...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. 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...” Sir Charles Newbold, P at Page 701 proceeded as follows;

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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...”



15. In my view, the preliminary objection as drawn does not meet the threshold set in the case of Mukisa Biscuit Manufacturing (*supra*). I thus proceed to dismiss the same with costs and further order that the application dated 29<sup>th</sup> September, 2023, be set for hearing on merit and on priority basis.
16. The claimant's preliminary objection dated October 15, 2023, fails and is dismissed with costs to the respondent.
17. Orders accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2023.**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

Mr. E. Ngame present for the Claimant/Respondent

Mr. Okwemba present for the Respondent/Applicant

Erwin Ongor-C/A

