



Kenya Medical Practitioners Pharmacists and Dentists Union (KMPDU) v County Public Service Board of Wajir & another (Employment and Labour Relations Petition E186 of 2023) [2023] KEELRC 3401 (KLR) (20 December 2023) (Ruling)

Neutral citation: [2023] KEELRC 3401 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E186 OF 2023
AN MWAURE, J
DECEMBER 20, 2023**

BETWEEN

KENYA MEDICAL PRACTITIONERS PHARMACISTS AND DENTISTS UNION (KMPDU) PETITIONER

AND

COUNTY PUBLIC SERVICE BOARD OF WAJIR 1ST RESPONDENT

COUNTY GOVERNMENT OF WAJIR 2ND RESPONDENT

RULING

1. The 1st and 2nd Respondents filed a Preliminary Objection dated 12th October 2023 in opposition to the Notice of Motion and Petition dated 28th September 2023 on grounds that:

1. This Honourable Court is deprived of jurisdiction to hear and determine this matter in the first instance in view of the fact that the matter is prematurely before the Honorable Court, the Applicant having failed to exercise the mechanisms available under the express provisions of Section 58 and 62 of the *Labour Relations Act* No 14 of 2007, Laws of Kenya.
2. The Applicant has ignored the existence of statutory rules and procedures to address the issues they have raised. The Applicant has similarly not explained why they cannot or have not followed the said procedure as was held in the case of *Speaker of the National Assembly v James Njenga Karume [1992]* eKLR where the Court of Appeal observed:

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an act of parliament, that procedure should be strictly followed.”



3. The subject Notice of Motion and consequently the Petition is therefore defective, frivolous, vexatious and an abuse of the process of this Honourable Court for the foregoing reasons.
2. The preliminary objection was canvassed by way of written submissions.

Respondents' Submissions

3. The Respondents submitted that the objection is premised on the fact that this court lacks jurisdiction of first instance to hear and determine the subject matter by virtue of Section 58 and 62 of the [Labour Relations Act](#) rendering the same premature before this court, the Applicant having failed to exhaust the available statutory remedy to refer the dispute herein to conciliation.
4. The Respondents submitted that Section 58 of the [Labour Relations Act](#) is complete with its own procedure and an appeal process to this Honourable Court. The Applicant has ignored that procedure and are merely forum shopping.
5. The Respondents submitted that this court's jurisdiction under the [Labour Relations Act](#) is restricted only to hearing appeals against the decisions/awards in arbitration, enforcing the said awards and or setting aside the same.
6. The Respondents submitted that the subject collective Bargaining Agreement if found to be valid, has an unequivocal dispute Resolution Clause 'F' where the parties agreed on a procedure to resolve any form of dispute arising between them.
7. The Respondents submitted that only upon exhaustion of such remedies and mechanisms that the Applicant can move this court, the said procedure ousts the jurisdiction of this court in first instance. The Applicant has not demonstrated any exceptional circumstances to warrant their exemption from this provision of the law.
8. The Respondents submitted that judicial intervention in the process of negotiating the terms or review of collective bargaining agreement is limited and both parties are required to engage in a free and voluntary negotiations as a key ingredient in collective agreement. It relied on the case of [Kenya Medical Practitioners Pharmacists and Dentists' Union vs County Secretary, Taita Taveta County Government & 3 Others \[2021\]](#) eKLR.

Petitioner's Submissions

9. The Petitioner submitted that the objection is not a pure point of law as it involves contested facts. There exists a contest as to the expiry of the CBA, once a dispute or clash exists in a preliminary objection it ceases being one. It relied on the case of Nitia Properties Limited – v- Jagjit Singh Kalsi & Another, C.A. No. 132 of 1937 and B W M V J M C [2018] eKLR.
10. The Petitioner submitted that for a preliminary objection to succeed it must fully meet all the three elements laid in Mukhisa Biscuits Manufacturing Ltd –vs- West End Distributors Ltd [1969] E.A 697 case as per Nambuye J in [Attorney General & another v Andrew Maina Githinji & another \[2016\]](#) eKLR the objection herein consists of disputed facts and ought to have been raised vide a substantive motion application not a preliminary objection.
11. The Petitioner submitted that the issues raised in the Petition are way beyond the scope of the jurisdiction of the minister in charge of labour. The Petitioner has raised issues of constitutional infringements and breach of constitutional rights and intertwined with labour relations which fall squarely within the purview of this court.



Analysis and Determination

12. The main issue is whether the Preliminary Objection raised is meritorious. The Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (*supra*) held:

“ 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....”

13. Further, in the case of Quick Enterprises Ltd Vs Kenya Railways Corporation, Kisumu HCCC No.22 of 1999, the Court held that: -

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

14. The Preliminary Objection herein does not raises a pure point law as it is premised on the ground that before instituting the Petition herein, the Petitioner failed to exhaust the alternative dispute resolution mechanisms provided under Sections 58 and 62 of the Labour Relations Act No 14 of 2007, Laws of Kenya. The above sections are not coached in mandatory terms as section 58 provides that an employee and employer may conclude a collective agreement. This does not therefore translate into a pure point of law like if it was an arbitration clause in a contract which necessarily must be observed strictly by the parties.

15. The Petitioner have not contested the above fact but only submitted that the issues raised in the Petition are way beyond the scope of the jurisdiction of the minister in charge of labour as it raises issues of constitutional infringements and breach of constitutional rights and intertwined with labour relations. This is also clear from the petition the issues raised are also subject to the jurisdiction of this court.

16. This raises the issue whether this court is deprived of jurisdiction to hear and determine the dispute in the first instance.

17. The prayers on the Petition are very clear and in the Petition the first prayer is a declaration that the fundamental rights and freedom as encapsulated and guaranteed in articles 27, 41, 43, 47 and 48 of the constitution of Kenya 2010 have been derogated contravened and infringed upon by the respondent.

18. Section 58 of the Labour Relations Court provides:

“ 58. Alternative dispute resolution

1. An employer, group of employers or employers’ organisation and a trade union may conclude a collective agreement providing for

a. the conciliation of any category of trade disputes identified in the collective agreement by an independent and impartial conciliator appointed by agreement between the parties; and

b. the arbitration of any category of trade disputes identified in the collective agreement by an



independent and impartial arbitrator appointed by the agreement between the parties.

2. A party that has referred a dispute to conciliation in terms of an agreement contemplated in subsection (1) is not required to refer it to the Minister for conciliation.
 3. An award in an arbitration in terms of a collective agreement contemplated in subsection (1) is final and binding and—
 - a. is subject to appeal on points of law to any court;
 - b. may be set aside by the Industrial Court on any ground recognised in law; or
 - c. may be enforced by the Industrial Court.
 4. An application to review an arbitration award shall be made to the Industrial Court within thirty days of the award.”
19. It is the Respondents submission that the Petitioner failed to first address the dispute raised in the main suit *vide* conciliation then refer the matter to this court if aggrieved by the conciliator’s decision.
20. The court however is persuaded this is not a mere trade dispute but it is a dispute that raises constitutional issues.
21. A preliminary objection must raise a pure point of law. A preliminary objection in other words cannot be sustained where facts have to be adduced or a court has to exercise its discretion.
22. Furthermore, the Petitioner submitted that a conciliator under Section 58 of the *Labour Relations Act* is not the appropriate forum to address the issues raised in the Petition as it raises constitutional issues and is exempted from the doctrine of exhaustion.
23. Exceptions to the doctrine of exhaustion are addressed William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR where the court held:
- “.....the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake.”
24. The petitioner in his submissions averred that the petition raised issues of constitutional infringements and breach of constitutional rights and intertwined with labour relations which fall squarely within the purview of this court’s jurisdiction.
25. Flowing from the above and from the cited case laws and submissions the court is satisfied the preliminary objection by the respondent does not raise pure point of law as provided also in the case of “Quick Enterprises Ltd vs Kenya railways Corporation (*supra*) and so the same is dismissed accordingly.
26. Let each party meet their respective costs of the preliminary objection.
27. The parties can proceed with the notice of motion application or with both the application and petition as they choose.



DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 20TH DAY OF DECEMBER, 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

