



REPUBLIC OF KENYA



KENYA LAW
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**Kashonga v Kashonga & 2 others (Petition E34 of 2022)
[2022] KEELRC 1726 (KLR) (22 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1726 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E34 OF 2022**

**SC RUTTO, J
JULY 22, 2022**

BETWEEN

LUCY WAMBUI KASHONGA PETITIONER

AND

REGIANH NASIEKU KASHONGA 1ST RESPONDENT

ESTHER NAEKU KASHONGA KAMAKEI 2ND RESPONDENT

KENNEDY KASHONGA 3RD RESPONDENT

RULING

1. What comes up for determination is the respondents' preliminary objection dated April 29, 2022. The objection is to the effect that this court lacks jurisdiction to entertain the suit on the following grounds:
-
 - a) The petitioner is not and has never been an employee of the respondent thus there is no employer/employee relationship between the parties.
 - b) The petitioner having asserted her position as a director and shareholder of Thorn Tree School Limited confirms that the parties relationship is regulated by section 3 and part IX of the *Companies Act*, 2015 and clauses 78,79,82,89 and 90 of the company's memorandum and articles of association.
2. The preliminary objection was canvassed by written submissions.
3. In its submissions in support of the preliminary objection, the respondents state that the same raises a pure point of law. It cited the case of *Mukisa Biscuit Co vs Westend Distributors Ltd* (1969) EA.
4. It was further submitted on behalf of the respondents that the petitioner is a director and shareholder of Thorn Tree School Limited hence the parties are regulated by section 2, part IX of the *Companies*



Act and clauses 78, 79, 82, 89 and 90 of the company's memorandum and articles of association. That further, the petition offends the provisions of the Employment Act. That there has never been an employment relationship between the petitioner and the respondents, whether written or verbal, to pay any salary or wages. That the issues raised in the petition is purely between directors and shareholders in the company known as Thorn Tree School Limited.

5. The respondents further submitted that under the Companies Act, the Employment and Labour Relations Court is not included in the word "court". The respondents placed reliance on several authorities including Owners of Motor vehicle Lilian "S" vs Caltex Oil (Kenya) Ltd (1989) KLR and Geoffrey Asanyo vs Nakuru Water and Snatiation & 6 others (2014) eKLR.
6. On the other hand, the petitioner submitted that the issues raised in the objection about her employment can only be ascertained after parties tender evidence at the trial. That the preliminary objection does not raise a pure point of law. To this end, the petitioner urged the court to dismiss the respondents' preliminary objection with costs.
7. As per the determination in the celebrated case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors ltd (1969) EA 696: "A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. the improper practice should stop"
8. Essentially, for a preliminary objection to succeed the following elements ought to be satisfied: -
 - a) It should raise a pure point of law;
 - b) It is argued on the assumption that all the facts pleaded by the other side are correct; and
 - c) It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
9. In light of the above, this court must now consider whether the issues raised in the instant preliminary objection are matters of fact or law, with the assumption that the facts, are correct.
10. I have perused the grounds upon which the preliminary objection is premised and note that the respondents have raised the issue of the court's jurisdiction based on the relationship between the parties. As it is, the parties' relationship is not clearly ascertainable from the record.
11. At this juncture, it is not clear whether there is an employment relationship between the parties as the facts and evidence before this court are not sufficient. The key piece of evidence which is the memorandum and articles of association has not been availed hence it only means that the issue of the parties' employment relationship if at all, has to be first settled and this can only be done following hearing and evaluation of evidence on record.
12. The preliminary objection does not therefore raise a pure point of law since the court will have to ascertain the parties' relationship from further evidence to be adduced during the trial. The memorandum and articles of association referenced to were not presented before court. This qualifies the objection and it is no longer a pure point of law as the factual issue of the parties' relationship arises.
13. Indeed, and going by the submissions of the petitioner, the parties' relationship does not seem to be a settled issue hence the preliminary objection is not on a pure point of law. It is clear to me that the issue raised by the respondents pertaining to the employment relationship between the parties, would



require evidence and which cannot be entertained by way of preliminary objection as relations cannot be inferred and, on that ground, alone, this objection cannot be sustained.

14. Finally, it is noteworthy that the petition had initially been instituted before the High Court in the Constitutional and Human Rights Division and *vide* the court's order dated February 4, 2022, the petition was transferred to the Employment and Labour Relations Court. The order reads in part: -

“...having read and considered the petition and notice of motion both dated 11/01/2022 filed herein, this court finds that the bone of contention revolves around an alleged employer/employee relationship. Once that is resolved, the other issues will fall in place.”

15. For the reasons set out above the preliminary objection is overruled.

16. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF July 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the petitioner Mr. Ojienda

For the Respondent Mr. Thimba

Court Assistant Barille Sora

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 had 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 Civil 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.

STELLA RUTTO

JUDGE

