



**Kenya Union of Road Contractors and Civil Engineering Workers v
China Railway No. 5 Engineering Group Company Limited (Cause
E233 of 2022) [2022] KEELRC 4014 (KLR) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 4014 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E233 OF 2022
JK GAKERI, J
SEPTEMBER 29, 2022**

BETWEEN

**KENYA UNION OF ROAD CONTRACTORS AND CIVIL ENGINEERING
WORKERS CLAIMANT**

AND

**CHINA RAILWAY NO. 5 ENGINEERING GROUP COMPANY
LIMITED RESPONDENT**

RULING

1. Before me for determination is a Preliminary Objection dated May 5, 2022 seeking orders that;
 - i. The court is not properly seized of jurisdiction to entertain the Claimant's application and suit. That referral of a dispute to the court only arises if a trade dispute is not resolved after conciliation. By all accounts, conciliation report annexed to the Claimant's claim were final reports evidencing settlement agreement. In the absence of a certificate to the effect that the dispute remains unresolved, then the existence of said agreement ousts this court of its jurisdiction.
 - ii. The disputes that were before the Conciliator and which gave rise to the reports of January 25, 2022 and March 28, 2022 were settled and the resolutions emanating therefrom are gradually being effected thereby rendering the suit premature.
 - iii. The continued pendency of the claimant's application and claim is an abuse of the process of the court.
2. The claimant/respondent's response to the preliminary objection is dated May 24, 2022.



3. The National Secretary General of the Claimant states that although the Cabinet Secretary for Labour appointed a conciliator after the dispute was reported to him and conciliation reports on record were made, the respondent had not complied with them and the dispute is thus deemed to have been unresolved.
4. That the respondent has not adduced any evidence of compliance with the settlement.
5. It is the Claimant's case that the court has jurisdiction to entertain the suit.
6. The Claimant prays for dismissal of the preliminary objection with costs to it.

Respondent's submissions

7. The respondent submits that the preliminary objection herein meets the threshold of a preliminary objection as enunciated in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696.
8. Reliance is made on section 2 of the [Labour Relations Act](#), 2007 for the definition of a trade dispute.
9. It is the respondent's case that the issues raised by the claimant were addressed in a settlement agreement dated January 25, 2022 and signed by the respective parties.
10. That the agreement was made pursuant to the provisions of section 68 of the [Labour Relations Act](#).
11. That the claimant's allegations of existence of a dispute on house allowance is a misnomer unless the claimant seeks to revisit the issue. It is contended that the issue of house allowance is not properly before the court because the claimant's memorandum of claim alleges that the house allowance of 15% is illegal and no evidence of underpayment has been adduced.
12. As regards non-remittance of union dues, the respondent urges that the issue was addressed by the conciliators report dated March 28, 2022 and certain recommendations were made and dues have been remitted since then for employees who have been verified as members of the union. That the issue of union dues is alive as verification was still on-going as part of the reconciliation process and the claimant cannot turn around to abandon it.
13. Finally, the respondent submits that the issue of refusal to deduct union dues alleged by the claimant is a trade dispute and the claimant had not made a demand under section 73(2) of the [Labour Relations Act](#), 2007.
14. That the respondent has been remitting union dues and the instant claim is pre-mature.
15. It is the respondent's case that the claimant's claim be dismissed in its entirety.

Claimant's submissions

16. The claimant submits that the respondent's objection does not meet the threshold of a preliminary objection as it raises factual issues that call for evidence and has belaboured the point that there is a settlement agreement between the parties but has not provided evidence of compliance with the settlement and thus the dispute remains unresolved.
17. Reliance is made on section 48 of the [Labour Relations Act](#), 2007 which guarantees and employee minimum remuneration and conditions of employment.
18. It is further submitted that no prejudice would be suffered if the preliminary objection was dismissed with costs.



Determination

19. The issues for determination are;
 - i. Whether the objection meets the threshold of a preliminary objection.
 - ii. Whether the preliminary objection is merited.
20. As to whether the objection meets the threshold of a preliminary objection, the starting point is the definition of a preliminary objection as formulated by the Court of Appeal in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (Supra)* where Law JA expressed himself as follows;

“So far as I am aware, 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 on 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.”
21. In the words of Newbold P;

“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 has to be ascertained or if what is sought is the exercise of judicial discretion . . .”
22. The court is bound by these sentiments including those of the Supreme Court in *Hassan Ali Joho & another v Suleiman Said Shabbal & 2 others* (2014) eKLR, on the essence of a Preliminary Objection.
23. In the words of Githinji S.M J in *Gladys Pereruan v Betty Chepkorir* (2020) eKLR,

“The preliminary objection if allowed may dispose of the entire suit without giving parties the opportunity to be heard. This has to be done with caution that the court has a duty to hear all parties and determine the case on merit. In addition, this court has also a duty to safeguard itself against abuse of its process.”
24. The court is guided by these sentiments.
25. In the instant case, the pith and substance of the respondent’s objection is that the documents on record show that the matter in question was referred to conciliation and final reports filed and are on record. That the absence of a certificate of the conciliator that the dispute was unresolved ousts the court’s jurisdiction.
26. In its statement of response dated May 5, 2022, the respondent avers that since it has no recognition agreement or Collective Agreement with the claimant, it has no obligation to deduct union dues in the absence of a verification exercise and the conciliation recommendations are yet to be implemented.
27. In a nutshell, the respondent denies all the averments by the claimant.
28. It does not accept that there is an agreement on record signed by all the parties including the County Labour Officer, West Pokot and Turkana Counties.
29. Puzzlingly, the contents of the statement of response and the preliminary objection are incongruous.



30. Consequently, to the issue whether there is a preliminary objection proper before the court, the answer is in the negative.
31. What is before the court are factual issues as opposed to a pure point of law. Relatedly, the respondent denies any reconciliation meeting with the claimant yet it relies on the documents on record to urge its preliminary objection.
32. Having found that objection before the court does not meet the threshold of a preliminary objection as enunciated in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (Supra)*, the issue of whether it is merited falls by way side.
33. For the foregoing reasons, the Preliminary Objection dated May 5, 2022 is hereby dismissed.
34. Costs in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 29TH DAY OF SEPTEMBER 2022

DR. JACOB GAKERI

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 *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.

DR. JACOB GAKERI

JUDGE

