



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 14 OF 2020

(Before D.K.N.Marete)

KENYA UNION OF PRE-PRIMARY

EDUCATION TEACHERS.....CLAIMANT

VERSUS

SECRETARY, LAIKIPIA COUNTY

PUBLIC SERVICE BOARD.....1ST RESPONDENT

THE COUNTY SECRETARY

LAIKIPIA COUNTY.....2ND RESPONDENT

RULING

This is an application by way of a preliminary objection dated 30th April, 2021. It comes out as follows;

1. *THAT the Application dated 26/4/2021 seeking stay of the proceedings in Claimant's Bill of cost, offends Judicature Act Cap 8 Laws of Kenya; the High Court (Practice and Procedure Rules) Part 1 Rule 3 having been filed during High Court vacation.*
2. *THAT the Application offends Order 42 rule 6 of the Civil Procedure Rules.*
3. *THAT this honourable court lacks jurisdiction by dint of Section 6 of the Civil Procedure Act to entertain the Application as a valid Notice of Appeal on record has initiated appellate process at the Court of Appeal.*
4. *THAT the application is statute-barred under Section 6 of the Civil Procedure Act.*

The 1st and 2nd Respondents fault the preliminary objection and pray that the same be dismissed with costs.

The Claimant/Applicant in her written submissions dated 17th May, 2021 submits that it is the taxation of party to party costs that would indicate the actual decretal amounts as this was the subject of computation. This application is therefore premature and offends the Advocate's Remuneration Order through which the applicant can dispute the amount without necessarily resulting in this application for stay.

Further, the application offends the Judicature Act (Part 1 Rule 3) of the High Court Practice and Procedure Rules. This is because the application was made and filed during the High Court vacation but never sought grounding on the vacation rules.

Again, this application comes to court vide Section 1A and 1B of the Civil Procedure Act and Order 51 rule 1 of the rules together with Article 159 of the Constitution which are general provisions and do not entertain a case for leave during the vacation. This court therefore lacks jurisdiction to issue a stay order in the circumstances.

The Claimant/Objector in support of his case seeks to rely on the authority of **Walter Kundert & another v Warda Mohamed Shali Civil Appeal No.117 of 2001** where the court held thus;

“It is my view that while the appellant court had power to make and made the orders for extension and stay under the above order, the applicant made the formal application to be brought before the court under some other orders or provisions. The applicant on his application has shown section 3A of the Civil Procedure Act as the vehicle that brought him before the court. Was this the proper vehicle which carried him to court?”

“It is my further view that the Civil procedure Rules provide almost or virtually for every situation that arises in the practice of civil law.”

It is the Claimant/Applicant’s case that this application offends Order 42 Rule 6 of the Civil Procedure Rules.

The Respondents in their written submissions dated 25th May, 2021 submit that the impugned application was made on 26th April, 2021, a period outside the High Court vacation as is known in law or any advertisement by the Chief Justice. The court registry, if at all, would have refused to admit the applicant should the same not have been compliant with process and law.

Again, the preliminary objection, is not a pure point of law as is required of the authority of **Mukhisa Biscuits Manufacturing Co.Ltd v West End Distributors Limited (1969) EA 696**. In the circumstances we are shrouded in, the court would be minded to establish evidence of the timing and timelines of the High Court vacation.

This was as expressed in the authority of **Republic v Eldoret Water & Sanitation Company Limited Exparte Booker Onyango & 2 others (2007) eKLR** where M.K.Ibrahim,J. (as he then was) in reference to Mukhisa above observed as follows;

“...The first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.”

Further,

“In the light of the foregoing, a party raising a preliminary objection on a point of law must proceed on the basis (only for the preliminary point) that all facts pleaded by the other side are correct and albeit this, the cause of action is not sustainable as a matter of law. The Objector in such a situation is deemed to accept the correctness of the other party’s facts for the purposes of the application. To do otherwise would render the preliminary objection to be not a true demurrer. An objector cannot introduce any factual dispute or controversy and must stick to pure points of law.”

The Respondent further seeks to rely on Article 159 (2) (d) of the Constitution of Kenya, 2010 which provides as follows;

159(1)...

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles-

- a) ...
- b) ...
- c) ...
- d) Justice shall be administered without undue regard to procedural technicalities; and
- e) ...

Again, she relies on the High Court (Organisation and Administration) Rules, 2016, at Part 1 provides as follows;

1. Despite any provision in these Rules, the court shall administer justice without undue regard to procedural technicalities as contemplated under Article 159 (2) (d) of the Constitution.
2. Proceedings before the court shall not be rendered invalid merely because a party has failed to comply with any aspect of these Rules.
3. Where a party fails to comply with these Rules or the relevant practice directions, the court may, having regard to the seriousness of the non-compliance and generally to the circumstances of the case, give appropriate directions.
4. The Registrar may refuse to accept any document which does not comply with these rules or the relevant practice directions and may give appropriate directions.

It is therefore imperative that this court entertains substantive determination of issues without regard to technicalities in which in any event are denied.

The Respondents further submits that the taxation proceedings are distinct and a separate cause of action from the appeal. There is no offence to Section 6 Civil Procedure Act which provides thus;

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Explanation –The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.

The Respondent's case overwhelms that of the objector. I buy and go for her submissions that this objection borders on technicalities. It is not grounded on sound legal principles.

Further, the application is not compliant with the rule in the authority of **Mukhisa Biscuits** (supra.) It would require an analysis of evidence and facts for affirmation of the actual position of the High Court vacation as pleaded. Simply put, the preliminary objection is not based on a pure point of law.

I am therefore inclined to dismiss the preliminary objection with orders that each party bears their costs of the application.

DATED AND DELIVERED AT NYERI THIS 19TH DAY OF JULY, 2021.

D.K.Njagi Marete

JUDGE

Appearances

- 1. Mr. Samuel Opiyo for the Claimant Union /Objector.**
- 2. Miss Mutungi instructed by Mutungi Kithinji & Company Advocates for the Respondent.**