



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MALINDI**

**CAUSE NO E 9 OF 2021**

**KENYA HOTELS AND ALLIED WORKERS UNION.....CLAIMANT**

**VERSUS**

**ARMO AQUARIUS LTD T/A LILY PALM RESORT.....RESPONDENT**

**RULING**

1. This is a claim by the Claimant on behalf of the twenty two (22) Grievants listed in the Memorandum of Claim. The Claimant asserts that the twenty two (22) individuals are its members, having joined it on 16<sup>th</sup> November 2020.

2. From the Memorandum of Claim, it is the Claimant's assertion that the Grievants were employees of the Respondent having been engaged on diverse dates. That they were unfairly terminated on 30<sup>th</sup> February 2020 on account of a purported redundancy.

3. The Respondent's Advocates have filed a Notice of Preliminary Objection to the claim. The basis of the objection is as follows:-

**a. From the pleadings as filed, the Grievants were not employees of the Respondent as at 16<sup>th</sup> November 2020 when they purported to join the Claimant Trade Union. Therefore, the Claimant Union had no competence to institute these proceedings on their behalf for purposes of pursuing a claim against the Respondent for an alleged redundancy that occurred on 30<sup>th</sup> February 2020.**

**b. That there is no agreement between the Grievants, the Claimant Union and the Respondent in terms of section 9(1) (a) (b), (2) and (3) of the Employment Act.**

**c. That the Grievants joined the Claimant Trade Union prior to getting clearance from their previous Union, the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA).**

4. On 27<sup>th</sup> October 2021 when the cause came up for pre- trial directions, the Respondent's Advocates asked that the preliminary objection be given priority. Accordingly, directions issued to the effect that the objection shall be heard first and that it will be canvassed through written submissions. The Respondent filed its submissions in line with the court's directions. However, and despite adjournment to allow the Claimant's counsel to file submissions, he did not. I will therefore proceed to write the ruling based on the submissions by the Respondent and the other documents on record.

5. A preliminary objection has been described as an objection that is premised on a legal point. It can only be pleaded on the assumption that the parties agree on the facts as pleaded. The net effect of this position is that preliminary objections are not a suitable device in cases where facts are contested or are to be ascertained by evidence.

6. The foregoing has been emphasized in several court pronouncements. In *Aviation & Allied Workers Union Kenya v. Kenya Airways Ltd & 3 Others, Application No. 50 of 2014, [2015] eKLR*, the court observed as follows: -

**“Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”**

7. In *Jamii Bora Kenya Limited v Esther Wairimu Mbugua & another [2019] eKLR*, the court, quoting previous decisions on the subject, said this of preliminary objections: -

**“A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence....”**

8. And in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR (IEBC case)*, the court said this of a preliminary objection: -

**“It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”**

9. The court in the IEBC case went further to frame two questions that the court must always grapple with when determining whether what has been raised meets the threshold of a preliminary objection. These are: -

**a. What pure point of law is raised in the preliminary objection?**

**b. Are the facts in issue settled?**

10. The point here is to ensure that parties only take up what are in actual fact pure preliminary points of law. I will examine the preliminary objection now raised against these general guidelines.

11. In respect of the first ground, it is true that the Claimant asserts that the Grievants joined it on 16<sup>th</sup> November 2020. Paragraph three (3) of the Memorandum of Claim which makes this assertion also refers the court to annexure AA3 attached to the Memorandum. Annexure AA3 is, inter alia, a series of cards showing that the Grievants are members of the Claimant. The cards display the membership numbers of the Grievants and the date they were registered as members of the Claimant.

12. I note that from the cards, all the Grievants are said to have become members of the Claimant between the years 2014 and 2019. This is obviously in contradiction with the assertion by the Claimant that the Grievants joined it in November 2020.

13. This action is by the Claimant on behalf of the several Grievants. Only three (3) of the Grievants have sworn affidavits verifying the correctness of the Memorandum of Claim. The rest have not.

14. I also note that the Memorandum of Claim asserts that the Grievants were terminated on 30<sup>th</sup> February 2020. The court takes judicial notice of the fact that the month of February never has days in excess of twenty nine (29). The court therefore considers that there could be errors in the Memorandum of Claim and it would be unsafe to proceed on the Memorandum as it currently is to uphold the preliminary objection. These are issues which may require clarification through trial.

15. In any event, the facts in the cause are neither agreed nor settled. For instance, there is disagreement whether Lily Palm Resort is the same thing as Armo Aquarius Ltd T/A Lily Palm Resort. There is disagreement on whether there was a valid redundancy declared against the Grievants. There is disagreement whether there was in fact a contract of employment between the Grievants and the Respondent. Where there is no agreement on the primary facts in a dispute such as is the case in this cause, I think that it is not appropriate to close out a party on account of a preliminary objection.

16. In respect of the 2<sup>nd</sup> ground of the preliminary objection, it appears that the Respondent takes the view that section 9 of the Employment Act obligates a Trade Union to have written engagement agreements with its members. I think that this is a misapprehension of the law. This section applies to employers and employees. It requires every employer to whom the section applies to prepare a record of employment contracts with his/her employees. The section cannot be construed as imposing a similar obligation between a Trade Union and its members.

17. On whether the Grievants had been cleared with KUDHEIHA before they joined the Claimant Trade Union, this is not an issue of law but fact. Such can only be ascertained through production of evidence. It is not a suitable matter for a preliminary objection.

18. I therefore decline to allow the preliminary objection. The parties may list the cause for disposal in the usual manner.

**DATED, SIGNED AND DELIVERED ON THE 20<sup>TH</sup> DAY OF DECEMBER, 2021**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

No appearance for the Claimant

No appearance for the Respondent

**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 15<sup>th</sup> April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**B. O. M. MANANI**

**JUDGE**