



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 747 OF 2018**

*(Before Hon. Lady Justice Maureen Onyango)*

JOHN BIIY.....1<sup>ST</sup> CLAIMANT  
SIMON K. KIBII.....2<sup>ND</sup> CLAIMANT  
ROBERT KIBET.....3<sup>RD</sup> CLAIMANT  
ALICE N. YAHUMA.....4<sup>TH</sup> CLAIMANT  
LYDIA C. TANUL.....5<sup>TH</sup> CLAIMANT  
SHEILAH JEMUTAI.....6<sup>TH</sup> CLAIMANT  
CAROLINE JERUTICH.....7<sup>TH</sup> CLAIMANT  
SOLOMON K. KATUIT.....8<sup>TH</sup> CLAIMANT  
PETER K. MUTAI.....9<sup>TH</sup> CLAIMANT

**VERSUS**

SETH PANYAKO.....1<sup>ST</sup> RESPONDENT  
AGNES MUNDERU.....2<sup>ND</sup> RESPONDENT  
KENYA NATIONAL UNION OF NURSES.....3<sup>RD</sup> RESPONDENT  
REGISTRAR OF TRADE UNIONS.....4<sup>TH</sup> RESPONDENT

**AND**

HENRY ADOLWA.....1<sup>ST</sup> INTERESTED PARTY  
PURITY MATU.....2<sup>ND</sup> INTERESTED PARTY  
CHARLES ALSORENG.....3<sup>RD</sup> INTERESTED PARTY

**RULING**

Before me for determination is a notice of preliminary objection dated 4<sup>th</sup> July 2018. It is filed by the 3<sup>rd</sup> respondent. The grounds of objection are as follows –

1. That, the Application and the entire suit is bad in law, incurably defective and an abuse of court process.
2. That, the Application offends the mandatory provisions of the employment and Labour Relations Court (Procedure) Rules, 2016 Rule No. 17(2) as the 3<sup>rd</sup> Respondent was not notified of the motion filed in court.
3. That, the Application and the entire suit is subjudice in Cause No. 12/2017, 1069/2017, 50/2018, 387/2018, and JR 32/2017 at the
4. Employment and Labour Relations Court Nairobi, whereby the issues raised and prayers sought are substantially similar hence an abuse of court process.
5. That, the Claimant is guilty of material non disclosure as certain material facts relevant to these proceedings have not been disclosed.
6. That, the Claimant lacks locus standi, capacity to bring the suit herein as the National Chairman of the 3<sup>rd</sup> Respondent as the position of the national chairman of the 3<sup>rd</sup> Respondent is vacant.
7. That, the Application and the suit are incurably defective as the affidavit supporting the Application and the affidavit verifying the claim are sworn by a stranger and the suit is not brought under Article 22 of the Constitution of Kenya 2010.
8. That, the suit is frivolous, vexatious, scandalous hence an abuse of court process and should be dismissed with costs.

The parties disposed of the preliminary objection by way of written submissions.

The 1<sup>st</sup> and 3<sup>rd</sup> respondents submitted that the main issue in the notice of preliminary objection is lack of locus standi to file the claim. They refer to their appendix JKB-1 which it is submitted is proof that the 1<sup>st</sup> claimant was the National Chairman of the 3<sup>rd</sup> respondent as at 8<sup>th</sup> June 2017 but was not the national Chairman on 10<sup>th</sup> November 2017 having vacated office. The 1<sup>st</sup> and 3<sup>rd</sup> respondent's further submit that in **Cause No. Nakuru ELRC 369 of 2015, Kenya National Union of Nurses –V- Chief Officer, Public Service Management (Miriam Kosgei) County Government of Uasin Gishu and 3 Others** at page 42 the court made a determination that the 1<sup>st</sup> claimant had been validly terminated from his employment as a nurse.

It is further submitted by the 1<sup>st</sup> and 3<sup>rd</sup> respondents that the IPPD – Pay Roll by-product at pages 3 – 26 of the respondent's bundle shows that only the 5<sup>th</sup> claimant had been remitting union dues as at January 2019.

The 1<sup>st</sup> and 3<sup>rd</sup> respondents submit that under Section 41 and 47 of the Labour Relations Act, the claimants have no *locus standi* to file the present claim.

For the claimants it is submitted that what the 3<sup>rd</sup> respondent has filed does not qualify to be a preliminary objection as it has not filed any pleadings and the claim is undefended, relying on the definition of a preliminary objection by Sir Charles New Bold in the celebrated case of **Mukisa Biscuit Manufacturing Company Limited -V- West End Distributors Limited**. It is further submitted for the claimants that the 3<sup>rd</sup> respondent is using the preliminary objection as a sword rather than a shield. They rely on the decision of the Supreme Court in Supreme Court Civil Application No. 36 of 2014 in the case of **Independent Electoral and Boundaries Commission -V- Jane Cheparenger and 2 Others (2015) eKLR**.

It is submitted for the claimants that the issue of subjudice is a matter of proof with facts and so does not qualify for as a preliminary objection relying on **Nakuru Civil Case No. 489 of 2013, Samuel Waweru -V- Geoffrey Muhoro Wangi**.

The claimants further submit that the issue of *locus standi* has been expanded with Article 22(1) and (4) of the Constitution to the extent that very person has the right to institute court proceedings claiming that a right or fundamental principle in the Bill of Rights has been denied, violated or infringed or is threatened and that under clause (3) the absence of rules does not limit the rights of any person to commence court proceedings.

The 2<sup>nd</sup> and 4<sup>th</sup> respondent and all the Interested Parties did not file any submissions in respect of the preliminary objection.

### **Determination**

A preliminary objection side fined in Blacks Law Dictionary Tenth Edition as an objection that, if upheld, would render further proceedings impossible or unnecessary, such as an objection to jurisdiction.

In **Mukisa Biscuit Manufacturing Company Limited –V- West End Distributors Limited** (supra) the court defined preliminary objection as follows –

“... a preliminary objection consists of a 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.”

Sir Charles Newbold further defined the term thus –

*“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 Supreme Court addressed the issue of preliminary objection in **Supreme Court Civil Application No. 36 Of 2014, Independent Electoral & Boundaries Commission –V- Jane Cheperenger & 2 Others [2015] eKLR** stated as follows:-

*“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection — against profligate deployment of time and other resources. And secondly, it serves the public cause of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”*

In the case of **Nakuru Civil Case No. 489 of 2013, Samuel Waweru Versus Geoffrey Muhoro Wangi** where a preliminary objection of a similar nature to the instant Preliminary Objection was raised, the Court stated as follows:-

*“This court must now consider whether the issues raised in this Preliminary Objection are matters of fact or law. I have perused the reasons by the applicant in his Preliminary Objection. I have not seen a single point of law that has been raised. What has been raised are purely matters of fact which the defendant's counsel ought to have a chance to respond to. I hold the view that by filing such an objection, the plaintiff has denied the defendant the opportunity to respond factually to the Preliminary Objection. As a matter of Law, a party upon whom a Preliminary Objection is served, does not have a right to respond factually and can only place before the court the law applicable. What the plaintiff should have done was to raise matters in relation to conflict by filing a formal application.”*

The authorities referred to above clearly demonstrate the nature of and circumstances under which a preliminary objection may be raised. As preliminary objection is, as demonstrated in the authorities, a matter of pure law arising from pleadings, on based on the assumption that the pleaded facts are not contested and one that does not require proof outside the fact pleaded.

Applying these principles to the 3<sup>rd</sup> respondent's preliminary objection herein I agree with the claimants that all the grounds in the preliminary objection would fail the test as all the grounds would require proof by way of evidence. This is confirmed by the fact that the claimant ha attached and/or referred to documents outside the pleadings on record to justify the said grounds of preliminary objection. Further, the respondents and Interested Parties having not responded to the claim, the 1<sup>st</sup> and 3<sup>rd</sup> respondent cannot use the preliminary objection as a sword. The grounds in the preliminary objection are not limited to the pleadings filed by the claimants.

For the foregoing reasons the preliminary objection fails and I accordingly dismiss the same.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21<sup>ST</sup> DAY OF JUNE 2019**

**MAUREEN ONYANGO**

**JUDGE**