



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 1592 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

JOHN K. BIY.....1ST CLAIMANT
SIMON K. KIBII.....2ND CLAIMANT
ALICE N. YAHUMA.....3RD CLAIMANT
LYDIA C. TANUL.....4TH CLAIMANT
AMOS C. NGETICH.....5TH CLAIMANT

VERSUS

JOSEPH NGWASI.....1ST RESPONDENT
FREDRICK OIGO.....2ND RESPONDENT
SETH PANYAKO.....3RD RESPONDENT
MAURICE OPETU.....4TH RESPONDENT
ASHA ALI IDO.....5TH RESPONDENT
AGNES MUNDERU.....6TH RESPONDENT
GEORGE SHIVEKA.....7TH RESPONDENT
ANN GITHIONGO.....8TH RESPONDENT
DAMON KWARAA.....9TH RESPONDENT
HENRY ADOLWA.....10TH RESPONDENT
PURITY MATU.....11TH RESPONDENT
CHARLES ALISORENG.....12TH RESPONDENT
JOHN GACHARA.....13TH RESPONDENT
STEPHEN RUTEERE.....14TH RESPONDENT

KENYA NATIONAL UNION OF NURSES.....15TH RESPONDENT

REGISTRAR OF TRADE UNIONS.....16TH RESPONDENT

RULING

On 7th December 2018, the Claimants filed a Notice of Motion application seeking a litany of orders among them to stop the 1st to 15th Respondents from proceeding with the countrywide illegal nurses' strike as per the notice they had issued, orders restraining the 1st to 14th Respondents from entering the union office to discharge their duties, to have one Edith Muruli registered as acting secretary of the 15th Respondent and the office handed over to her. They also sought orders to have the union offices secured and that they be granted access to the office, that the 3rd, 6th, 10th, 11th and 12th Respondents be barred from operating the union's bank accounts at Barclays and Co-operative Bank and that the 16th Respondent be directed to supervise the elections of the 15th Respondent.

They simultaneously filed a claim in which they sought to have the offices of the 1st to 14th Respondent declared vacant and a declaration that the strike is illegal and void, in addition to the prayers in the application.

The 15th Respondent opposed the claim and application. Vide a Notice of Preliminary Objection they sought orders to strike out the claim on the grounds that the court did not have jurisdiction to hear the application as the same was *res judicata* and that it was an abuse of the court process as some of the issues raised were *sub judice* in existing suits. Further, that the application was frivolous, malicious and incurably defective and that the Claimants misled the court by concealing material facts.

The preliminary objection was canvassed by way of written submissions. Only the Claimants filed written submissions. They submit that the preliminary objection is incurably defective, bad in law, frivolous, vexatious and an abuse of the court process as it does not fall within the confines set out in the case of **Mukisa Biscuit Manufacturing Company Limited vs. West End Distributors Limited [1969] EA 696**. The Claimants also submit that the 15th Respondent's preliminary objection does not raise pure points of law as he has not provided evidence of the cases filed prior to this suit. They rely on the case of **Samuel Waweru vs. Geoffrey Muhoro Wangi [2014] eKLR**.

The Claimants further submit that the issue raised by the 15th Respondent touching on the main claim are an afterthought and ought to have been raised at the earliest opportunity possible and not more than a year later hence it is overtaken by events. They submit that the objection based on section 30 of the Labour Relations Act is misconceived and premature and ought to be dismissed as there is no basis for an appeal since there has been no decision by the Registrar. It is their submission that this Court has jurisdiction to hear this matter pursuant to Article 162 (2) (a) of the Constitution and section 12 of the Employment and Labour Relations Court Act.

Analysis and Determination

The issues for determination are whether this Court has jurisdiction in the matter and whether the preliminary objection has merit.

Jurisdiction

This Court has jurisdiction as donated to it by Article 162 (2) (a) of the Constitution, to hear disputes relating to employment and labour relations. Further, Section 12(1)(g) and (i) grants this Court exclusive original and appellate jurisdiction to hear and determine disputes between a trade union and a member thereof and disputes concerning the registration and election of trade union officials.

It is trite law that a court will not hear a matter that is *res judicata* or *sub judice*. The 15th Respondent has not however adduced any evidence to prove that there are matters that have been determined or are pending in Court on the issues raised before this Court. As such, this Court has jurisdiction to hear the Claim as well as the Application.

Preliminary Objection

Blacks' Law Dictionary Tenth Edition defines a preliminary objection as that which if upheld, would render further proceedings impossible or unnecessary. It was further defined in the case of **Mukisa Biscuit Manufacturing Company Limited –V- West End Distributors Limited [SUPRA]** 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 ... 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 issue was discussed in the case of **Samuel Waweru -V- Geoffrey Muhoro Wangi [SUPRA]** where 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.”

From the foregoing, it is clear that a preliminary objection is raised as a matter of pure law arising from pleadings on the assumption that the pleaded facts are not contested and one that does not require proof outside the facts as pleaded.

Applying these principles to the 15th Respondent’s preliminary objection, the same fails the test as ground 2, 3 and 5 would require proof by way of evidence. Further, all the Respondents save for the 16th Respondent, having not responded to the claim, the 15th Respondent cannot use the preliminary objection as a sword. In *Supreme Court Civil Application No. 36 of 2014* between *Independent Electoral & Boundaries Commission -V- Jane Cheperenger & 2 Others [2015] eKLR* the Court observed that it was distinctly improper for a party to resort to a preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially and on the merits.

The 15th Respondent’s preliminary objection therefore lacks merit and is accordingly dismissed.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF JULY 2019

MAUREEN ONYANGO

JUDGE