



# REPUBLIC OF KENYA

## IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 35 OF 2018

SALOME MAINA.....CLAIMANT

VERSUS

CHIEF OFFICER DEPT. OF EDUCATION,

LAIKIPIA COUNTY GOVERNMENT.....RESPONDENT

### RULING

1. The Respondent objects to the suit by the Claimant on the grounds that the Claimant is non-suited against the Respondent as there is no privity of contract between her and the Respondent neither is the Respondent capable of being sued. The Respondent asserts that there is no substantive prayer in the application capable of being granted; there is no recognition agreement between the Respondent and the Kenya Union of Pre-Primary Education Teachers and that the pleadings filed herein are incompetent, bad in law and an abuse of court process; that the Respondent cannot be bound by the court orders issued on 3<sup>rd</sup> June 2016 in Nyeri ELRC Cause No. 121 of 2016 as the Respondent was not a party in the said proceedings.

2. The Claimant did not file any affidavit in opposition but Mr. Opiyo appeared for the Claimant on 14<sup>th</sup> March 2013 when the preliminary objection was argued. He submitted that the Respondent's preliminary objection should have raised points of law and not citing the recognition agreement which is stated to be a prerequisite for representation. He stated that the preliminary objection is an affront to the law and Constitution as the matter is a fair administrative action and that it is defined in the Fair Administrative Action Act. He called into aid the provisions of Section 4(2) and 4(3) of the Act. He submitted that under Article 47 of the Constitution gives the right to fair administrative action and referred to the letter of 12<sup>th</sup> July 2016 where the Union sought reasons for the action taken by the administrator and that there was no response. He submitted that the preliminary objection had not challenged the jurisdiction of the court to hear the matter as this was a labour matter proper. He stated that the Respondent is the officer in charge of education and that the Respondent was properly sued. He submitted that the Respondent did not deny that the Claimant is an ECD teacher and that the early childhood education is a devolved unit per the Fourth Schedule of the Constitution. He submitted that the statement made by the Respondent that the county government is not the one responsible but the school board was fatally defective. He stated that the Respondent had suggested through the preliminary objection that the employer was the Board of Management (BOM) and not the county and reiterated that the Union had through the letter explained the employer is the county government. He submitted that in cause 216 of 2016, the same county government had told the court that they were responsible for paying these teachers as they got funds from the exchequer. He submitted that it defied logic that they would pay each month in contravention of the law as the public expenditure was authenticated by the county government. He stated that the payment was not at the will or benevolence of the county officials. He rested his case by saying that the preliminary objection is defective as it did not raise a fair administrative action.

3. In a brief reply, Mr. Ndegwa for the Respondent submitted that where the law does not safeguard a right to unionise, such unionisation must be recognised to enable such a union to represent employees. He stated that there had been mention of the Basic Education Act and urged the court to note that the Claimant is a specific employee of the Board of Management and not the Respondent. That marked the end of oral arguments and I deferred the Ruling to today.

4. The law on preliminary objection is well settled. The oft cited case is the case of **Mukisa Biscuits Ltd v West End Distributors Ltd (1969) EA 696**. In that case, **Law JA and Newbold P.** held as follows:-

*"So far as I am aware, a preliminary objection consists of a point of Law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to 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."*

**Sir Newbold P.** stated in the same decision as follows:-

*"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. The improper raising of points by way of preliminary objection does nothing but unnecessary increase costs and, on occasion, confuse the issues. This improper practice should stop."*

5. This has stood the test of time and was cited in the case of **Jotham Mulati Welamondi v The Chairman Electoral Commission of Kenya [2002] eKLR** where the eloquent Ringera J. (as he then was) had this to say:

*I am also of the opinion that the only objections which could not be so taken are those predicated on disputed facts or which called upon the court to exercise its discretion. In the latter regard I would invoke the authority of **Mukisa Biscuits Ltd v West End Distributors Ltd (1969) E.A 696** on the scope and meaning of preliminary objections.*

6. His reasoning resonates with this case. The Respondent has not filed any pleadings and has instead filed a preliminary objection which seeks to upset the cart by asserting that the Claimant was not employed by the Respondent and that the Claimant is thus non-suited to seek remedies against the Respondent. The Claimant counters this by saying that her suit is seeking fair administrative action. In a nutshell, the issues in contention require the calling of evidence whether documentary or *viva voce* to prove or disprove the facets of employment being asserted by either side. The Respondent therefore jumped the gun as there are no legal issues that emerge from the pleadings to base the preliminary objection upon. As was stated by Law JA and Sir Newbold and Ringera J. (as he then was) the preliminary objection should be a pure point of law. It should not be raised where there is no clarity as to the point. In this case, the Respondent's preliminary objection does not meet the threshold of preliminary objection as the issues cannot be determined *in limine*. The Claimant filed suit in her name and not as a grievant suing through a union. She is not a putative claimant but the substantive claimant. I find the preliminary objection devoid of merit and thus dismiss it with costs to the Claimant.

It is so ordered.

**Dated and delivered at Nyeri this 6<sup>th</sup> day of April 2018**

**Nzioki wa Makau**

**JUDGE**