



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 12 OF 2017**

**(Before Hon. Justice Hellen S. Wasilwa on 1<sup>st</sup> October, 2018)**

**JOHN BIIY.....CLAIMANT**

**-VERSUS-**

**SETH PANYAKO.....1<sup>ST</sup> RESPONDENT**

**REGISTRAR OF TRADE UNIONS.....2<sup>ND</sup> RESPONDENT**

**KENYA NATIONAL UNION OF NURSES.....3<sup>RD</sup> RESPONDENT**

**AND**

**LOCAL AUTHORITIES PROVIDENT**

**FUND (LAPFUND).....1<sup>ST</sup> INTERESTED PARTY**

**LAPTRUST (UMBRELLAS) RETIREMENT FUND**

**BOARD OF TRUSTEES.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. The Application before Court is a Preliminary Objection dated 13<sup>th</sup> December 2017 brought under the Employment and Labour Relations Court (Procedure) Rules 2016 Rule No. 14(5) and is premised on grounds:

- 1. That the suit offends the mandatory provisions of the Labour Relations Act 2007 Section 41(1).**
- 2. That the suit and Application dated 14<sup>th</sup> December 2017 offends the mandatory provisions of the Labour Relations Act 2007 Section 30 and the Industrial Court Act 2011 Section 18(a).**
- 3. That the application and the suit are subjudice as there are many suits as there exist JR No.32 of 2017 and Cause No. 1069 of 2017 raising similar issues.**
- 4. That the application and the suit is frivolous, malicious and an abuse of Court process and should be dismissed with costs.**

2. The Claimant filed his Replying Affidavit to the 1<sup>st</sup> Respondent's Notice of Preliminary Objection where he states that the suit was filed under the provisions of Section 47 of the Labour Relations Act and not Section 41(1) which the Respondent has invoked.

3. He also submitted that ground (a) is resjudicature as the same has already been determined in this Court in the ruling dated 6<sup>th</sup> April 2017 and therefore the Notice of Preliminary Objection is incurably defective, bad in law, incompetent, frivolous, vexatious and an abuse of the Court process. That it is also a pure point of law which, must be contained in the pleadings already filed.

4. He avers that ground (b) of the Preliminary Objection has no legal basis as the Application is filed on the basis of illegality committed by

both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in removing him from his position as Chairman of the Union while there were Court orders in force which orders have never been set aside up to date.

5. He also states that the Preliminary Objection by the 1<sup>st</sup> Respondent raises issues touching on the main claim and is an afterthought and an issue that ought to have been raised at the earliest opportunity and not this time when this case has been in Court for more than one year and several Applications have been heard and determined and orders issued. The same is therefore overtaken by events and cannot be raised at this point.

### **Submissions**

6. 2<sup>nd</sup> Interested Party filed their submissions where they submit that the Preliminary Objection is misconceived as it does not consist of a pure point of law the determination of which can dispose of the suit, argued on the assumption that the facts as asserted by the adversary are correct. They therefore invite the Honourable Court to hold that the 1<sup>st</sup> Respondent's contention that the instant proceedings are sub-judice would constrain the Court to delve into facts and scrutinize the pleadings of the alleged co-existent suits.

7. They aver that the Preliminary Objection is based on repealed provisions of the law, the Industrial Court Act whose provisions the 1<sup>st</sup> Respondent has invoked in support of the Preliminary Objection has since been repealed by the Employment and Labour Relations Court Act. They therefore urge the this Honourable Court to dismiss the Preliminary Objection with costs.

8. The Claimant filed his submissions where he submits that the entire Notice of Preliminary Objection filed by the 1<sup>st</sup> Respondent in this matter does not qualify as a Preliminary Objection as it was only intended as a sword to win this case which would be resolved judicially and on merit. They relied on the case of **Independent Electoral & Boundaries Commission Vs Jane Cheperenger & 2 others [2015] EKLR.**

9. They aver that the issue of sub-judice is an issue of fact which impedes the existence of two suits, one which is current and another which was filed prior but in existence whose parties are similar and the issues raised are similar and that the issues raised in the later suit must be proved to be issues in the previously filed suit which is pending, to conclusively determine whether the matter is sub judice or not. Evidence through an affidavit must be presented annexing the pleadings of the two suits and a hearing concluded formally and not by way of Preliminary Objection therefore it must fail on the ground that the same does not qualify as a Preliminary Objection on a pure point of law as the same will require facts as it ought to have raised a point in law that has been pleaded. They relied on the case of **Samuel Waweru Vs Geoffrey Muhoro Wangi.**

10. They further aver that the Preliminary Objection by the 1<sup>st</sup> Respondent on the issues touching on the main claim is an afterthought and is an issue that ought to have been raised at the earliest opportunity and not this time when this case has been in Court for more than 1 year and several applications have been heard and determined and orders issued.

11. They further state that the same is therefore overtaken by events and cannot be raised at this point. They relied on the case of **Bia Tosha Distributors Limited Vs Kenya Breweries Limited & 5 others.** They therefore submit that the Preliminary Objection is defective, incompetent, lacks merit and is an abuse of the Court process as the issues raised are issues of facts which require proof by way of evidence and urge the Court to dismiss the 1<sup>st</sup> Respondent's Preliminary Objection with costs.

12. The 1<sup>st</sup> Respondent filed their supplementary submissions on 12.7.2013. They reiterate what was in their original submissions. They aver that the claim does not meet the threshold of law as stipulated in the Labour Relations Act Section 41 hence is null and void.

13. Section 41 of the Labour Relations Act 2007 deals with instances when the Honourable Court may grant injunctions restraining unauthorized and unlawful expenditure of trade union funds.

14. In this Court's view, the issue of determining whether funds of a trade union are being misused or not are factual issues. Evidence will need to be led to prove whether this exists or not. The case of **Mukisa Biscuit Manufacturing Company Limited vs West End Distributors Limited (1969) EA 696** is clear that a Preliminary Objection raises pure points of law. The defence of a Preliminary Objection was stated by Sir Charles Newbold in this case 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 pleadings, and which if argued as a preliminary pint may dispose of the suit”.**

15. The issue raised herein by the Applicant herein however, falls beyond pure points of law and this does not fall under what I would refer to as a Preliminary Objection.

16. On issue of the claim being subjudice, the Applicant has submitted that there exists JR No. 32 of 2017 and Cause No. 1069 of 2017 raising similar issues.

17. In the current case, I note that the Claimant came before this Court on 9.1.2017 under Certificate of Urgency seeking certain urgent orders. He also filed a Memorandum of Claim on the same day which was Amended as per the Amended Claimant dated 27.1.2017. He sought the following orders:-

**1. A declaration that the 1<sup>st</sup> Respondent's acts of abuse of office is in violation of the Constitution of the 3<sup>rd</sup> Respondent, the County Government's Act and the Constitution of Kenya.**

2. A declaration that the 1<sup>st</sup> Respondent is unfit to hold the office of the General Secretary and the 1<sup>st</sup> Respondent be removed from office and the position of the General Secretary be declared vacant.

3. The 2<sup>nd</sup> Respondent be ordered to summon the National Governing Council of the 3<sup>rd</sup> Respondent to fill the vacant position of the General Secretary.

4. A declaration that the MOU entered into between the 1<sup>st</sup> Respondent and the Chief Executive Officer of Local Authorities Provident Fund on 5/12/2016 is illegal ab initio, unlawful, unconstitutional, null and void.

5. A Preliminary Injunction to restrain the 1<sup>st</sup> Respondent and or his agents or servants from entering and or trespassing into or in any manner whatsoever interfering with the operations of the 3<sup>rd</sup> Respondent.

6. The 1<sup>st</sup> Respondent be ordered to surrender the official vehicles of the 3<sup>rd</sup> Respondent namely: Toyota Prado Registration No. KCC 757R, Toyota Noah as well as a Laptop, an iPad, the office Smartphone with phone number 0711337321 and the same be handed over to the 3<sup>rd</sup> Respondent.

18. In JR No. 32 of 2017, dated 3/1/2018, the Applicant sought the following orders:-

1. THAT, the Honourable Court be pleased to certify this application as urgent and order that the same be heard ex-parte in the first instance.

2. THAT, the Applicant herein be granted leave to apply for Judicial Review Orders of Certiorari, Mandamus and Prohibition against the Respondents in terms of the followings:-

a. AN ORDER OF CERTIORARI do issue to bring to this Court and quash the decision of the 2<sup>nd</sup> Respondent dated 10<sup>th</sup> November, 2017 declaring a vacancy for the post of National Chairman of the 3<sup>rd</sup> Respondent.

b. AN ORDER OF PROHIBITION do issue to prohibit the Respondents, by themselves and or their agents and or servants and or representatives from holding and or conducting by-elections to fill the vacant position of the National Chairman of the 3<sup>rd</sup> Respondent on the basis of the illegal declaration of vacancy issued on 10<sup>th</sup> November 2017 by the 2<sup>nd</sup> Respondent.

c. AN ORDER OF MANDAMUS to compel the 2<sup>nd</sup> Respondent to reinstate Applicant as the National Chairman of the 3<sup>rd</sup> Respondent into the Register of officials of the 3<sup>rd</sup> Respondent as declared by the 2<sup>nd</sup> Respondent on 10<sup>th</sup> November 2017.

d. The grant of leave to apply for Orders of Prohibition and Certiorari do operate as a stay of the Respondent's decision to hold and conduct a by-election to fill the vacant position of National Chairman of the Respondent as declared by the 2<sup>nd</sup> Respondent on 10<sup>th</sup> November 2017.

3. The costs of this application be borne by the Respondents.

19. In Cause No. 1069 of 2017, the Claimant had sought the following orders:-

a. A declaration that the current ongoing strike in some of the Counties declared by the 1<sup>st</sup> Respondent on 5<sup>th</sup> June, 2017 is illegal, null and void.

b. An order that the 1<sup>st</sup> to 6<sup>th</sup> Respondents to immediately call of the strike declared on 5<sup>th</sup> June, 2017.

c. An order of permanent injunction to restrain the 1<sup>st</sup> to 6<sup>th</sup> Respondent and or their agents or servants from interfering with the smooth running of the Health Care Services in the country through declaration of illegal strikes.

d. An order that the ongoing Nurses Collective Bargaining Agreement Negotiations between the 6<sup>th</sup> Respondent and the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties be allowed to run smoothly uninterrupted until it is signed and registered.

e. An order that the Claimant be included in the Negotiating Team of the CBA between the 6<sup>th</sup> Respondent and 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties.

f. An order of permanent injunction to restrain the 1<sup>st</sup> to 6<sup>th</sup> Respondents and or their agents and or servants from inciting the members of the 6<sup>th</sup> Respondent against the Claimant through the media including social media.

g. An order of permanent injunction to restrain the 6<sup>th</sup> Respondent from victimizing the Claimant on account of this cause.

h. An order of permanent injunction to restraint he interested parties from taking any disciplinary action against the

**members of the 6<sup>th</sup> Respondent on account of the strike declared on 5<sup>th</sup> June 2017.**

**i. Any other relief which the Court may deem fit and just to grant.**

**j. The costs of the claim be awarded to the Claimant as against the Respondents.**

20. From the above analysis, it is evident that the orders sought in Cause No. 12/17 were in relation to the operations of the 1<sup>st</sup> Respondent herein in relation to his acts as National General Secretary of the 3<sup>rd</sup> Respondent herein. The orders sought are the removal of the 1<sup>st</sup> Respondent and cancellation of the MOU between 1<sup>st</sup> Respondent and Chief Executive Officer of Local Authorities Provident Fund. This case is still pending in Court.

21. JR 32/2017 seeks orders to quash a decision made declaring a vacancy in the post of National Chairman of 3<sup>rd</sup> Respondent. Other orders relate to conducting of elections in office of National Chairman of 3<sup>rd</sup> Respondent. These orders are definitely not similar to the orders sought in Cause No. 12/2017. The orders in 1069/2017 are on the other hand in relation to strike which this Court declared illegal and this is overtaken by events.

22. In the circumstances, the assertion that this cause is sub-judice is not true. I find the Preliminary Objection filed herein lacks merit. I dismiss the same accordingly and direct that the main claim proceeds for hearing to conclusion.

**Dated and delivered in open Court this 1<sup>st</sup> day of October, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Seth Panyako in person – Present

Odhiambo for 2<sup>nd</sup> Interested Party – Present

Orenga holding brief for Odera for 1<sup>st</sup> Interested Party – Present

Mageto for Claimant – Present

Weru holding brief for Odukenya for Registrar of Trade Unions – Present