



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT NAIROBI
CAUSE NO. 35 OF 2014
(Before D.K.N. Marete)

NATIONAL SOCIAL SECURITY FUND.....CLAIMANT

Versus

KENYA UNION OF COMMERCIAL, FOOD & ALLIED WORKERS....RESPONDENT

RULING

The matter for determination is the veracity of a preliminary objection by the respondent dated 27th January, 2014. It is framed as follows;

- i. That the Application is not in good faith.*
- ii. That is not true that the Respondent absconded negotiations as purported or alleged by the Claimant/Applicant.*
- iii. THAT the Honourable Court was misled to believe that **the intended strike action was unprotected and on course when infact it was protected and by mutual consent/agreement had been put on hold.***
- iv. THAT the Application was meant to portray the Respondent in bad faith.*
- v. **THAT** the Respondent, during the hearing of this Preliminary Objection herein, shall demonstrate to the Honourable Court that this Application was lodged in bad faith.*
- vi. The Respondent's relies on Replying Affidavit and annexures thereof.*
- vii. Costs to Respondent.*

It is notable that on record is also another notice of preliminary objection dated 10th April, 2014 by the respondent.

When the matter came for hearing on 4th June, 2014, Mr. Owiyo for the respondent submitted that the application and memorandum of claim filed in this cause are not in good faith and ought to be dismissed for being an abuse of the process of court. He further submitted that the applicant/claimant does not disclose information on this matter and therefore should not be entertained.

The respondent further submitted that parties are in agreement on the Collective Bargaining Agreement

and that the claimant/applicant is not able to explain the relevance of the Salaries & Remuneration Commission on the subject. She further submits that the application dated 9th April, 2014 ought to have been an application for review and not necessarily an application for stay of court orders as prayed. He prayed that the application and claim be dismissed with costs.

Mr. Njiru, counsel holding brief for Ms. Mumia for the respondent opposed the preliminary objection grounds that this is based on facts and not points of law. He further submitted that all the issues canvassed arise out of issues of court orders and do not raise issues of law. These would call for evidence through written submissions and *viva voce* evidence.

The respondent further submits that the orders of 11th April, 2014 have been obeyed and if the respondent is dissatisfied with the same, he should appeal against them and not merely raise an objection. He prayed that the preliminary objection be dismissed for lack of merit, being bad in law and also being an abuse of the process of court.

The law on the veracity of preliminary objections is laid out in the authority of *Mukisa Biscuits* where a preliminary objection was defined as follows in a later usage by Ndolo, J. in *Stephen Nyamweya & Another vs. Riley Services Limited Industrial Court Cause No. 2469 of 2012*;

*7. The parameters of what constitutes a preliminary objection were defined in the well-known case of **Mukisa Biscuits Vs. West End Distributors Limited (1969 EALR)** in which the Court defined a preliminary objections as that which:*

“raises a pure point in 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.”

This clearly and undoubtedly sets out the law on what a preliminary objection must be based on. It is strictly an interrogation of issues of law and certainly would not entertain matters which would require evidence to determine.

The circumstances of this case and even the frame of this preliminary objection broadly or even wholly lies on issues of evidence. The submissions by the respondent are also on issues of evidence. It is no wonder that Mr. Njiru from the onset picks a quarrel with the preliminary objection and prays that the same be dismissed for lack of merit, being bad in law and also being an abuse of the process of court. I cannot agree any more.

The preliminary objection falls short of the pre-requisites of law and practice on the subject. I am therefore inclined to dismiss the same with costs to the claimant/applicant.

Delivered, dated and signed the 30th day of June, 2014.

D.K. Njagi Marete

JUDGE

Appearances:

1. Mr. Njiru instructed by the Federation of Kenya Employers for the Claimant/Applicant.
2. Mr. John Owiyo for the Union.