



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

APPEAL 3 OF 2014

1. **LABAN MOKUA**
2. **MOFFAT MUNENE**
3. **SAMSON OMECHI**
4. **DOUGLAS WESONGA**
5. **GEORGE OMONDI**
6. **PHYLLIS NYAITONDI**
7. **PATRICK MULAGHUI**
8. **JENIFFER NAITORE**
9. **MARGARET WAKIO**
10. **NELIUD LULUMA.....APPELLANTS**

VERSUS

REGISTRAR OF TRADE UNIONS.....1ST RESPONDENT

KENYA UNION OF COMMERCIAL FOOD

& ALLIED WORKERS.....2ND RESPONDENT

RULING

1. The 2nd Respondent has raised a preliminary objection against the Appeal. The appearances in the matter were as follows: Mr. Jaoko appeared for the Appellants, Miss Kassim for the 1st Respondent while Mr. Nyabena appeared for the 2nd Respondent.
2. The 2nd Respondent's preliminary objection was as follows:-
 1. That the purported Appeal is null and void
 2. That the purported Appeal is in contravention of Section 12 of the Labour Relations Act, 2007
 3. That the Appellants have not come to Court with clean hands and therefore do not deserve the exercise of the Court discretion in their favour.
3. Mr. Nyabena proposed to combine grounds 2 and 3 and argue them together. He submitted that the purported Appeal was non-complaint with the law and it was not an appeal as known in law. The provisions of Section 30 of the Labour Relations Act were cited and submission made that a memorandum of appeal must be filed within 30 days and what was filed was not an appeal but a Notice of Motion. It was submitted that Rule 8(3) is in mandatory terms and Form 1 of the Schedule was not complied with. He submitted that there is no memo of appeal and the Court has

no jurisdiction to hear a matter where its jurisdiction has not been invoked by adherence to the Rules. He submitted that one cannot not amend that which does not exist.

4. Miss Kassim for the 1st Respondent fully associated herself with the submissions made and emphasised that the Appellants have not complied with Section 20 of the Labour Relations Act and thus she sought the dismissal of the appeal with costs.
5. Mr. Jaoko for the Appellants submitted that the second limb of the argument by the 2nd Respondent on breach of Section 12 of the Labour Relations Act purely brings in an issue the Court cannot address by preliminary objection. Whether the appellants have violated the provisions of Section 12 of the Labour Relations Act or whether they have come with unclean hands cannot be determined by preliminary objection save by documentary or *vica voce* evidence to enable the Court to interrogate the facts and come to a conclusion. He submitted that a preliminary objection cannot be raised when the facts are in dispute. He relied on the case of **Mukisa Biscuits Manufacturing Co. v West End Distributors [1969] EA** at 701 where Sir Charles Newbold P agreed with Law JA and held where facts are to be ascertained a preliminary objection cannot be raised. Further to that he submitted that what was sought by the applicants was judicial discretion and that cannot be subject to preliminary objection. He submitted the issues in contention were triable issues which cannot be subject of a preliminary objection. He relied on the case of **Johnson Githaiga & 4 others v Nicosia Nderitu & 3 Others Civil Appeal 229 of 2012** (unreported) and **KNTC v Bawazir Co. (1993) HCCC 258 of 1997** (unreported). He submitted that in reliance of Rule 14(6) the Court should exercise its discretion to allow a party to amend to conform with the standard legal requirement and that Section 20 of the Industrial Court Act states that Court will not subject the pleadings to technicality. He thus urged the Court to disallow the preliminary objection and allow the Appellants to amend.
6. In his reprise the advocate for the 2nd Respondent submitted that the issue of recruitment is not a fact in dispute. He submitted that regarding compliance of Rule 8 it seemed that the Appellants had admitted that there is no appeal.
7. The law on preliminary objection is settled. The *locus classicus* being the oft-cited case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696**. In that case it was held that a preliminary objection is a point of law when if taken would dispose of the suit. Law J.A. stated a preliminary objection to be thus:- ?

“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 point 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.”

8. The passage submitted by Mr. Jaoko was from the holding by Sir Charles Newbold, President. The learned judge stated in the same judgment 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.”

9. The Court has been told it has no jurisdiction to entertain the Appeal. The leading case on jurisdiction is the celebrated case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held as follows

I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to

make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

10. The authority for this holding by Nyarangi JA is to be found in the writings of John Beecroft Saunders in a treatise which is no longer published headed **Words and Phrases Legally defined – Volume 3: I – N** page 113 and it states the following about jurisdiction:-

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

11. Clearly, if I lack jurisdiction to entertain the Appeal the matter will be at an end as I will have to down my tools and take no further step.

12. The Appellants approached the Court under Certificate of urgency on 17th April 2014. In the application seeking conservatory orders various documents were attached. At page 18 the Appellants attached a Record of Appeal while at page 16 they attached a copy of the Form at the First Schedule which is blank but signed and dated on page 17. Section 12 and 20 of the Labour Relations Act have been cited but I do not think these are applicable in terms of the preliminary objection taken. In the submissions by counsel for the 2nd Respondent this aspect of the claim relates to issues that would be best resolved by way of documentary or *viva voce* evidence.

13. The Appellants have cited the case of **Johnson Githaiga & v Nicosia Nderitu** (supra) and **KNTC v Bawazir** (supra) which are decisions that find resonance with this Court. The Courts in the two cases were dealing with issues that were triable and thus could not fit in the confines of a preliminary objection. The pronouncements were sound and ought to be followed. In this case we have something deeper and more profound. One aspect of the case would require delving into facts but as pointed out earlier that does not fit within the purview of the preliminary objection.

14. Section 18 of the Industrial Court Act 2011 specifies that an appeal lies to this Court against the decisions of the Registrar of Trade Unions. Rule 8 of the Industrial Court (Procedure) Rules 2010 provides as follows:-

8. (1) Where any written law provides for an appeal to the Court, an aggrieved person shall file a memorandum of appeal with the Court within the time specified for that appeal under the written law.

(2) Where no period of appeal is specified in the written law, an appeal shall be filed within thirty days from the date the decision that is the subject of appeal was delivered.

(3) A memorandum of appeal shall be in Form 1 set out in the First Schedule.

(4) A memorandum of appeal shall be accompanied by copies of all documentary evidence that an appellant wishes to rely on in the Appeals.

15. In the case before me, the Appellant did not file a Memorandum of Appeal either in the format of Form 1 set out in the First Schedule or at all. The objection taken in that respect is that the purported appeal is null and void. The provisions of the Industrial Court and the Constitution of Kenya Article 159 are that the Court should not give undue regard to technicalities. The mode and manner of approaching a Court is not a technicality. Where rules make provision on the manner of approach and a party attempts to partially comply that cannot be said to be a technicality. The failure to invoke jurisdiction is fatal. I take comfort in the words of John Beechcroft Saunders who states that by jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. In the statute in place the authority of this Court is to entertain Appeals preferred. The matter before Court is not capable of being cured by an amendment and in the premises the preliminary objection taken by the 2nd Respondent and supported by the 1st Respondent succeeds. I strike out the suit before Court with costs to the Respondents.

Orders accordingly.

Dated and signed at Nairobi this 9th day of July 2014

Nzioki wa Makau

JUDGE