



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**CAUSE NO. 1178 OF 2013**

*(Before D.K.N. Marete)*

**STEPHEN MUTWIWA MASIKA & 3 OTHERS.....CLAIMANT**

Versus

**TITUS W. KHAEMBA & 2 OTHERS.....RESPONDENT**

**RULING**

The matter for ruling is a preliminary objection dated 18th November, 2013 by the respondents which preliminary objection opposes the application dated 25th July, 2013 on the following grounds;

1. *This Honourable Court has no jurisdiction to hear and determine this matter.*
2. *The 1<sup>st</sup> and 2<sup>nd</sup> Claimant/Applicant have no authority and capacity to act on behalf of the union since they are under suspension and have offended the provision of section 35 of the Labour Relations Act 2007.*
3. *The Transport Workers Union Kenya which is wrongly and unlawfully pleaded as a party in these proceedings has NEC of the union was not sanctioned the filing of this claim and/or application, and this claim offends the provisions of its registered constitution.*
4. *The claim is frivolous and vexatious.*
5. *The Claim is an abuse of the Court process, and should be struck off with costs.*

The matter came to court severally until the 17th March, 2014 when the parties agreed to dispose of the preliminary objection by way of written submissions.

The respondents, in their written submissions contend that this cause and its two limbs, the Memorandum of Claim dated 25th July, 2013 and the Notice of Motion of the same date rests on the four claimants, the 1st to 3rd claimants being therein described as officials of the 4th claimant. The respondents are also described as officials of the union under paragraphs 1-4 of the claim.

The contention here is that the 2nd and 3rd claimants were suspended by the Central Council of the Union in its meeting of 22nd June, 2013 and the 1st claimant met the same fate at a NCC meeting of 20th July, 2013. These changes were effected by the Registrar of Trade Unions by causing changes in registration of officials of the union and producing new extracts indicating that the 1st to 3rd claimants were under suspension and that the 1st to 3rd respondents were acting in their positions.

Therefore, by 25th July, 2013 the claimants, being under suspension, had no capacity to act as officials of the union and their purporting to so act affects the provisions of S.35 and particularly S.35 (5) and (6) of the Labour Relations Act, 2007, above cited.

S.35(1) *A trade union, employers' organization or federation shall exhibit prominently –*

(a) *in its registered office, a notice giving the names of all officials and their titles;*

(b) *in every branch office the notice specified in paragraph (a) and in addition, a notice giving the names and titles of the officials of the branch*

(2) *Notice of any changes of officials or of the title of any officials shall be submitted to the Registrar in Form Q set out in the Second Schedule, within fourteen days after the change, together with prescribed fee, and the Registrar shall register the change, subject to subsection (4) and Subsection (5).*

(3) *Before registering any change of officials or correcting any register, the Registrar may require the production of any relevant evidence of the change.*

(4) *If, after inquiry, the Registrar is not satisfied as to the validity of any appointment or the propriety of any proposed correction, the Registrar may refuse to register the change of officials or to correct the register.*

(5) *No change of officials shall have effect until it is registered by the Registrar.*

(6) *No person who is not registered by the Registrar in accordance with this section shall act or purport to act as an official of a trade union, employer's organization, or federation or of any branch.*

The respondent further argues and submits that if the 1st to 3rd claimant had any issues with their suspensions they should have raised this with the Registrar of Trade Unions as hereunder;

*The 1<sup>st</sup> -3<sup>rd</sup> Claimants if they had an issue with their suspension should have sued the union which suspended them together with the Registrar of Trade Unions who made a decision to cause changes in the Register of officials and mark them as suspended, as per Section 30 of the Labour Relations Act, 2007. They did not.*

These are sound arguments and submissions on law. We thank the respondents counsel for this logical analysis.

The claimants/applicants written submissions opens as below;

1. ***THAT*** respondents' Preliminary Objection dated 18/11/2013 lacks merit and is grounded on misconceived notion, misinterpretation of the law, and lies; untruthfulness and I urge this Honourable Court to disallow it.
2. ***THAT*** to start with, this Honourable Court has jurisdiction to hear and determine the applicants' application dated 25/7/2013 as well as the suit/claim. This is because, there was no any valid or legal suspension of the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Claimants' as falsely alleged by the 1<sup>st</sup> respondent in his Affidavits sworn on 1<sup>st</sup> August, 2013 and other dates in regard to this cause.
3. ***THAT*** by asking this Honourable Court to approve the purported suspension of the claimants/applicants, the respondents are misleading the court to help them perfect an illegality

which is against the Law.

4. ***THAT*** the purported suspension was carried out by the respondents without giving the 1<sup>st</sup> to 3<sup>rd</sup> claimants an opportunity to contract the accusations leveled against them, and condemned the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> claimants unheard. It also violated the rules of natural justice, hence cannot stand.
5. ***THAT*** it is trite Law that “***A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their views***”. That was not done by the respondents in this case. Thus the purported suspension is irregular, illegal and unacceptable in a democratic society.
6. ***THAT*** before rushing to illegally purport to call for the Central Council Meeting, the respondents did not disclose to the claimants any iota of evidence they had if at all, which made them believe that the claimants failed in their duties and thereby gave the respondents power to purport to discuss the claimants suspension without informing them of the evidence in support of the accusations or involving any form of investigations of financial impropriety nor did they indicate the period which such alleged offences occurred.

These continue as hereunder;

27. ***THAT*** the preliminary objection raised by the respondents does not meet the threshold laid down as to what constitutes a preliminary objection. The respondents’ preliminary objection is grounded on disputed issues which have to be tried, substantially heard and determined on merits, being matters which determination is through taking direct/oral evidence by this Honourable Court, such issues cannot be subjected to preliminary objection for purposes of doing substantive justice in this type of a case.

28. ***THAT*** the respondents are challenging capacity to sue which is a mixed question to law and facts and therefore, the court should not determine the same at preliminary stage without subjecting the suit/Case to a full hearing and investigate the issues raised through direct evidence. This is fortified further by among other documents’ and issues, the registrar’s letter dated 2/7/2013 and copied to the 2<sup>nd</sup> Applicant/Claimant, where he wrote to the 1<sup>st</sup> respondent asking him to shed light on those issues raised **see exhibit “SP5”, referred above.**

29. ***THAT*** it is trite law that the inherent jurisdiction of this Honourable Court to Strike – off a case should be exercised very sparingly and exercised only in very clear and exceptional cases.

30. ***THAT*** such jurisdiction should not be exercised in matters involving opposing parties each alleging the truths and un-truths over a dispute and each opposing and traversing the acts pealed by the other which needs to be properly interrogated through direct evidence’s through substantially hearing the parties and conclusively determining the issues on merits. Where there are disputed facts and or issues, such cannot be disposed-off by way of preliminary objection.

The Claimant/Applicant further seeks to rely on the authority of **Johnson Githaiga Nderitu & 4 Others Vs Nicholas Nderitu Maita & 3 Others Civil Appeal No. 229 of 2012** where the Court of Appeal at paragraph 11 made the following observation;

*A cursory glance at the pleadings indicates that triable issues of fact have been raised by both parties. For instance, whether the power of attorney was used fraudulently or in excess of authority; whether the 1st plaintiff was to be consulted despite the existence of the power of attorney; whether the plaintiffs have locus standi to institute the proceedings;. It is our considered view that these issues cannot be summarily disposed off by way of preliminary objection.*

The Claimant/Applicant also sought to reinforce their position by relying on the authority of **Mukhisa Biscuits Manufacturing Co. Ltd. V. West End Distributors Ltd [1969] E.A. 696** where the court made the following observations on the subject.

*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 unnecessarily increase costs, and, on occasion, confuse the issues. This improper practice should stop.*

The Court of Appeal in the case of **Johnson Githaiga Nderitu & 4 Others Vs Nicholas Nderitu Maita & 3 Others** (ibid) thus adds to the jurisprudence made the following observations on the ingredients of a preliminary objection at page 5;

11. *A cursory glance at the pleadings indicates that triables of fact have been raised by both parties. For instance, whether the power of attorney was used fraudulently or in excess of authority; whether the plaintiffs have locus standi to institute the proceedings; whether the defendants acquired the suit property bona fides; whether a donee can exercise a power of attorney to the exclusion of the donor and successfully challenge the authority of the donor. It is our considered view that these issues cannot be summarily disposed off by way of preliminary objection. As was stated in the case of **Nitia Properties Limited – v- Jagjit Singh Kalsi & Another, C.A. No. 132 of 1937**, it must be borne in mind that for a preliminary point to succeed, the facts as alleged in the plaint are deemed to be correct. In the instant case, the facts as alleged in the plaint and defence are disputed and prima facie the claim in this suit cannot be deemed to be incontestably hopeless and be summarily dismissed by way of preliminary objection.*

12. *Article 159 (d) of the Constitution enjoins Courts to administer substantive justice and not to give undue consideration to technicalities and procedural justice. The rules of natural justice dictate that no person shall be condemned unheard. The appellants desire that the plaint be struck out by way of preliminary objection. This is against the grain and spirit of Article 159 (d) of the Constitution and the basic tenets of the rules of natural justice which require all parties must be heard – audi alterem partem. Further, Courts are mandated not to give undue regard to technicalities through the overriding objectives as enshrined in Sections 3A and 3B of the **Appellate Jurisdiction Act and as stated in Douglas Mbugua Mungai –vs- Harrison Munyi, - Civil Application No. Nai. 167 of 2010:-***

***We are as a matter of statute law required to take a broad view of justice and take into account allow the necessary circumstances, factors, and principles and be satisfied at the end of the exercise that we have acted justly. “As was stated in Stephen Boro Gitaha – vs – Family Finance Building Society & 3 Others, Civil application No. Nai. 263 of 2009.***

***The overriding objective overshadows all technicalities, precedents, rules and actions .....and whatever is in conflict with it must give way.”***

***In DT Dobie & Co.(Kenya) Ltd. –vs- Muchina, Civil Appeal 37 of 1978, this Court expressed itself as follows:-***

***“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case.....”***

*We adopt the dicta in the D.T. Dobie case and the overriding objective governing the exercise of jurisdiction by the Court: we note that the critical facts in this case are disputed and for these reasons, this appeal has no merit and is hereby dismissed with costs.*

If one made a cursory glance at the preliminary objection as raised one realizes that the nearest it comes to being a test on grounds of law is the 1st and last grounds of the Preliminary Objection. Grounds 2-4 would clearly require evidence to bring home and therefore fall out of the legal ambits of a preliminary objection. Even grounds 1 and 5 aforesaid are not expressly wholly issues of law and may require to be buttressed by a handsome dossier of evidence.

The circumstances of this case do not format a preliminary objection that is sustainable. The issues in dispute are so disputed and controversial that it would not be proper to determine the same at this stage or by this mode. This court must be well set-out to sail through the battles and war to a logical determination and conclusion of the issues in dispute.

I am therefore inclined to dismiss the preliminary objection with no order as to costs.

Delivered, dated and signed this 9th day of July, 2014.

**D.K. Njagi Marete**

**JUDGE**

Appearances:

1. Mr. Rakoro instructed by Rakoro & Company Advocates for the Respondents.
2. Mr. Jaoko instructed by Nchoe, Jaoko & Company Advocates for the Claimants/Applicants.