



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU
CAUSE NO. 25/2013

(Before Hon. Justice Hellen Wasilwa on 4th July, 2013)

MOHAMED RAFIZ ISSAK T/A
AL NOOR CAFETERIACLAIMANT

VERSUS

KENYA HOTELS & ALLIED
WORKERS UNIONRESPONDENTS

RULING

The respondents herein raised a preliminary objection before this court in relation to the application dated 18.12.2012. The preliminary objection is in respect of jurisdiction of the court where the suit was initially filed. According to the respondents, this matter was initially filed as HCC No. 174 of 2012 before the High Court at Kisumu. When the file was placed before Aroni J on 21/12/2012, she directed that the file be referred to the Industrial Court for directions.

The respondents contend that this being a dispute on recognition and dismissal, this case ought to have been filed before the Industrial Court initially and not before the High Court. The same was also filed under Section 1(a) (b) of the CPA and transferred to Industrial Court under S. 12 of the Industrial Court Act 2011. However the respondents contend that the relevant law for filing this application is S. 74 of Labour Relations Act moreover the procedure to be followed is S. 77 of LRA which details how such a matter should be brought before the Industrial Court. Having brought this case under the wrong

procedures of law, the respondent's contention is that this application should not be entertained.

The claimants on the other hand contend that what respondents are contending are not a preliminary objection but issues of fact. That a preliminary objection should be limited to points of law only. However according to claimants, the issue was what leading to closure of their business and this is seen from the statement of Mohamed Issak which shows they came to court initially to stop illegal activities of the Union officials. That this has nothing to do with recognition.

They cite ***Mukisa Biscuits Co. =VS= West End Distributors Ltd*** which held that a preliminary objection must be on pure points of law. They submit that the preliminary objection should be rejected and if there is a problem with pleading the claimants to be directed to put them right.

Upon hearing the parties herein the issues for determination are:

- **Whether the application raises pure points of law.**

The authority cited of **Mukisa Biscuits Co. =VS= West End Distributors Ltd**; EALR [1969] 696 stated at pg 701 that;

“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 facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion ...”

What the respondents raise are a mixture of points of law and facts and some of them a reply to the main application before court. I however note that indeed these are some factual issues they have raised which need to be addressed by the claimants before the main application is considered including an amendment of their pleadings to bring them under the proper procedure of law.

While dismissing the preliminary objection as not raising pure points of law, I also direct that the claimants do amend their pleadings and bring them under the correct procedures of law governing the Industrial Court.

HELLEN WASILWA

JUDGE

4/07/2013

Appearances:-

N/A for both parties

CC. Sammy Wamache.