



Rift Valley Railways Workers Union (K) v Kenya Railways Staff Retirement Benefits Scheme (KRSRBS) & 3 others; Attorney General (Interested Party) (Civil Miscellaneous Application E629 of 2023) [2024] KEHC 352 (KLR) (Civ) (26 January 2024) (Ruling)

Neutral citation: [2024] KEHC 352 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL MISCELLANEOUS APPLICATION E629 OF 2023

AN ONGERI, J

JANUARY 26, 2024

BETWEEN

RIFT VALLEY RAILWAYS WORKERS UNION (K) APPLICANT

AND

**KENYA RAILWAYS STAFF RETIREMENT BENEFITS SCHEME
(KRSRBS) 1ST RESPONDENT**

RETIREMENT BENEFITS AUTHORITY (RBA) 2ND RESPONDENT

KENYA RAILWAYS CORPORATION 3RD RESPONDENT

**THE GOVERNOR COUNTY GOVERNMENT OF NAIROBI 4TH
RESPONDENT**

AND

THE ATTORNEY GENERAL INTERESTED PARTY

RULING

1. The 3rd defendant /applicant raised a notice of preliminary objection dated 18/8/2023 against the plaintiffs suit herein on the following grounds;
 - i. This honourable court lacks the requisite jurisdiction to hear and determine the issues raised in the application as drawn and filed herein.
 - ii. The suit and application herein is sub-judice as it is directly and substantially similar in issue between the same parties i.e (ELC Mis/No. E067 of 2023 Makongeni Residents Association



(Mara) vs State Law and Office of the Land Registrar and 2 others) and currently pending judicial determination.

- iii. The applicant, Rift Valley Railways Workers Union is not a juridical person capable of filing and sustaining an application before this honourable court in its name as it is the case herein.
 - iv. Mr. Munai Opondi Isaac is neither an advocate of this honourable court nor a party and as such he has no legal capacity to represent a party by filing pleadings and making submissions on behalf of such a party before this court.
 - v. Mr. Munai Opondo Isaac continued representation of the applicant before this honourable court is in contravention of Section 31 of the [Advocates Act](#) as read together with Order 9 of the [Civil Procedure Rules](#).
 - vi. The suit and application ought to be dismissed as it an act of forum shopping and vexatious litigation that ought to come to an end.
 - vii. The application is nothing but an abuse of court processes and should therefore be struck out and dismissed with costs.
2. The 1st and 2nd respondents and Interested Parties supported the notice of preliminary objection.
 3. The parties filed written submissions as follows; the 3rd respondent submitted that the plaintiffs suit application filed herein is sub-judice as the matters in issue pleaded herein are directly and substantially in issue before this court in Nairobi ELC No. E067 of 2023 *Makongeni Residents Associations v. State Law Office and Office of the Land registrar & 2 Others*. The plaintiff in the current suit appears as the 4th interested party where again the same Mr. Munai Isaac Opondo filed an application dated 11/7/2023 which mirrored the same grounds as the ones before this court.
 4. The 3rd respondent argued that it is an express provision of the law that a party cannot invoke the jurisdiction of a court of law to hear and determine a suit which is the subject of hearing and determination before another court. in support the 3rd respondent cited [David Ndi v. Attorney General & Others](#) [2021] eKLR where it was stated;

“The rationale behind this provision is that it is vexatious and oppressive for a claimant to sue concurrently in two courts. Where there are two courts faced with substantially the same question or issue, that question or issue should be determined in only one of those courts, and the court will, if necessary, stay one of the claims. Ordinarily, it is the second suit that will be stayed. (See *Thames Launches Ltd v Trinity House Corporation (Deptford Strond)* [1961] 1 All ER 26; *Royal Bank of Scot-land Ltd v Citrusdal Investments Ltd* [1971] 3 All ER 558)”
 5. The 3rd respondent submitted further that the sub-judice rule served the purpose of ensuring that there is no multiplicity of suits over the same subject matter and/or cause of action. This in turn save the parties from unnecessary litigation and costs and ensures the proper utilization of judicial and administrative resources. This court therefore lacks requisite jurisdiction to hear and determiner the issues herein as they are the same as those in ongoing proceedings in the ELR Court thus *sub judice*.
 6. The 3rd respondent also submitted further that Mr. Munayi Issac Opondo purports to represent and/or act for the plaintiff as a secretary general yet he does not have the locus standi to prosecute the application herein. Mr. Munayi Isaac Opondo is not an Advocate nor a party therefore has not legal capacity to represent a party being non suited with no legal capacity to lodge and/or sustain the application and suit before court.



7. Further, that the actions by Mr. Munayi Isaac Opondo contravenes section 31 of the [Advocates Act](#) as read together with section 9 of the [Advocates Act](#) which requires one to be admitted as an advocate to have his name at the time being on the roll and to have in force a practicing certificate. The proceedings therefore conducted by an unqualified person are null and void, documents drawn or signed and filed by unqualified person are void *ab initio* as is evident in the present suit.
8. The 1st respondent in support of the preliminary objection stated further that the orders sought by the applicant in the applications and the main suit relate to the structure and governance of the 1st respondent which do not fall within the jurisdiction of this court.
9. That the 1st respondent is governed by a trust deed and rules which contains the terms and rules under which the 1st respondent operates. Clause 11 of the said Trust Deed and Rules gives the 3rd Respondent the power to appoint trustees to the Board of Trustees of the 1st Respondent under which it duly acted upon by appointing the current Trustees who sit in the Board of Trustees.
10. Further, Clause 34 of the Trust Deed and Rules of the 1st Respondent states that:

“If at any time hereinafter any dispute, difference or question shall arise between the Sponsor, the Trustees, the members, the members' departments or other persons or their persona/ representatives or any of them respectively touching the construction, meaning or effect of this deed or any other cause or thing therein contained or the rights or liabilities of any of them under this deed or otherwise howsoever in relation to the scheme then every such dispute or question shall be referred to arbitration by a single arbitrator appointed by the parties and in default of such agreement by the arbitrator agreed upon by the parties in the dispute and the result of which arbitration shall be final and binding upon all parties and the proceedings shall be regulated by the provisions of the [Arbitration Act](#) No. 4 of 1995 of the Laws of Kenya or any law or instrument amending, extending or replacing the Act.”
11. Further, under section 48 (1) of the [Retirement Benefits Act](#), any person aggrieved by the decision of the manager, administrator, custodian or trustee of any scheme may request in writing for a review of any such decision by the Chief Executive Officer of the Retirement Benefits Authority. Thereafter, a party dissatisfied with a decision of the Executive Officer has a right of appeal to the Retirements Benefit Authority Tribunal. The Applicant herein has also not explored this avenue by making a written request for review to the Chief Executive Officer of the Retirement Benefits Authority nor has any appeal been made to the Tribunal.
12. The applicant on the contrary submitted that this court is bestowed with unlimited jurisdiction in both civil and criminal matters. The exception created by the said vide Article in Article 5(a)(b) do not at all fall within the ambit of what the [Constitution](#) might have identified as issues incapable of being litigated/entertained by this Court.
13. Further, that the substratum of the matter herein is one that is Civil in Nature and is therefore before the right court to exercise its Jurisdiction.
14. The applicant also argued that The [Civil Procedures and Rule](#) in Order 9 SubRule (2) has clearly designated and or identified Advocates and Recognized Representatives as persons with the locus to draw, file and prosecute matters in court. The fact that Mr. Munayi Opondo Isaac, is not an advocate of this Honorable Court nor a party to this matter does not at all negate his right to address this Hon Court or represent the Plaintiff/applicant in this matter.
15. The issues for determination in the NOPO are as follows



- i. Whether this court has jurisdiction to hear this case.
 - ii. Whether this suit is *sub-judice*
 - iii. Whether the applicant Rift Valley Railways Workers Union is not a juridical person.
 - iv. Whether Mr. Munayi Opondo has the locus standi to file this suit.
 - v. Whether this suit contravenes Section 31 of the [Advocates' Act](#).
 - vi. Whether this suit should be struck out and dismissed.
 - vii. Who pays the costs of this preliminary objection?
16. On the issue as to whether this court has the jurisdiction to hear this case, I find that the 3rd Respondent raised this NOPO on the basis there is an Arbitration Clause in Clause 34 of the Trust Deed and Rules of the 1st respondent.
 17. The 3rd Respondent submitted that this Court is not the proper forum for adjudicating the issues in dispute. That the Trust Deed and Rules provide for arbitration under Article 34 and secondly, that there is a dispute resolution mechanism provided for under section 46, 47 and 48 of the [Retirements Benefits Authority Act](#) (RBA Act).
 18. Section 46 (1) of the [RBA Act](#) states that:

“Any member of a scheme who is dissatisfied with a decision of the manager, administrator, custodian or trustees of the scheme may request, in writing, that such decision be reviewed by the Chief Executive Officer with a view to ensuring that such decision is made in accordance with the provisions of the relevant scheme rules or the Act under which the scheme is established.”
 19. The 3rd Respondent also submitted that Section 47 of the [Act](#) establishes an Appeals Tribunal, while section 48 sets out its jurisdiction as follows:

“(1) Any person aggrieved by a decision of the Authority or of the Chief Executive Officer under the provisions of this Act or any regulations made thereunder may appeal to the Tribunal within thirty days of the receipt of the decision.
 20.

(2) Where any dispute arises between any person and the Authority as to the exercise of the powers conferred upon the Authority by this Act, either party may appeal to the Tribunal in such manner as may be prescribed.”
 21. However, I find that the issues raised by the Applicant do not relate to the provisions of the Trust Deed, but issues relating to the handling of the Kenya Railways Staff Retirement Benefits Scheme Funds by unauthorized persons.
 22. The fact that there is incorporated within the provisions of the Trust Deed an internal dispute resolution mechanism does not host the jurisdiction of this Court.
 23. Clause 34 of the Trust Deed provides that:

“Save where the decision of the Trustees is made final under the provisions of this Deed, if at any time hereafter any dispute, difference or question shall arise between the Sponsor,



the Trustees, the Members, the Member's Dependants or other persons or their Personal Representatives or any of them respectively touching the construction, meaning or effect of this Deed or any cause or thing therein contained or the rights or liabilities of any of them under this Deed or otherwise howsoever in relation to the Scheme then every such dispute or question shall be referred to arbitration by a single arbitrator appointed by the parties and in default of such agreement by the Auditor (sic) agreed upon by the parties in the dispute and the result of which arbitration shall be final and binding upon all parties and the proceedings shall be regulated by the provisions of the Arbitration Act, No 4 of 1995 of Laws of Kenya or any law or instrument amending, extending or replacing that Act.”

24. The issues raised in the Application in my opinion are not the ones anticipated in the Arbitration clause and the Applicant has a right to seek redress from a Court of Law.
25. On the issue as to whether this suit is subjudice, I find that it is not in dispute that the matters in Nairobi ELC No. E067 of 2023 *Makongeni Residents Associations v. State Law Office and Office of the Land registrar & 2 Others* concerns a land dispute but the issue before this Court has to do with unauthorized persons handling Kenya Railways Staff Retirement Benefits Scheme.
26. I find that Munayi Opondo describes himself as the Secretary General of Rift Valley Railways Workers Union.
27. The Respondents did not produce evidence that such an entity does not exist or that it has no locus standi to file this suit.
28. A Workers' union has the capacity to sue or be sued in its own name.
29. In the case of *Kenya Shipping, Clearing, and Warehouses Workers Union v Africair Management & Logistics Limited* [2016] eKLR, the court held as follows on the issue of trade Unions;

“A Trade Union is defined under Section 2 of the Labour Relations Act 2007 as an association of Employees whose principal purpose is to regulate relations between Employees and Employers. Once this association is registered, it attains under Section 21 of the Labour Relations Act the capacity to sue and be sued in its own name. A dispute which involves a Member is an associational issue which allows the Trade Union to take up the dispute in its own name.

The obligation of the Trade Union to represent its Members in and out of Court, and the right to the Members to representation, in work related grievances and disputes, flows from the membership of the Employee to the Trade Union. These are obligations and rights created by membership. Recognition is between the Trade Union and the Employer. Membership creates a relationship between the Trade Union and its Members. The two relationships are not the same thing, and do not have the same legal effect. Trade Unions collect regular membership fees from Employees, and the Employees in return, enjoy the representation and protection of the Trade Union under the Union Constitution and the law. Membership allows the Employees to have the Trade Union's legal representation in Court, while Recognition allows the Union to collectively bargain with the Employers, for the benefit of Members, and all Unionisable Employees.

These concepts have gained anchorage in the Constitution of Kenya, under Article 36 and 41 on freedom of association, and in Particular Article 22 [2] [d] which allows Trade Unions to bring suits claiming a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or is threatened. An association under the Constitution has the



authority to bring such a suit in the interest of one or more of its Members. This Article has recognized the associational standing of Trade Unions before Courts. It has affirmed the legal provisions, and clauses within the Trade Unions' internal Constitutions, which mandate them to bring Claims before the Court on behalf of their Members. Although Article 22 [2][d] does not govern proceedings of all nature, in all Courts, its spirit must be read in all proceedings where such associational standing is expressed or implied by Legislation or internal Constitutions regulating Trade Unions.”

30. In the circumstances of this case, I find that the preliminary Objection filed by the 3rd Respondent requires to be ventilated by viva voce evidence since there are facts to be ascertained such as the claim by the Applicant being the Secretary General of Rift Valley Railways Workers Union.

31. The definition of a preliminary objection was well set out in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696 as follows:

“So far as I’m 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.”

32. This was followed up by the Judgment of Sir Charles Newbold in the same case who stated as follows;

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 had 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 issue. The improper practice should stop”

33. I find that this suit does not contravene Section 31 of the *Advocates Act* since the Applicant has not approached the Court as an Advocate but as Secretary General of a workers' Union.

34. I find that it is in the interest of justice to allow the plaintiff to ventilate his case.

35. In the case of *Multiscope Consulting Engineers v University of Nairobi & Another* {2014} eKLR Aburili J observed as follows;

“This court further employs the principle that a right to a hearing and therefore fair trial is enshrined in Article 50 of the *Constitution* is a fundamental Human Right and the cornerstone of the rule of Law. It also up with the right to access justice under Article 48 of the *Constitution*. It is the court’s duty to accord or ensure every person who has submitted to the jurisdiction of the court is accorded an opportunity to ventilate their grievances.”

36. I dismiss the NOPO dated 18/8/2023 with costs to the plaintiff and direct that the Respondents file their Responses to the Application dated 9th August 2023 within 14 days of this date.

37. The Application will be canvassed orally in Court on 19th March 2024 at 2pm in open Court.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 26TH DAY OF JANUARY, 2024.

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A. N. ONGERI

JUDGE

In the presence of:

..... for the Applicant

..... for the 1st Respondent

..... for the 2nd Respondent

..... for the 3rd Respondent

..... for the 4th Respondent

..... for the Interested Party

