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| Case Number: | Micro and Small Enterprises Tribunal 21 of 2021 |
| Date Delivered: | 25 Nov 2021 |
| Case Class: | Civil |
| Court: | Micro and Small Enterprises Tribunal |
| Case Action: | Ruling |
| Judge: | Dr J. Bett - Chairman, R. Katina - Vice-Chair, Hon J. Were - Member, A. Gikuya - Member & A. Kibet - Member |
| Citation: | Canva Trading Kenya Ltd Mombasa v Hall Nyambega [2021] eKLR |
| Advocates: | Counsel Wamotsa for Respondent Ms Joy Kendi –Tribunal Administrator |
| Case Summary: | - |
| Court Division: | Tribunal |
| History Magistrates: | - |
| County: | Nairobi |
| Docket Number: | - |
| History Docket Number: | - |
| Case Outcome: | that Preliminary Objection dismissed |
| History County: | - |
| Representation By Advocates: | Both Parties Represented |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |

**REPUBLIC OF KENYA**

**IN THE MICRO AND SMALL ENTERPRISES TRIBUNAL AT NAIROBI**

**MSET MOMBASA 21 OF 2021**

**CANVA TRADING KENYA LTD MOMBASA.....CLAIMANT**

**VS.**

**HALL NYAMBEGA.....RESPONDENT**

**RULING**

1.The Respondent raised a Preliminary Objection to the hearing of the claimants claim dated 5th May 2021 and filed on 21st June 2021. This was raised in the Respondent's Response to the claim and counterclaim dated 20th September 2021 and filed on 23rd September 2021. The grounds for the objection were that the Tribunal Lacks Jurisdiction to entertain the claim as it offends the provisions of section 55(1) of the Micro and Small Enterprises Act, No 55 of 2012 on the basis that the respondent is not a member, past member or persons falling within the said legal provisions nor is the respondent an association or persons registered with or member of the Authority established under the Act. That consequently, the Claimant's claim was fatally defective and ought to be struck out and proceedings by the claimant dismissed for offending the said legal provisions.

2.The Preliminary Objection was argued by way of written submissions. The Respondents counsel in his written submissions filed on 28th October 2021 argued that the Tribunal lacks Jurisdiction to entertain the claimants claim. He drew the Tribunal to the provisions of section 55 of the Micro and Small enterprises Act No. 55 of 2012. The relevant section provides:

*55 (1) If any dispute concerning the micro and small enterprises arises—*

*(a) among members, past members and persons claiming through members, past members of associations and or administrators of estate of deceased members of the associations;*

*(b) between members, past members or administrators of estate of deceased members of the association, and the Authority, or any of their officers or members;*

*(c) between the Authority and an association, it shall be referred to the Tribunal for determination.*

*3.The counsel argued that the Jurisdiction of the Tribunal is limited to the persons specified in the Act and that the claimant ought to provide evidence that:*

*a) It is a micro or small enterprise.*

*b) Is registered under the Act under section 4(3).*

*c) Both the claimant and the respondent are persons falling under the class of persons specified under section 55 of the Act or they (must be a micro and small enterprise registered under the Act).*

4.He further argued that the claimant does not fall within the class of persons specified in the said provisions and that the "dispute" as claimed was not a dispute within the meaning of the legal provisions.

5.Finally, he argued that under section 55 (2) (g), the Tribunal may hear any other dispute acceptable by the Tribunal. That a reading of the provisions in the context of entire section 55 leads to the interpretation that any other dispute is a dispute confined or limited

to disputes enumerated under section 55(2) (a) to (f) or similar disputes subject to the provisions of section 55(1) and (2) (section 2 on the definition of an association) of the Act.

6. The second limb of objection as submitted by the counsel for the Respondent was that that there was no authority exhibited before the Tribunal authorizing Ms Eunice Okal, the Managing Director of the Claimant to file and defend the proceedings on its behalf and that the suit commenced by Ms Okal was fatally defective and should be struck out. On this point however, the Tribunal notes that it was not raised in the respondent's response but at submission stage as though it was an afterthought.

7. The Claimants' counsel filed written submissions dated 2nd November 2021 on 11th November 2021. The counsel argued that the Respondent had failed to allude to the well laid down principles on Preliminary objections. He further argued that the membership of the Micro and Small enterprises Association could be ascertained through evidence and therefore such a matter could not be dispensed with on a preliminary basis.

8.The Tribunal has carefully considered the pleadings, evidence and submissions by the parties. Accordingly, the issues to be determined are:

*a)Whether the grounds set out in the notice of Preliminary Objection are points of law.*

*b)Whether the Preliminary Objection is merited.*

*c)Whether this case offends section 55 of the Micro and Small enterprises Act No 55 of 2012.*

*d)Who should pay costs if any.*

***Determination***

9.The 1st Ground in the notice of Preliminary Objection is with regards to the Jurisdiction of the Tribunal to hear and determine this matter.

10.This Tribunal is aware of the leading decision on Preliminary Objections where the Court of Appeal for East Africa, then the highest court for purposes of this jurisdiction and the others in East Africa in ***Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd.*** (1969) EA 696, where Law J.A. and Newbold P. (both with whom Duffus V-P agreed), respectively at 700 and 701, held as follows:

***Law, JA.:***

*"So far as I am aware, a Preliminary Objection consists of a pure 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 on 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."*

***Newbold, P.:***

*"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 increases costs and, on occasion, confuse the issues. This improper practice should stop."*

11.The Supreme Court of Kenya, has confirmed, and extended, the nature and scope of Preliminary Objections and its decision thereon is binding on this Tribunal and all courts below it by virtue of Article 163 (7) of the Constitution of Kenya 2010.

12.In the case of ***David Nyekorach Matsanga & Another v. Philip Waki & 3 Others*** [2017] eKLR, the three judge bench of the High Court (Lenaola, J. (as he then was), Odunga and Onguto, JJ.) after considering various holdings of the Supreme Court of

Kenya on question of Preliminary Objection held as follows:

*"We quickly turn to the question whether we have before us a Preliminary Objection proper. Traditionally, the case of* ***Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696*** *has been the watershed as to what constitutes Preliminary Objections. The Court of Appeal in* ***Nitin Properties Ltd v Singh Kalsi & another [1995] eKLR*** *also aptly captured the legal principle when it stated as follows:*

***"....A Preliminary Objection 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...."***

13.*This statement of the law has been affirmed time and again by the courts: see for example,* ***Hassan Ali Joho & another -v- Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR*** **where** *the Supreme Court stated that:*

***".....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".***

14.*The Supreme Court has further reconsidered the position of parties resorting to the use of Preliminary Objections and pronounced itself as follows in the case of* ***Independent Electoral & Boundaries Commission –v- Jane Cheperenger & 2 Others [2015] eKLR.***

***"[21] The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to Preliminary Objections. The true Preliminary Objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the Preliminary Objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits."***

15.Flowing from the above statement, The Supreme Court has thus laid it clear that the focus ought to be both the purpose as well as the nature of the Preliminary Objection. If it will serve the public purpose of sparing the sparse judicial time and also militate against wasteful deployment of time and other resources then the Tribunal ought to entertain the Preliminary Objection. With abundance of caution, there is also the rider that disputes are better off being resolved judicially, than summarily.

*1*6.The same emphasis has been made by the Supreme Court in subsequent cases. The strict approach in **Mukisa Biscuits**' case seems therefore to have been extended. In the case of **Kalpana Rawal & 2 OthersvJudicial Service Commission & 6 Others [2016] eKLR** the Supreme Court stated that the examples of jurisdiction and limitation given by law J.A in the **Mukisa Biscuits'**case were but only examples of two grounds worthy of preliminary hearing and that a checklist approach to the test as to whether a matter merited and fell under the Mukisa Biscuits case was not in consonant with the spirit and letter of the Constitution. The court then proceeded to state that where the Preliminary Objection raised a "fundam*ental issue" (per Mutunga CJ) then as a matter of good order it was appropriate to have the issue settled first even if there were apparent factual conflicts.*

17.In line with the provisions of Article 163(7) of the Constitution, the Tribunal is obliged to adopt this more liberal approach by the Supreme Court.

*18.Based on the principles set out above, the Tribunal finds that:*

i.On the Respondent's **Notice of Preliminary Objection** that the Tribunal has no jurisdiction and that the Cause is inherently bad in law, it is not in doubt that without jurisdiction a Tribunal has no option but to down its tools. A question of jurisdiction is based on a pure point of law and therefore the Tribunal finds and holds that the said objection meets the description of what amounts to a Preliminary Objection.

*ii.The Respondent's questions regarding the claimants' lack of written authority is also a matter that may be resolved at a preliminary stage.*

19.Having held and found that that the two issues raised by the Respondent's counsel to wit; on Jurisdiction and on the lack of

written authority to commence proceedings herein fits the description of a Preliminary Objection and can be determined on a preliminary scale, the Tribunal will now embark on determining whether the Preliminary Objections are merited.

20.The question of whether the Claimant has no authority to file this suit goes to the jurisdiction of this Tribunal. Without such authority**,** a suit cannot stand and therefore the Tribunal finds and holds that the same is a properly raised Preliminary Objection. See the case of **Law Society of Kenya …Vs… Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000,** where the Court held that;-

***"****Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law". **Further in the case of Alfred Njau and Others ...Vs... City Council of Nairobi ( 1982) KAR 229**, **the Court also held that;-***

***"the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings".***

21.It is evident that ***locus standi*** is the right to appear and be heard in a Tribunal or in other proceedings and literally, it means **'a place of standing**'. Therefore if a party is found to have no ***such authority,*** then it means he/she cannot be heard even on whether or not he has a case worth listening to. Further if this Tribunal was to find that the Claimant has no ***such authority,*** then the Claimant cannot be heard and that point alone may dispose of the suit. In the case of **Quick Enterprises Ltd …Vs.... Kenya Railways Corporation, Kisumu High Court Civil Case No.22 of 1999,** the Court held that:-

*"When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone."*

22.It is the Respondent's contention that the Claimant's Managing Director has no **locus standi** to file this claim. This contention is based on the fact that the claimant's Managing Director has **no written** authority and this has been raised at the submission stage. The Tribunal recognizes that while determining issues via Preliminary Objection, the Tribunal should not be required to probe evidence. Specific to this case, the Respondent having alleged that the Claimant lack authority to sustain this matter is an issue that requires further evidence and the same can be ascertained at the substantial disposition of this case.

23.Further, it is important to note that though over time, there has been a requirement for a written authority to be presented, the Courts have pointed out that the said written authority is not necessary as long as the deponent has stated that he has the said authority. See the case of **Bethany Vineyards Limited & Another v Equity Bank Limited & 2 Others [2020] eKLR** where the Court held that;

*"The decision has since been applied in Kenyan courts, for example, in Fubeco China Fushun v Naiposha Company Limited & 11 others [2014] eKLR.*

*It does become apparent that there is no requirement for a corporate entity to present a resolution of a company indicating that a company has authorized the filing of a suit or has authorized the swearing of an affidavit on its behalf nor, for that matter, confirming it has authorized an advocate to represent it. It suffices for the deponent to state that he has authority to do such act."*

*24.*While deriving comfort from the principles set out in the above cases, the Tribunal therefore finds and holds that the Preliminary objection based on the lack of written authority is not merited and the Tribunal dismisses the same**.**

25.On the question of Jurisdiction, the Tribunal is confronted with two divergent views. On the one hand, the Claimant asserts that the Tribunal has Jurisdiction to hear and determine this matter while on the other hand, the Respondent's counsel holds the view that the reading of the relevant statute restricts the sphere of operation of the Tribunal and that the Tribunal should keep off.

26.In his submissions, the Respondent's counsel argued that the Jurisdiction of the Tribunal is limited to the persons specified in the Act and that the claimant ought to provide evidence that:

*a) It is a micro or small enterprise.*

*b) Is registered under the Act under section 4(3).*

c) *Both the claimant and the respondent are persons falling under the class of persons specified under section 55 of the Act or they (must be a micro and small enterprise registered under the Act).*

27.Based on this acknowledgement, the Tribunal contends that the issues raised are weighty and may not be easily dispensed with at the preliminary stage.

28.The Tribunal in determining the question of Jurisdiction is guided by the purposive interpretation of the legislation so as to achieve the desired ends of justice without exposing the parties to any form of prejudice.

29.The Supreme Court in the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others, Supreme Court Petition No. 26 of 2014 [2014] eKLR**, opined that a purposive interpretation should be given to statutes so as to reveal the intention of the statute. The court observed as follows:

***"In Pepper vs. Hart [1992] 3 WLR, Lord Griffiths observed that the "purposive approach to legislative interpretation" has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the Court is not to be held captive to such phraseology. Where the Court is not sure of what the legislature meant, it is free to look beyond the words themselves, and consider the historical context underpinning the legislation. The learned Judge thus pronounced himself:***

***"The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted."***

30.While analyzing how to determine the intention of a statute, the Court of Appeal in **County Government of Nyeri & Anor. Vs. Cecilia Wangechi Ndungu [2015] eKLR** held that:

***"Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors."***

31.The Tribunal notes that a contextual or purposive reading of a statute must of course remain faithful to the actual wording of the statute. A contextual interpretation of a statute, therefore, must be sufficiently clear to accord with the rule of law. In ***Stopforth v Minister of Justice and Others; Veenendaal v Minister of Justice and Other. In the*** Stopforth case, Olivier JA provided useful guidelines for the factors to be considered when conducting a purposive interpretation of a statutory provision:-

*"In giving effect to this approach, one should, at least, (i) look at the preamble of the Act or at the other express indications in the Act as to the object that has to be achieved; (ii) study the various sections wherein the purpose may be found; (iii) look at what led to the enactment (not to show the meaning, but also to show the mischief the enactment was intended to deal with); (iv) draw logical inferences from the context of the enactment."*

32.Our understanding of the nature of dispute herein is that it is a commercial dispute involving micro and small enterprises as envisaged under section 55 (2) of the Act. Section 55(1) (a) of the Act envisages disputes concerning micro and small enterprises among those micro and small enterprises and may involve persons claiming through those enterprises as members of the association, past members and administrators of the estate of the deceased members.

33.Strict interpretation of section 55 (1) (a) would mean that the intervention by the Tribunal would only be confined to the

registered members of the Association. Whereas that would be the ideal situation in the long run, the Tribunal is cognizant that the process of Registration of the Associations is an ongoing exercise. Indeed, the Transition mechanism under section 75 of the Act allows those Associations to operate subject to modifications as necessary to give effect to the Act. As such, the associations or umbrella organizations previously registered under any written law are deemed to have been registered under the Act.

34.This understanding is further reinforced by the general interpretation of the term "enterprise" under the Act to mean an undertaking or a business concern whether formal or informal engaged in the production of goods and services. On the other hand, a "micro enterprise" is interpreted to mean a firm, trade, service, industry or business activity. Our further reading of the objectives of the act is informative that the Act was intended to facilitate the formation and upgrading of informal micro and small enterprises. As stated, this process is ongoing. The Tribunal is aware that the office of the Registrar of the Micro and small enterprises under section 4 of the Act was operationalised in 2020. It is the said office that is responsible for the registration of micro and small enterprises in accordance with the provisions of the Act. The informality of the micro and small enterprises therefore should not deprive those entities of their rights to access the Tribunal under the Act.

35.**Furthermore, the Tribunal also underscores that section 55 (2) (g) clothes the Tribunal with limited discretionary powers to entertain** any other dispute acceptable by the Tribunal. **The Tribunal is of the considered view that the dispute herein is one of those that would merit considerations under this section.**

36.We do not therefore think that the intention of the legislation was to lock out those micro and small enterprises involved in commercial disputes as was the case herein from accessing the Tribunal for dispute resolution. We believe that the most suitable forum for efficient and expeditious resolution of disputes of this nature would be at the Tribunal level. This indeed would hasten the realization of Articles 48 and 159 of the Constitution on access to Justice. The alternative would be to allow the parties to pursue the dispute resolution process through the traditionally established court system.

*37.*Consequently, the Tribunal is unable to find at this stage that the case herein *offends section 55 of the Micro and Small enterprises Act No 55 of 2012.*

38.The Upshot of the foregoing analysis is that **Preliminary Objection** dated 20th September 2021 and filed on 23rd September 2021**,** is **not** merited and the same is dismissed. The cost of the Respondent's Preliminary Objection shall be in the Cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH NOVEMBER 2021**

**Dr J. BETT …….....[CHAIRMAN]**

**R. KATINA….....[VICE-CHAIR]**

**Hon J. WERE.....[MEMBER]**

**A. GIKUYA.....[MEMBER}**

**A. KIBET.....[MEMBER]**

Judgement delivered virtually in the presence of:

1.Counsel Wamotsa for Respondent

2.Ms Joy Kendi –Tribunal Administrator