



REPUBLIC OF KENYA



KENYA LAW
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**Sarma Enterprises Ltd & another v Superloop Ltd & 2 others; Mugendi
& 6 others (Interested Parties) (Constitutional Petition E412 of 2022)
[2022] KEHC 13983 (KLR) (Constitutional and Human Rights) (7 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 13983 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E412 OF 2022**

M THANDE, J

OCTOBER 7, 2022

BETWEEN

SARMA ENTERPRISES LTD 1ST PETITIONER

SARAH MBETI KARINGI 2ND PETITIONER

AND

SUPERLOOP LTD 1ST RESPONDENT

ELIZAPHAN MAINA MURAGUARI 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

AND

HARUN MUGENDI INTERESTED PARTY

LILIAN NGIRICHI INTERESTED PARTY

LUKE NGENYE INTERESTED PARTY

ALFRED SILA INTERESTED PARTY

TERRY NJOKI INTERESTED PARTY

BILLIAN MAKENA INTERESTED PARTY

REGINA MWANGI INTERESTED PARTY



RULING

1. The petitioners herein filed a petition dated August 12, 2022 against the respondents, seeking the following orders:
 - i. A declaration that to the extent that the action by the 1st and 2nd respondents on August 3, 2022, expelling and/or removing the petitioners from their membership in the 1st respondent is discriminatory on the petitioners, and that articles 19, 20, 27, 36, 47 and 259 of the Kenya [Constitution 2010](#) have been contravened, and the said action is therefore null and void, ab initio.
 - ii. A declaration be and is hereby issued that any arbitrary expulsion and/or removal of the petitioners from their membership in the 1st respondent without considerations of due process and all the tenets of natural justice is a violation of article 27 and 47 of the [Constitution](#), therefore null and void, ab initio.
 - iii. A declaration be and is hereby issued that any arbitrary expulsion of the petitioners from the BNI Global Connect Application without considerations of due process and all the tenets of natural justice is a violation of article 27 and 47 of the [Constitution](#), therefore null and void, ab initio.
 - iv. An order quashing the purported expulsion and/or removal of the petitioners from the membership of the 1st respondent and reinstating them to the membership of the 1st respondent.
 - v. An order of *Mandamus* be and is hereby issued directing the respondents and the 1st to 7th interested parties to reinstate the petitioner to the Mavuno Chapter of BNI Kenya.
 - vi. An order of prohibition be and is hereby issued directing the 1st to 7th interested parties from opening the petitioners' classification in the Mavuno Chapter of BNI Kenya.
 - vii. An order directing the 3rd respondent to investigate the actions of the 2nd respondent with a view to taking appropriate disciplinary action for violating various articles of the [Constitution of Kenya 2010](#).
 - viii. An order of compensation based on general and exemplary damages for violation of the petitioners' fundamental rights and freedoms.
 - ix. Costs of the suit.
2. The petitioner's claim is based on article 47 of the [Constitution of Kenya, 2010](#), and Sections 4 and 7 of the [Fair Administrative Action Act](#) (FAAA) and claim that their removal from the membership of BNI Community and the Mavuno Chapter violated and infringed on their right to fair administrative action. The petitioners contend that the 2nd petitioner's application for renewal of her membership in the chapter was refused without any clear, logical or lawful reasons. It was contended that communication of the impugned decision was from the office of the national director and not from the membership committee of the chapter. The petitioners accused the 2nd respondent of high handedness and termed his actions as discriminatory, ultra vires his powers, unconstitutional and a nullity in law.
3. The 1st and 2nd respondents and all the interested parties except the 4th interested party (the interested parties) opposed the petition vide their preliminary objection (PO) dated August 12, 2022. The



objection is that first, this court lacks jurisdiction to hear this matter as the same is a commercial dispute which ought to be heard by the commercial court. Second, the 1st petitioner is not a natural person and thus cannot be a member of the 1st respondent's group. Third, the 2nd petitioner proceeded to pay annual membership in total disregard of the 1st respondent's membership renewal procedure and policy.

4. Directions were given that the PO be disposed of first. Parties filed their written submissions which I have duly considered. The following are the issues for determination:
 - i. Whether this court has jurisdiction to entertain the petition.
 - ii. Whether the petitioners were unfairly discontinued from BNI Kenya - Mavuno chapter and should be reinstated thereto.
 - iii. Whether the 2nd and 3rd objections are pure points of law.

Whether this Court has jurisdiction to entertain the Petition

5. The respondents and interested parties submitted that this court lacks jurisdiction to entertain the petition owing to the fact that there is an arbitration clause in the terms and conditions outlined in the BNI form for new membership/category change/renewal. Accordingly, it was submitted that the matter ought to be referred to arbitration in line with article 159(2)(c) of the *Constitution of Kenya, 2010*. My Nyaga, learned counsel submitted that the petitioners did not in their documents avail the application for renewal of membership and the reason is that the application contains an arbitration clause. He urged that the petition be struck out.
6. For the petitioners, Mr Waweru, learned counsel submitted that a PO should be raised on a matter of a purely legal nature and not issues to be ascertained through facts. He argued that if counsel wanted to raise issues of fact then he ought to have done so by way of a replying affidavit. Relying on articles 20 (1), 22(1), (23(1) & (3), 165(3)(b), 258 and 259(1) The petitioners submitted that the court has jurisdiction to hear the petition, as it touches on their rights and fundamental freedoms. They contended that the nature of the dispute herein involves constitutional matters that ought to be decided in a manner guided by article 259 and article 10 on national values.
7. Arbitration is one of the dispute resolution mechanism recognized by law and even promoted by the *Constitution*. In the case of *County Government of Kirinyaga v African Banking Corporation Ltd* [2020] eKLR cited by the respondents and interested parties, the court had this to say about an arbitration clause:

The clear intentions of the parties was that if any dispute arises they oust the jurisdiction of the court and have preference to have the dispute settled through arbitration. This in line with judicial authority, under article 159(2)(c) of the Constitution which states.

“In exercising Judicial authority courts and Tribunals shall be guided by the following principles –

“alternative forms of dispute resolution including reconciliation, mediation, arbitration ----- shall be promoted.”

The court will therefore promote other forms of dispute resolution where the circumstances of the case so allows and the parties have agreed to an alternative mode of dispute resolution other than the court.



8. Similarly, in the case of *Dock Workers Union Limited v Messina Kenya Limited* [2019] eKLR, the Court of Appeal had this to say about an arbitration clause:

On the contrary and as rightly held by the learned trial Judge, the parties herein had categorically agreed to refer any ensuing dispute as regards the contract of employment herein to arbitration. Parties have the freedom to choose the regime of the law they want to be governed under and embody it in their contracts. If parties opt to have an arbitration agreement in their contract of employment which spells out how disputes between them would be resolved, that is perfectly within their rights. The parties entered into the said agreement freely and opted to oust other means of dispute resolution mechanisms other than arbitration. They cannot turn around and denounce the arbitration agreement. It is also worth of note that the Constitution of Kenya itself has given prominence to arbitration by acknowledging it as one of the alternative modes of dispute resolution that courts should encourage.

The learned judge cannot therefore be faulted for finding that the arbitration agreement in the parties' contract was valid.

9. It is noted that the petition herein seeks enforcement of fundamental rights and freedoms. Under article 23(1), this court has jurisdiction, in accordance with article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the bill of rights. This jurisdiction remains vested in the court notwithstanding the existence of an arbitration clause.
10. This court is established under article 165 of the *Constitution* which has conferred upon the court unlimited original jurisdiction in criminal and civil matters, save for the limitation in clause 5 thereof. Accordingly, the jurisdiction of the court cannot be ousted by any arbitration clause. An arbitration clause merely gives parties the option to pursue arbitration in the event of a dispute.
11. In this regard I concur with the holding in *Benson L Vioya v George Wasonga & 3 others* [2012] eKLR where Majanja, J. stated:

This petition concerns the enforcement of fundamental rights and freedoms under article 22 of the Constitution. This is an independent and enforceable right and it cannot be taken away by the provisions of the Association's constitution. The arbitration clause is relevant as establishing a dispute resolution process within the Association and may be given effect in other disputes other than those concerning enforcement of fundamental rights. The High Court has jurisdiction to determine any matters concerning the threat, infringement, breach or violation of fundamental rights and freedoms protected by the Bill of Rights and that jurisdiction cannot be taken away by an arbitration clause.

12. The court also notes that the arbitration clause referred to by the respondents and interested parties was not availed before it. The issue of the arbitration clause was raised for the first time in the respondent's and interested parties' submissions. indeed, the terms of the arbitration clause were set out in the written submissions. It is trite law that submissions are not pleadings and that new issues cannot be



raised in submissions. In *Republic v Chairman Public Procurement Administrative Review Board & another ex parte Zapkass Consulting and Training Limited & another* [2014] Korir, J stated:

The applicant, the respondents and the interested party all introduced new issues in their submissions. Submissions are not pleadings. There is no evidence by way of affidavits to support the submissions. New issues raised by way of submissions are best ignored.

13. And in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR, the Court of Appeal stated:

So what we conclude is that the learned trial judge simply lifted the figure of Ksh 80,161,720/= from the 1st respondent's submissions and awarded it against the appellant. This was wholly in error. Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all.

14. Duly guided by the Court of Appeal, this court cannot lift the terms of the arbitration clause in the respondents' and interested parties' submissions and make a decision based upon the same. Accordingly, the court finds that the objection raised in this regard lacks merit and is rejected.

15. It was further submitted that the 1st respondent is a business networking forum and thus the dispute before the court is purely commercial and should be heard before the commercial court. The petitioners countered this by stating that the dispute between the parties is not commercial and that they have cited specific violations of the *Constitution*. They submitted that the petitioner's rights under article 47 were violated and that this court has jurisdiction under articles 23(1) and 165 to hear applications for redress violation of denial, violation and infringement of fundamental rights and freedoms.

16. The court has already stated herein that the *Constitution* has conferred upon it, the jurisdiction to entertain an application for protection of fundamental rights and freedom and for redress for any denial, violation or infringement of the same.

17. In the case of *Mustafa Tobiko Ole Tampul v Hassan Ole Naado & 17 others* [2021] eKLR, Mrima, J stated:

Both parties are in agreement with what a constitutional issue is. They both referred to Fredricks & other vs. MEC for Education and Training, Eastern Cape & Others case (supra) where the court, rightly so, delimited what a constitutional issue entails and the jurisdiction of a Constitutional court as follows: -

The Constitution provides no definition of 'constitutional matter'. What is a constitutional matter must be gleaned from a reading of the Constitution itself: if regard is had to the provisions of... Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State.... the interpretation, application and upholding of the Constitution are also constitutional issues. So too is the question of the interpretation of any legislation or the development of the common law promotes the spirit, purport and object of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the



Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly on extensive jurisdiction...

18. The learned judge went on to state:

Taking cue from the foregoing, and broadly speaking, a constitutional issue is, therefore, one which confronts the various protections laid out in a Constitution. Such protections may be in respect to the Bill of Rights or the Constitution itself. In any case, the issue must demonstrate the link between the aggrieved party, the provisions of the Constitution alleged to have been contravened or threatened and the manifestation of contravention or infringement. In the words of Langa, J in *Minister of Safety & Security v Luiters*, (2007) 28 ILJ 133 (CC): -

... When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider constitutional rights and values...

19. I concur with the learned judge that a constitutional matter is one that from a reading of the *Constitution* itself, it can be seen that such matter includes inter alia the scope and application of the bill of rights. Further that such matter causes the court to interrogate constitutional provisions and violation thereof, if any. A petitioner only needs to demonstrate a nexus between himself and the constitutional provisions alleged to have been contravened.

20. In the present case, the petitioners have claimed that the refusal by the 1st respondent to renew their membership in BNI Mavuno Chapter infringed on their constitutional rights to fair administrative action under article 47 and sections 4 and 7 of the FAAA. They further contend that their right to equality and freedoms from discrimination under article 27 was also violated. Having considered the matter herein, I am persuaded that the dispute between the parties raises constitutional issues and is not commercial in nature. Accordingly, I find and hold that this court has jurisdiction to entertain the petition.

Whether the petitioners were unfairly discontinued from BNI Kenya - Mavuno chapter and should be reinstated thereto

21. It was submitted for the respondents and the interested parties that if the petition were allowed, it will cause great prejudice to the 1st respondent because the 2nd petitioner despite being a member of BNI for 10 years disregarded the membership renewal policy and failed to apply for renewal as required. As a result, her membership lapsed on July 31, 2022 and she ceased to be a member. The court was urged to dismiss the Petition with costs.

22. With respect, this issue is the crux of the petition and can only be determined at the full hearing and not at this stage of hearing of the PO. Accordingly, the court declines to consider this prayer.

Whether the 2nd and 3rd objections are pure points of law

23. The petitioners contention in respect of the second and third objections is that they are not pure points of law and are contested matters which require evidence to be adduced to prove them.



24. The law on preliminary objections is well settled. A preliminary objection must be raised on a pure point of law. In the celebrated case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696, Sir Charles Newbold rendered himself thus:

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.

25. And in the case of *Akusala Borniface & another v Law Society of Kenya & 12 others; Law Society of Kenya Nairobi Branch (Interested Party)* [2021] eKLR, cited by the Petitioners, Mrima, J. stated:

The validity of any preliminary objection is gauged against the requirement that it must raise pure points of law capable of disposing the dispute at once. It is, therefore, mandatory for a court to ascertain that a preliminary objection is not caught up within the realm of factual issues that would necessitate the calling of evidence.

26. The respondents and the interested parties herein contend that the 1st petitioner is not a natural person and thus cannot be a member of the 1st respondent’s group and further that the 2nd petitioner proceeded to pay annual membership in total disregard of the 1st respondent’s membership renewal procedure and policy.

27. To my mind, these are facts that must be ascertained. None of these objections is a pure point of law. They are facts that must be ascertained by the calling of evidence and none is a pure point of law. Accordingly, I find that the PO fails the test set out in the *Mukisa Biscuit* case (supra).

28. In the end and in view of the foregoing, I find that the preliminary objection dated August 22, 2022 lacks merit and the same is hereby dismissed with costs to the Petitioners.

DATED AND DELIVERED IN NAIROBI THIS 7TH OCTOBER 2022

.....

M. THANDE
JUDGE

In the presence of: -

.....for the Petitioners

.....for the Respondents

.....for the Interested Parties

.....Court Assistant

