



REPUBLIC OF KENYA



**Polle v Jubilee Insurance Co. of Kenya Limited (Constitutional Petition E030 of 2021)
[2023] KEHC 2686 (KLR) (Constitutional and Human Rights) (31 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2686 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E030 OF 2021**

AC MRIMA, J

MARCH 31, 2023

BETWEEN

EDNA CHIRU POLLE PETITIONER

AND

JUBILEE INSURANCE CO OF KENYA LIMITED RESPONDENT

RULING

1. The application for consideration in this ruling is a Notice of Motion dated April 13, 2021 which was filed by the Respondent herein.
2. The application sought to transfer this matter to the Commercial and Tax Division of the High Court. The Respondent posited that the matter was a commercial dispute as it related to the use of the Petitioner's image as intellectual property, hence fell beyond the purview of this Court.
3. The application was supported by the sworn affidavit of one Margaret Kipchumba, the Respondent's Group Company Secretary and Head of Legal Services. She annexed a copy of some directions by the then Chief Justice dated November 18, 1997 on the classification of commercial matters.
4. The Respondent also filed written submissions in support of the application alongside a List and Bundle of Authorities.
5. The Petitioner opposed the application by way of a response dated May 3, 2021. The response was to the effect that the matter raised serious constitutional issues and ought to be determined by the instant Court.
6. The Petitioner also filed written submissions and referred therein to several decisions.



7. This Court is indeed grateful to all the parties for such elaborate and exhaustive submissions thereby making its work relatively simple.
8. Given the length and nature of the submissions, I will not reproduce the same verbatim in this ruling. However, I will consider the parties' positions, arguments and decisions referred to in the discussion herein.
9. What this Court is to determine is whether the Petition raises any constitutional issues worth consideration by the Constitutional and Human Rights Court. To that end, a look at what constitutional issues are is imperative.
10. Once again, I reiterate the fact that the parties have elaborately dealt with this aspect. Several decisions have been referred to on what constitutional issues are. I will just make a small addition thereto.
11. In Nairobi High Court Constitutional Petition No E406 of 2020 *Renita Choda vs Kirit Kapur Rajput* (2021) eKLR, this Court considered what a constitutional issue is and the precision in constitutional Petitions ought to be drafted. This is what was stated:

33. Long before the downing of the new constitutional dispensation under the *Constitution* of Kenya 2010, Courts have variously emphasized the need for clarity of pleadings. I echo the position.
34. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (commonly referred to as 'the Mutunga Rules') also provide for the contents of Petitions. Rule 10 thereof provides seven key contents of a Petition as follows: -

Form of petition.

10. An application under rule 4 shall be made by way of
 - (1) a petition as set out in Form A in the Schedule with such alterations as may be necessary.
 - (2) The petition shall disclose the following—
 - (a) the petitioner's name and address;
 - (b) the facts relied upon;
 - (c) the constitutional provision violated;
 - (d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
 - (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
 - (f) the petition shall be signed by the petitioner or the advocate of the petitioner; and



(g) the relief sought by the petitioner.

35. Rule 10(3) and (4) of the Mutunga Rules also have a bearing on the form of petitions. They provide as follows: -

(3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.

(4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.

36. Rules 9 and 10 are on the place of filing and the Notice of institution of the Petition respectively.

37. The Supreme Court in *Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 Others case (supra)* had the following on Constitutional Petitions: -

Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru vs Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

38. 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...

39. In the United States of America, a constitutional issue refers to any political, legal, or social issue that in some way confronts the protections laid out in the US Constitution.
40. 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 vs 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...

41. Whereas it is largely agreed that the Constitution of Kenya, 2010 is transformative and that the Bill of Rights has been hailed as one of the best in any Constitution in the world, as Lenaola, J (as he then was) firmly stated in *Rapinder Kaur Atal vs Manjit Singh Amrit* case (*supra*) ‘... Courts must interpret it with all liberation they can marshal...’
 42. Resulting from the above discussion and the definition of a constitutional issue, this Court is in agreement with the position in *Turkana County Government & 20 Others vs Attorney General & Others* case (*supra*) where a Multi-Judge bench affirmed the profound legal standing that claims of statutory violations cannot give rise to constitutional violations.
12. This Court will now apply the foregoing to this matter. The starting point is a look at the Amended Petition dated May 3, 2021.
 13. The Petitioner contested the continued use of her image, photograph or likeness by the Respondent in an advertisement. She briefly posited that she consented to the advertisement when she was an employee of the Respondent on the understanding that the Respondent will not use her image or photograph in the advertisement upon termination of her employment. The Petitioner further posited that she left employment with the Respondent, but to her utter shock and surprise the Respondent continues to run the advertisement with her image or photograph thereon.
 14. As a result, the Petitioner contended that her rights under Articles 28, 30 and 31 of the Constitution continue to be infringed. To that end, the Petitioner prayed for declaration of infringement of her rights, injunction and compensation.



15. This Court has carefully considered the Respondent's argument that the matter is a commercial dispute hinged on intellectual property rights and as such ought to be dealt with by the Commercial and Tax Division of the High Court.
16. The Amended Petition, however, did not raise any aspect of infringement of the Petitioner's intellectual property rights which rights are provided for under Article 40 of the Constitution. Instead, the Petitioner claims infringement of Articles 28, 30 and 31 of the Constitution as a result of the continued use of the image or photograph. The Petitioner stated the Articles of the Constitution alleged to be infringed by the Respondent and she also attempted to demonstrate the manner of infringement.
17. The Amended Petition was, therefore, drafted in a concise manner and stands the precision test laid in Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others case (*supra*).
18. The Petitioner, therefore, established a 'link between the aggrieved party, the provisions of the Constitution alleged to have been contravened and the manifestation of contravention or infringement'. What remains in the matter is the aspect of whether the allegations are proved.
19. Having so found, the contention that the matter is a commercial dispute does not hold. The Petitioner did not contend that her intellectual property rights were in any way infringed, if at all any were created by the advertisement. This is a matter where the Petitioner is simply seeking the protection of her rights and the remedies sought are within the Article 23(3) purview.
20. The application, therefore, suffers a false start. It is for rejection. However, even as the application fails, there is need to ascertain whether this Court has the jurisdiction to deal with this matter from the perspective of the doctrine of exhaustion in light of the provisions of the Data Protection Act, No 24 of 2019.
21. Consequently, the following orders do hereby issue: -
 - a. The Notice of Motion dated April 13, 2021 is unsuccessful and is hereby dismissed.
 - b. The Respondent shall bear the costs of the application.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 31ST DAY OF MARCH, 2023.

A C MRIMA

JUDGE

Ruling No 1 virtually delivered in the presence of:

Miss Muhanda, Counsel for the Petitioner.

Mr Mbaluto, Counsel for the Respondent.

Regina/Chemutai – Court Assistants.

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