



**Ndunda v Qatar Airways QCSC (Petition E417 of 2020) [2023] KEHC 22752 (KLR)
(Constitutional and Human Rights) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22752 (KLR)

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

PETITION E417 OF 2020

LN MUGAMBI, J

SEPTEMBER 29, 2023

**IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21, 22 (1), 23 (1), (3), 25, 27(1) (2), 30,
35 AND 47 OF THE CONSTITUTION OF KENYA, 2010 AND IN THE MATTER OF
THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
UNDER ARTICLE 27, 30, 35 AND 47 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF SECTION 2, 3 AND 4 OF THE ACCESS TO INFORMATION
ACT, 2016 AND IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT**

BETWEEN

JOAN MUMBUA MULI NDUNDA PETITIONER

AND

QATAR AIRWAYS QCSC RESPONDENT

RULING

1. What comes up for determination is the notice of preliminary objection dated February 11, 2021 where the respondent contends that this court lacks jurisdiction to hear the petition on the grounds that:
 - a. The actions complained of in the present petition took place outside the territory of the Republic of Kenya. The petitioner cannot apply the provisions of the Constitution to challenge these actions before this honourable court;
 - b. The honourable court does not have jurisdiction to adjudicate on matters outside the territory of Kenya as defined under article 5 of the Constitution.



Petitioner's Response

2. The petitioner filed her replying affidavit dated October 24, 2021 in response to the preliminary objection. She contends that the respondent is an international airline with offices in Kenya and Qatar and registered as a foreign company in Kenya pursuant to the *Companies Act*, cap 486 which she deposes that the new *Companies Act*, 2015 deems those companies as incorporated pursuant to part 7 clause 65 of the *Companies Act* on savings and transitional provisions. She deposes that this court is seized with jurisdiction and lists the reasons in paragraph 5 of the affidavit as being why. She deposes further that the instant petition is for a request of information and has nothing to do with her employment contract dated May 18, 2015 or any dispute arising from the said contract.

Submissions

3. The application proceeded for hearing on the June 26, 2023 and the parties highlighted their submissions on whether or not the preliminary objection should prevail.
4. The petitioner's submissions are dated October 19, 2021. As part of her background, the petitioner submitted that she is a Kenyan Citizen who was employed as a pilot with the respondent sometime in October 2015. That the employment contract was executed in Kenya and although the said contract was terminated, it is not the subject matter of the petition herein. That the gravamen of the petition is purely on the infringements of her rights to access information held by the respondent. She submitted on two issues for determination: whether the preliminary objection raised by the respondent meets the required threshold in law; and whether this honourable court is seized with jurisdiction to hear the matter.
5. While submitting on her first issue, the petitioner stated that while a preliminary objection must be premised solely on issue of law at the outset without necessarily delving into the merits of the case, the preliminary objection which is the subject matter of this ruling is founded on the grounds that the actions complained of took place outside the territory of Kenya. She relied on the cases of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) E.A 696 and that of *Oraro v Mbaja* (2005) 1KLR 141 and reiterated that the said objection invokes facts and that the only way the court can make a finding on the truthfulness of the allegations set out by the parties is by hearing the petition itself.
6. On the issue of whether this court is vested with jurisdiction to hear the petition, the Petitioner place reliance on the case of *Owners Of Motor Vessel 'lillian S' vs. Caltex Oil (kenya) Limited* (1989) KLR 1 which established that jurisdiction flows from the law and the recipients court is to apply the same with any limitations embodied therein. That article 23 of the *Constitution* authorises courts to uphold and enforce the bill of rights while article 165 (5) (b) give the High Court jurisdiction to determine the question of whether a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened.
7. The petitioner submitted further that she is neither concerned with her employment contract nor any dispute arising therefrom and as such the issue of extra territorial jurisdiction does not arise and any averment to that effect is fallacious, misguided and baseless. She placed further reliance on the South African case of *Kaunda & others vs. President of the Republic of South Africa* (CCT 23/04) 2004 ZACC 5, the case of *Miguna Miguna v Lufthansa Group operating as Lufthansa German Airlines & 6 others; Kenya National Commission On Human Rights & Another (interested Parties)* 2021 EKLK, the case of *Stephen Chase Kisaka v Emirates Airline Limited* (2020) EKLK and that of *Performing Right Society Limited & Qatar Airways Group* QCSC (2020) EWHC 1872 (Ch). That the infringement of her constitutional rights guaranteed under the Kenyan Constitution and these rights cannot be protected



by Qatari courts. Further that the documents she seeks can be transmittable to her via email with no inconvenience to the respondents.

8. The petitioner concluded by urging this court not to shy away from exercising its jurisdiction that is apparent in articles 23 and 165 of the Constitution and find that the preliminary objection is not only malicious, vexatious and frivolous but is also a delay tactic and the same should be dismissed with costs.
9. The respondent's submissions are dated August 13, 2021. Among the undisputed facts that the respondent highlighted, is that the petitioner was the respondent's employee with clause 14 of her contract categorically indicating that her place of work was in the state of Qatar and further that the said contract stipulated that any dispute arising out the same shall be governed by Qatar Labour Law and all other applicable laws of the State of Qatar. The respondent acknowledges that the information being sought by the petitioner although she terms it personal information, it is governed by clause 14 of the employment contract. While placing reliance on the case of National Bank of Kenya Limited v Pineplastic Samkolit (k) Ltd & another (2001) Eklr, the respondent urged this court to refrain from stepping into the parties' shoes to re-write the contract between them after they had agreed that Qatar Labour Law would govern their relationship and any dispute would be determined by Qatari Courts and in accordance with Qatari laws.
10. On the issue of extra-territorial application of the Kenyan Constitution, the respondent submitted that the actions complained of in the present petition took place outside the territory of the Republic of Kenya and that the petitioner cannot apply the provisions of the Kenyan Constitution to challenge these actions before this honourable court. That the court does not have extra territorial jurisdiction to adjudicate on matters outside the territory of Kenya as defined under article 5 of the Constitution. That the Constitution is intended to apply within Kenyan territory and that there is no provision that suggests that it applies to actions that took place outside the territory of Kenya. The respondent also relied in the South African case of *Kaunda* (supra) where the court relied on section 7(1) of the South African Constitution which the respondent submits that is similar to article 19(1) of the Kenyan Constitution.
11. The respondent contends further that the information requested by the petitioner relates to her employment information and with the respondent in the state of Qatar and as per the contract between the parties, Qatar law applies. That the petitioner cannot therefore seek the provisions of the Kenyan law and the Kenyan Constitution to seek that information in this court.
12. The respondent urged this court to find that it lacks jurisdiction to determine the matter because any contrary decision would det a dangerous precedent because it would mean that any person can institute a constitutional petition in Kenya alleging violation of the bill of rights with respect to actions that took place in foreign territory. Consequently, the petition be struck out with costs.

Analysis and Determination

13. The main issue for determination is whether this court has the requisite jurisdiction to handle this petition. This court's jurisdiction is provided for in article 165 (3) of the Constitution which provides that:

- (3) Subject to clause (5), the High Court shall have--
 - a. unlimited original jurisdiction in criminal and civil matters;
 - b. jurisdiction to determine the question whether a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened;



- c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under article 144;
- d. jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - i. the question whether any law is inconsistent with or in contravention of this Constitution;
 - ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - iv. a question relating to conflict of laws under article 191; and
- e. any other jurisdiction, original or appellate, conferred on it by legislation

14. It was held in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] EKLK thus:

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

15. In The Matter of The Interim Independent Electoral Commission, Constitutional application number 2 of 2011 the Supreme Court held:

“Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

16. This petition is dated December 14, 2020. The petitioner alleges that her rights under articles 27, 35 and 47 of the Constitution as read with section 4(b) of the Access to Information Act and section 4 of the Fair Administrative Action Act were violated by the respondent.

17. The respondent argued that the information the petitioner wants relates to her employment contract with the Qatar Airways which contract is governed by the labour laws of the State of Qatar and not Kenya.



18. The fact that the petitioner was employed by the respondent is not in dispute. A perusal of the employment contract indicates that it was executed in Qatar Airways Tower in Doha Qatar. Clause 14 reads as follows:

‘This offer letter and your employment contract shall be governed by the Qatar Labour Law and all other applicable laws of the State of Qatar. Any dispute shall be referred to the Qatari Courts and shall be construed in accordance with Qatari laws.’

19. The petitioner accepted the terms of employment by executing the offer of the employment. In *Dorcas Kemunto Wainaina v IPAS* [2018] EKLK, it was held that in cases of international contracts where there is no express provision of choice of law and which contract is performed majorly in Kenya, by a Kenyan citizen and where the employer has a presence within the country, the court will have jurisdiction.

20. This however is unlike the present case as the contract has a specific clause on the applicable laws to govern the employer/employee relationship. The petitioner submits that the petition has nothing to do with her employment contract, but it is apparent that the documents she is pursuing are those connected to her employment with the respondent. In paragraph 3 of the petition she says it and the documents she seeks are limited to that particular period. She says:

3. At all material times to this petition, the petitioner was employed as a pilot with the respondent having been offered employment vide an offer of employment as a first officer on Boeing 777 dated May 18, 2015 accepted by the petitioner on October 11, 2015.’

21. At paragraphs 5 and 6 of the petition, he continues:

‘5. Subsequent to the termination of employment, the respondent issued the petitioner with a certification of flying hours...detailing her flying hours as of the August 6, 2020...

6. On the October 8, 2020 and subsequently on the October 12, 2020, the petitioner requested from the respondent official and complete information in regard to her flight hours from October 9, 2015 until August 6, 2020 inclusive.’

22. The information she seeks is basically one that pertains to the employment period which according to the terms of the employment contract was governed by the laws of Qatar. She cannot thus invoke article 35 of the *Constitution* to demand the said documents. That contract ousted the jurisdiction of this court by defining the forum that was to govern matters arising or relating to the employment contract. This case is distinguishable from the *PRS v Qatar Airways Case* (supra) that was relied upon by the petitioner because the said case was for copyright infringement in flight by Qatar Airways.

23. This preliminary objection succeeds and the entire petition is thus struck out for lack of jurisdiction.

24. Each party shall bear its own costs.

DATED AND DELIVERED AT MILIMANI THIS 29TH DAY OF SEPTEMBER, 2023

L.N MUGAMBI

JUDGE

