



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL PETITION NO. 198 OF 2018

IN THE MATTER OF: CONTRAVENTION OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: OF: ALLEGED BREACH/INFRINGEMENT OF RIGHTS AND FUNDAMENTAL FREEDOMS

AND

IN THE MATTER OF: ARTICLE 3, 10, 19, 21, 22, 27, 46, 47, 165, 258 & 259 OF THE CONSTITUTION OF KENYA

BETWEEN

KENYATTA MAITAPETITIONER

AND

PLAN INTERNATIONAL KENYA.....RESPONDENT

RULING

The Application

1. By the Notice of Motion application dated 18th September, 2018 the Respondent/Applicant prays that the petition filed herein on 23rd July, 2018 be struck out and costs be provided for on grounds:

(a) That the cause of action as raised by the Petitioner herein is similar to the ones raised in ELRC No. 5 of 2014, which suit was canvassed by the same parties herein and a final determination made.

(b) That the issues raised in the instant petition can and have been heard and determined by the Employment & Labour Relations Court in a separate matter. As such, the constitutional court's mandate has neither been appropriately raised nor necessitated by any circumstances and as such, the instant suit is an abuse of the court process.

(c) That the issues raised in the instant petition are effectively res judicata and in light of failure by the Petitioner to prove the necessity of intervention by the constitutional court, the latter lacks the jurisdiction to entertain this suit.

(d) That the petition filed herein is therefore scandalous, frivolous and/or vexatious and the continued presence thereof is an abuse of the court process.

(e) That it is only in the interest of justice that the suit is struck out or dismissed.

2. The application is supported by affidavit sworn by Samuel Musyoki on 18th December, 2018. The deponent avers that he is the Respondent's interim County Director and has the authority and knowledge to depone to matters herein.

3. The Applicant's case is that it is aware that the Petitioner herein had initially filed suit against the Respondent in the Employment & Labour Relations Court, being *ELRC no. 5 of 2014*, in which suit the Petitioner had sought various orders to be made in his favour based on a claim of breach of contract by the Respondent. The said suit was filed on the basis of the Petitioner being a former employee of the Respondent. The initial suit was heard and a well-reasoned determination made by the Learned Justice Rika on 24th October 2017. In the said Award, the Employment & Labour Relations Court, having looked at all the evidence produced and testimony adduced in court, made a determination that whilst there was a misapprehension of Human Resource policies by the Respondent, which led to late payment of the

Petitioners gratuity, there was no deliberate breach of contract by the former. Based on the pleadings filed and determination made in ELRC No. 5 of 2014, the Applicant/Respondent believes that the instant suit should be struck off and/or dismissed on the grounds that the instant suit cannot be heard and/or determined by this Court as the same is effectively *Res Judicata*. The course of action raised, evidence adduced and issues highlighted are substantially the same with those raised in ELRC no. 5 of 2014, which initial suit has been heard and determined. This court therefore lacks the jurisdiction to make a second determination on the same issues. In any event, the Applicant avers that this Court lacks the jurisdiction to hear and determine this Petition on the grounds that legal provisions/avenues, in this instance being the Employment Act of 2007, has been enacted and, should be applied to determine the dispute between the parties herein. The Applicant's case is that the claim by the Petitioner is one that arises from an Employer-Employee relationship, with the Employment & Labour Relations Court being the proper avenue for redress. This avenue has already been applied successfully. It is now an established principle of the Constitutional Court that where a matter can be disposed without recourse to the Constitution, the Constitution should not be involved at all. It is further the established legal practice that this Court will not normally consider a Constitutional question unless the existence of a remedy depends on it.

4. That based purely on the points of law raised above, the Applicant believes that the Petition herein does not raise any new issues for determination by this court and as such, the entire petition should be dismissed forthwith. The Applicant states that a clear and simple reading of the pleadings filed herein shows that the entire Petition is premised on a claim of breach of contract which occurred as a result of failure of the Respondent to settle the Petitioner's Gratuity payment within a set timeline. This was the same course of action raised in ELRC No. 5 of 2014, which was extensively canvassed by both parties and a reasoned determination made that the error by the Respondent was **NOT** a deliberate breach of contract but instead a misapprehension of the policies and procedures as drafted by the Respondent. By filing the instant petition, the Petitioner is attempting to sneak in an Appeal of the decision made in ELRC No. 5 of 2014 without following the due process and filing a formal Appeal. The Applicant states that the Petitioner's conduct is therefore a clear breach of court procedures, is vexatious and an outright abuse of the Court process. Such conduct should not be tolerated by this Court. That as such, it is evident that the Petitioner herein has no new claim as against the Respondent, is simply regurgitating the same facts and evidence before a new court and is effectively forum-shopping for fresh and favorable orders. The instant Petition is therefore frivolous, scandalous and/or vexatious and the same ought to be struck off.

The Response

4. The application is opposed by the Petitioner vide a Replying Affidavit sworn by the Petitioner and filed herein on 30th October, 2018. The Respondent's case is that the petition herein is not in any way related to the above said ELRC No. 5 of 2014. The Respondent avers that the main issue adjudicated by the said ELRC No. 5 of 2014 was whether the Petitioner was entitled to payment of his gratuity as an employee of the Respondent. On the contrary, the Petitioner avers that the petition herein is based on violation of his constitutional rights as a private citizen. The Petitioner referred to several allegedly violated rights which he wants vindicated in the petition. These are right not to be discriminated against. That in the ELRC Case No. 5 of 2014, the Court considered the issue of breach of employee – employer contractual relationship on the other hand the issues that have been brought for determination to the Constitutional Court arise out of the Respondents actions and inactions which violated the Constitutional rights of the Petitioner as a private Citizen of the Republic of Kenya; the said violations are summarized as follows:

- i. Right not to be discriminated against. The Petitioner as a Kenyan Citizen was subjected to a different set of unpaid leave/ study leave policy against what applies to citizens of other Countries where the Respondent has a presence.
- ii. Right to be treated with dignity and the right to have that dignity respected. Despite the Petitioner's desperate pleas in writing to resolve the grievance internally, the Respondent was not in any way moved by the many distress calls to address the grievance.
- iii. Right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The Respondent did not timely, efficiently, lawfully and reasonably follow laid down administrative procedures culminating in the infringement and denial of the foregoing constitutional right of the Petitioner.
- iv. Right to property. The Respondent's actions amounted to denial of the Petitioner's right to property.
- v. Right not to be subjected to torture in any manner, whether physical or Psychological. It was within the power and ability of the Respondent to make all reasonable efforts to ensure that his gratuity pay was effected fully and promptly but instead the Petitioner suffered mental pain and anguish due to the actions and inactions of the Respondent to maliciously withhold his gratuity pay.
 - (i) Breach of Right to privacy. That by the Respondent rightly admitting full knowledge of the loan repayment obligation but still maliciously detaining the Petitioner's gratuity pay contrary to his legitimate expectations, the Respondent directly induced the Petitioner to default on the loan repayment obligation where recovery efforts instituted by the Bank led to third parties gaining access to his sensitive private information.
- vi. It is not true both in fact and law to claim that the Employment and Labor relations Court fully adjudicated on the allegations of constitutional rights violations when it has no legal mandate and jurisdiction to adjudicate on such matters.
- vii. There is nowhere in the submissions, proceedings or Judgment of the ELRC case where there exists either a sentence or a paragraph showing that the exact current constitutional issues being raised in this suit were expressly prayed for by the Petitioner in his pleadings and fully adjudicated by the Employment and Labor relations Court in the previous suit.
- viii. The alleged breach of the Petitioner's constitutional rights particularly Articles 3, 10, 19, 20, 20, 21, 22, 23, 25, 27, 29, 31, 40, 46, 47, 165, 256 & 259 of the Constitution of Kenya could not be disposed by the Employment and Labour Relations Court but only the Constitutional Court due to limitation of legal mandate and jurisdiction of the former.

ix. That it is both a matter of fact and law that the actions and/or inactions of the Respondent grossly violated the constitutional rights of the Petitioner as a private citizen of the Republic of Kenya and no legal remedies have so far been provided.

x. This Constitutional petition is in no way an attempt to appeal the previous suit adjudicated by the Employment and Labor Relations Court but rather is a direct response to seek remedies from the Constitutional Court on Constitutional rights violations suffered by the Petitioner as a private Kenyan Citizen as provided for in the Constitution above completely different and separate from the employment contract breaches which were already ventilated.

xi. The fact that the Respondent has attempted to challenge only three of the seven Claims for Constitutional rights violations by the Petitioner, that is; discrimination, violation of right to privacy, right to compensation for economic losses suffered as a result of a direct induced loan default by the Respondent while four have not been contested that is, (the right to be treated with dignity and the right to have that dignity respected including the unalienable, right to be heard, right to fair labor practices, right not to be subjected to torture in any manner, whether physical or psychological and right to privacy), it is crystal clear that all issues were not fully adjudicated by the Employment and Labour Relations Court and indeed they are new and different to deserve the full attention, hearing and determination of the Constitutional Court.

xii. That the doctrine of *Res Judicata* should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions.

Submissions

5. Parties made oral submissions in court which I have carefully considered. In my view the issue for determination is whether or not the issues raised herein were the subject of the said ELRC No. 5 of 2014.

Determination

6. I have looked at the prayers in the petition herein. I have also looked at the Judgment in ELRC No. 5 of 2014. It is evident that the two have a close relationship. In fact, the petition is purely premised on the grievances of matters carried over from the said ELRC case. Other grievances occurred before the said ELRC No. 5 of 2014 was initiated. The question then which one has to ask oneself is why the Applicant did not ventilate all these issues in the ELRC No. 5 of 2014. What is also clear is that using the Articles in the constitution the Petitioner has cleverly expanded his areas of grievances against the Respondent and allegedly found areas in which his constitutional rights were violated by the Respondent. What is not in doubt however, is that all these alleged violations have their foundation in the contract of employment between the Petitioner and the Respondent. In other words, the foundation of this petition in every bit is about the said contract of employment. This court, as a constitutional court may have jurisdiction to deal with those violations. However, the ELRC is the Court constitutionally mandated with the jurisdiction on the said petition.

7. It is now clear jurisprudence that courts with equal status to the High Court have the jurisdiction to hear and determine constitutional issues, and alleged violations of constitutional rights which emerge during the proceedings in matters before those courts. In this petition a number of issues have already been dealt with, or ought to have been dealt with in the ELRC No. 5 of 2014. This Court must tread very cautiously so that it does not appear to preside as an appellate court over the issues which have been heard and determined by a court of concurrent jurisdiction.

8. This Court is not sure whether all the issues in the petition herein were dealt with in the said ELRC No. 5 of 2014, and so cannot strike out the petition. However, this Court is sure that the greater jurisdiction herein lies with the ELRC, and that the attempt to involve this Court by invoking its constitutional division is not proper in the light of the said ELRC No. 5 of 2014. It is the position of this Court that the petition herein must be heard and determined by the ELRC which having rendered Judgment in ELRC No. 5 of 2014 is in a better position to deal with other aspects of the alleged violations of the contract of employment.

9. For the foregoing reason this Court makes the following orders:

(a) This petition is herewith transferred to ELRC.

(b) Costs in the cause.

10. That is the Ruling of the Court.

Dated, Signed and Delivered in Mombasa this 30th day of April, 2019.

E. OGOLA

JUDGE

In the presence of: