



Group Nine Security Limited & 2 others v Ministry of Interior and National Administration & 2 others (Petition E002 of 2024) [2024] KEHC 2494 (KLR) (11 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2494 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PETITION E002 OF 2024
RN NYAKUNDI, J
MARCH 11, 2024**

BETWEEN

**GROUP NINE SECURITY LIMITED 1ST PETITIONER
REAL APPRAISAL LIMITED 2ND PETITIONER
VENUS GROUP OF HOTELS 3RD PETITIONER**

AND

**MINISTRY OF INTERIOR AND NATIONAL ADMINISTRATION 1ST
RESPONDENT
THE ATTORNEY GENERAL 2ND RESPONDENT
DIRECTOR GENERAL, PRIVATE SECURITY REGULATORY
AUTHORITY 3RD RESPONDENT**

RULING

1. What is pending before this court in the 1st instant is the 1st, 2nd and 3rd respondent’s Notice of Preliminary Objection dated 7.2.2024 and 13.2.2024 accompanied with submissions dated 16.2.2024. The respondents seek to have the suit struck out with costs for the following reasons;
 1. That the suit is incompetent and bad in law as the petitioner had filed a similar suit challenging the same Legal notice PSRA/005/2023 in the High Court at Eldoret in Constitutional Petition no. E018 of 2023 which suit was marked as settled in its entirety vide consent judgment dated 16th January 2024 by Hon. Justice Wananda.
 2. That this instant suit is a misguided attempt to reopen the said Constitutional Petition no. E018 of 2023. Yet the process and criteria for setting aside a consent judgment is well settled.



3. That this honourable court lacks jurisdiction to hear this matter since the petitioner has not exhausted the statutory/administrative remedies set out under section 43 of the [Private Security Regulation Act](#) No. 13 of 2016.
 4. That this suit is sub judice for reasons that the issues canvassed in it are currently under active litigation at the Employment and Labour Relations Court at Nairobi in *Judicial Review No. E0443 of 2023*. This petition was filed on 4th December 2023 preceding the filing of the instant case.
 5. That both suits challenge the same Legal Notice PSRA/005/2023 on the same grounds, cite similar issues, similar facts and the prayers sought are wholly if not substantially the same.
 6. That the petitioner is in continuous violation of the law and commission of an offence under section 6991) of the [Private Security Regulation Act](#) by employing or otherwise engaging private security officers who have not been trained, registered and licensed contrary to the licensing requirements under sections 6, 21, 22, 23 and 24 of the [act](#). All proceedings based on an illegality are null and void *ab initio* and no benefit can accrue.
 7. That this suit is bad in law for reasons that it is an abuse of the court process.
 8. That the petitioner has moved the court challenging legal Notice No. PSRA/005/2023 on grounds that he same did. The petitioner has moved the court challenging Legal Notice No. PSRA/005/2023 on the grounds that the same did not go through public participation and that it was merely a proposal by the 3rd respondent. They also allege that it was not gazette or published in the website; that it introduces raft for issuance of licenses and is in conflict with Special Issue Kenya Gazette Supplement No. 114(Legal Supplement No. 52) Legal Notice No. 125.
 9. That the petitioner claims that the requirement in the legal notice to pay security officers Kshs. 30,000.00/- is unreasonable since the same can only lead to an increase they charge clients which will be up to a sum of Kshs. 100,000.00.
 10. That in the circumstances the petitioner is seeking an order of *certiorari* to quash the decision of the respondents proposing a new basic pay, house allowance, overtime and other benefits thereto; prohibition prohibiting the implementation of the legal notice amongst others.
2. With respect to this issues, the respondents invited the court to rely on the provisions under Article 41 of the [Constitution](#) are a preserve of the Employment and Labour Relations Court. Counsel also cited the case of [Charles Oyoo Kanyangi & 41 others v Judicial Service Commission of Kenya](#) [2018] eKLR in support of this submission. Counsel urged that this is not the proper forum for the determination of this petition.
 3. The petitioners filed submissions in opposition to the preliminary objection. Counsel urged that the matter is not res judicata as the parties in this suit are not the same as those in *Judicial Review No. E043 of 2023* and further, that the reliefs are different from the instant petition. As a consequence, counsel placed reliance on the provisions of Section 6, 7 of the [Civil Procedure Act](#) and the principles in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distribution* (1969) EA 696. Given this background counsel for the petitioner submitted and urged the court to dismiss the preliminary objection for lack of merit.
 4. I have considered the petition as filed on 21.1.2024 challenging the legal notice Ref. PSRA/005/2023 as being a sham, unconstitutional null and void. The premise of the legal notice being unconstitutional



is fronted as having been in violation and infringement of Art. 2 of the Constitution which constitutes a fundamental of the petitioner's right to the legitimate expectation that all person including state officers and state organs are to defend the Constitution. That the respondents are in breach of Art.10 of the Constitution which constitutes a fundamental breach of the petitioner's rights to public participation. That the respondents are in breach of Art. 21 of the Constitution which constitutes and obligates every state officer and state organ to observe, respect, promote and fulfil the rights and fundamental freedoms in the bill of rights. That the respondents are also in breach of Art. 27 of the Constitution on the right to equal protection and equal benefits of the law. That the respondents have gone further to be in breach of Art.35 of the Constitution which constitutes a fundamental breach of the petitioner's right to information held by any person and required for the exercise or protection of any right or fundamental freedoms. That the respondents have not stopped there but also in breach of Art.47 of the Constitution of the petitioner's right to fair administrative action which provides that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action the person has a right to be given written reasons for the action. That the respondents went further to infringe and violet Art. 46 of the Constitution which violets a fundamental breach to the right on procuring goods and services of reasonable quality offered by public entities and private persons. Finally, that the respondents are in breach of Art. 55 of the Constitution which identifies the youth as special interest groups and the state shall take measures and ensure that the youth access employment. This is the cause of action in the petition filed by the petitioner's.

Analysis & Determination

5. It follows therefore, that an extract of the Private Security Regulation Act No. 12 of 2016 and the corresponding impugned legal notice PSRA/005/2023 is of significance as it lays the foundation what the dispute is all about as between the petitioners and the respondents. Pursuant to Sections 6, 9 9 21, 22, 23, 24, and 25 of the Private Security Regulation Act No, 13 of 2016 the Authority hereby notifies private security service providers, users of private security services and the general public That:

“The Authority has commenced nationwide registration, licensing, and issuance of Guard Force Numbers (GFN) to individual private security service providers who include but are not limited to; private security guards, corporate security officers, and all persons providing private security services, either employed or otherwise engaged by Government institutions, agencies or bodies; and/or by any individual, security companies, corporate entities, organizations, associations or any other entity recognized by law whether incorporated or unincorporated.

In view of the foregoing, it is a mandatory requirement for All individual private security officers (Private Security Guards) to undergo training in security matters in an institution accredited by the Authority as a prerequisite requirement for registration and licensing in accordance with Section 23 (2) (d) of the *Act*. In furtherance, of its mandate and powers conferred by Section 9 (b), (e), (h), (k), (q) and 10 (c), the Private Security Regulatory Authority hereby issues the following legal notice in regard to the Basic Minimum Wages for All private security officers(private security guards) operating in Kenya. The itemised employment and labour Relations issues of the impugned legal notice touch on basic pay, house allowance, overtime allowance, NSSF deductions, Social Health Insurance Fund and Affordable Housing Levy. Section 69 of the Regulation declares if any individual, organization, company, association or agency or entity recognized by law hires, employs otherwise engages the services of any security services provider and pays or remunerates



them below the prescribed minimum will be guilty of an offence punishable with a fine of 2 million in the case of a corporate or both.

6. As this is a preliminary objection, it is trite that the same must be raised on points of law. The law pertaining to Preliminary Objections is well captured by all the parties herein. In the famous *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, the Court of Appeal for Eastern Africa, stated (Law JA) in part that

“So far as I’m aware, 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. Examples are an objection to 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.”

7. Sir Charles Newbold President of the Court in the *Mukisa case* went on to state;

“a Preliminary Objection cannot be said to be such if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.” (Page 710).

8. There are many legal issues adverted to as between the petition, the notice of motion and the preliminary objection. As for me my starting point would be to answer the question Whether this court has jurisdiction to handle the petition?

9. The law at it stands as per the [Employment and Labour Relations Court Act](#) no. 2011 Section 12 the jurisdiction of the court is provided for by parliament as follows:

Jurisdiction of the court

1. The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Art. 162 (2) of the [Constitution](#) and the provisions of this [Act](#) or any other written law which extends jurisdiction to the court relating to employment and labour relation including;
 - a. Disputes relating to or arising out of employment between an employer and a trade union.
 - b. Dispute between an employer and a trade union.
 - c. Dispute between an employers’ organisation and a trade unions organization.
 - d. Disputes between trade unions.
 - e. Disputes between employer organizations.
 - f. Disputes between an employer’s organizations and a trade union.
 - g. Disputes between a trade union and a member thereof.
 - h. Disputes between and employer’s organization or a federations and a member thereof.
 - i. Disputes concerning the registration and election of trade union officials and
 - j. Disputes relating to the registration and enforcement of collective agreements.



10. The said jurisdiction of the ELRC court is enshrined in Art. 162(2)(a) of the Constitution to determine disputes relating to employment and labour relations. The landmark case in Owners of Motor Vessel Lilian S v Caltex Oil Kenya Ltd [1989] KLR 1 stated the jurisdiction is everything without it, a court has no power to make more one step. That jurisdiction flows from the law and the recipient court is to apply the same, with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdiction are donated by the Constitution.

11. Similarly, in Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others 2 of 2011 the Supreme Court remarked:

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.... The issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings.”

12. With that I turn to the issue of jurisdiction and the provisions of Section 12(1) of the ELRC Act, Art. 162(2)(a) of the Constitution as applied to the factual matrix of the petition with the corresponding notice of motion by the petitioner’s seeking conservatory orders as against the respondents. The basis of it is to stop the implementation of the legal notice PSRA/005/2023. The court takes cognisance that the main characteristics as prescribed pursuant to Section 6, 9(o), 21, 22,23,25 & 69 of the Private Security Regulation Act No. 13 of 2016 which gave birth to the impugned legal notice is all about the continuum of Employment and Labour Relations contracts as between organizations, companies, agencies in business of providing security services to various individual and entities. I must confess the issue yet again of jurisdiction which must be immediately tackled which I quit agree with the respondents that this court has no jurisdiction to entertain the petitioner’s petition challenging the legal notice PSRA/005/2023. This is a matter perfectly settled that ELRC has the jurisdiction to interpret the provision of a statute which may be construed as being unconstitutional within the legal framework of section 12(1)(a) of the Act. See also the Supreme Court decision in Petition No. E002 as consolidated with E004 of 2023 Kenya Growers Association and 2 others v Nation Social Security Fund board of Trustees and 13 others.

13. In relation to the proper forum to raise constitutional issues that are integrally linked to the predominate cause of action and the interpretation of the questions raised in the petition besides the collateral issues I am convinced that the proper forum is ELRC.

In this matter not only jurisdiction is a major barrier to entertain the petition but as deduced from the affidavits filed by the respondents there is a pending judicial review referenced as *E043 of 2023* before ELRC at Nairobi. Undoubtedly it is all about the same issues being canvassed by the instant petition. What is common is legal notice PSRA/005/2023. What are the implications? The answer is to be found in Section 6 of the Civil Procedure Act. These are the essential conditions of the doctrine of res sub judice:

1. The matter in issue in the subsequent suit is directly and substantially in issue in the previously instituted suit,
2. The parties in the both suits are the same, either directly or indirectly and,



3. The court in which the first suit is instituted, is a court of having jurisdiction or competent to grant the relief claimed in the subsequently instituted suit.
14. The rationale for this principle was restated in Kampala High Court Civil Suit No. 450 of 1993 *Nyanza Garage v Attorney General* in which the court stated:

“in the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matter, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits.”

Similarly, in *Thika Min Hydro Co. Ltd v Josphat Karu Ndwiga* [2013] eKLR court opined that:

“it is not form in which the suits is framed that determines whether it is sub judice. Rather it is the substance of the suit and looking at the pleading in both cases.”

15. In that view of the matter, it has become unnecessary for this court to go into more factual details of the petition on the merits. The same is accordingly disposed of for want of jurisdiction and the doctrine of res sub judice. Be that as it may I down tools to exercise any further jurisdiction on the cause of action and as a consequence the same is dismissed with costs to the respondents.
16. It is so ordered

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 11TH DAY OF MARCH 2024

.....

R. NYAKUNDI

JUDGE

