



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwambu v Twiga Foods Limited (Petition E003 of 2023)  
[2023] KEHC 22280 (KLR) (19 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22280 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
PETITION E003 OF 2023  
OA SEWE, J  
SEPTEMBER 19, 2023**

**BETWEEN**

**AMOS MWAMBU ..... PETITIONER**

**AND**

**TWIGA FOODS LIMITED ..... RESPONDENT**

**RULING**

1. The petitioner approached the Court on 25<sup>th</sup> January 2023 seeking declaratory orders, among other reliefs, on the grounds that his constitutional rights as enshrined in Articles 28, 31 and 40 of the *Constitution* had been violated by the respondent. He explained that he was employed by the respondent as a sales representative from October 2019 to October 2022 on a renewable performance based contract; and that in the course of his work the respondent's technical team visited his area and took his photograph with some clients.
2. He further averred that he was surprised to learn later that the photographs had been shared by the respondent through social media such as youTube, WhatsApp and LinkedIn as well as the respondent's website. Thereafter, the respondent used the photographs to brand its commercial vehicles during the launch of the Twiga Foods Ltd, Isuzu and NCBA partnership. He contended that the photographs were thus used by the respondent for commercial purposes without his consent; and therefore amounted to a violation of his right to dignity and privacy under the *Constitution* of Kenya.
3. In response to the Petition, the respondent filed a Notice of Preliminary Objection dated 28<sup>th</sup> March 2023, on the grounds that:
  - (a) This Court has no jurisdiction to hear, entertain and/or determine the Petition, as amended, as it is a dispute between an employee and his employer; which dispute falls within the ambit of Section 12 of the *Employment and Labour Relations Court Act*, Chapter 234B of the Laws of Kenya.



- (b) That the Court is divested of jurisdiction to hear, entertain and/or determine the Amended Petition dated 20<sup>th</sup> February 2023 by dint of Clause 18 of the Employment contract dated 8<sup>th</sup> June 2021, which provides that all disputes arising or relating to the agreement shall be referred to arbitration.
4. The respondent's Preliminary Objection was canvassed by way of written submissions, pursuant to the directions given herein on 22<sup>nd</sup> March 2023. Accordingly, Mr. Otieno for the respondent relied on his written submissions filed on 4<sup>th</sup> April 2023. He urged the Court to note that the petitioner has described himself as an employee of the respondent and annexed a copy of the employment contract to his Supporting Affidavit. Mr. Otieno therefore asserted that that the Court will have to delve into the employment records of the petitioner and the respondent; which evidence ought to be interrogated by the Employment and Labour Relations Court. He relied on *Daniel Mugendi v Kenyatta University & 3 Others* [2013] eKLR and *Wycliffe Amukowa & 2 Others v Machakos University* [2022] eKLR, among others authorities, for the proposition that the Employment and Labour Relations Court has the jurisdiction, when dealing with disputes involving employer and employee relations, to hear and determine breaches of fundamental rights.
5. Mr. Otieno further submitted that, looking at the employment contract dated 8<sup>th</sup> June 2021 that the petitioner intends to rely on, it is apparent that the dispute flows from the posturing that the petitioner is bound to comply with the arbitration clause even where constitutional questions arise. He cited *Kenya Breweries Limited & Another v Bia Tosha Limited & 5 Others* [2020] eKLR. Accordingly, counsel prayed that the respondent's Preliminary Objection be upheld.
6. On behalf of the petitioner, Mr. Nyongesa contended that, to the extent that the respondent's Preliminary Objection, is premised on contested facts, it is untenable. For instance, he pointed out that the petitioner was not an employee of the respondent as at the time of filing the Petition and therefore that the contract dated 8<sup>th</sup> June 2021 had come to an end and cannot be the basis for the instant disputation. He therefore submitted that, on that score alone, the Court has jurisdiction to entertain the Petition. He proceeded to point out that the authorities relied on by counsel for the respondent are all distinguishable on account of the fact that the parties concerned were in an employer/employee relationship at the material time. In his view, this Petition is properly before Court and should be proceeded with to its logical conclusion.
7. Needless to say that it would be inconsequential for a Court of law to proceed to hear and determine a matter if it lacks the jurisdiction so to do. As was aptly expressed by the Court of Appeal in the *Owners of Motor Vessel "Lillian s" v Caltex Oil (K) Ltd* [1989] KLR 1:
- "Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."
8. And, there is no gainsaying that the question of jurisdiction is one that must be taken in limine. In the *MV Lillian S Case*, the Court (per Nyarangi, JA) held that:
- "...it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it..."



9. Consequently, I have given careful consideration to the grounds raised by the respondent in its Notice of Preliminary Objection filed herein on 28<sup>th</sup> March 2023, the written and the submissions filed by counsel in that regard, in the light of the averments set out in the Amended Petition filed on 27<sup>th</sup> February 2023. It is manifest therefrom that the 2<sup>nd</sup> ground of the respondent's Preliminary Objection is untenable in so far as it is hinged on the employment contract dated 8<sup>th</sup> June 2023; and therefore is predicated on contested facts.
10. In *Mukisa Biscuits Manufacturers Ltd v West End Distributors Ltd* [1969] E.A 696, it was held that:
- “...a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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.”
11. Likewise, in *Oraro v Mbaja* [2005] 1 KLR 141 the principle was restated thus by Hon. Ojwang, J. (as he then was):
- “...The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed...Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”
12. Arising from the foregoing conclusion, the only valid point for the Court to consider is that of jurisdiction; and in the work, the *Major Law Lexicon*, Volume 4, jurisdiction is aptly defined thus:
- “By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it, or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by Statute or Chapter or Commission under which the Court is constituted and may be extended or restricted by similar means. If no restriction or limitation is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind or nature of the actions or the matters of which the particular court has cognizance or as to the area over which the jurisdiction extends, or it may partake of both these characteristics...”
13. Accordingly, in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR, the Supreme Court held that:
- “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 by law. We agree with counsel for the first and second Respondents in his submission that 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...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 on 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."

14. Needless to comment on the mandate of the Employment and Labour Relations Court under Articles 162, 165(3)(a) and (5) of the *Constitution* as well as Section 12 of the Employment and *Labour Relations Act*, or to mention that the Employment and Labour Relations Court has the jurisdiction to handle constitutional disputes that fall within its mandate. Indeed, in *Prof. Daniel N. Mugendi v Kenyatta University & 3 Others* [2013] eKLR, the Court of Appeal held:

"...we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the Environment & Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects."

15. There are however numerous situations in which overlaps arise as between the jurisdiction of the High Court on the one hand and the jurisdiction of the courts of equal status on the other. For instance, in this matter, the petitioner contends that is no longer an employee of the respondent; and that his dispute has nothing to do with his contract of employment with the respondent. His cause of action, as set out in Paragraphs 4-7 of the Amended Petition, is that the respondent used his images for commercial purposes without his consent. Hence, according to him, the dispute is not so much about an employer/employee relationship, but purely an issue of violation of his fundamental rights. In the circumstances, the question to pose is, what is the predominant issue in this dispute; and the answer, in this instance, is that the Petition as crafted, raises a constitutional issue as the predominant question for determination and is therefore properly before this Court.

16. Indeed in the two authorities relied on by counsel for the respondent, the parties were in an existing employer/employee relationship. In the Wycliffe Amukowa Case, the Court noted that the parties were in an employer/employee relationship when the suit was filed; and that the allegations of discrimination arose from the fact of that relationship; while in *Daniel N. Mugendi v Kenyatta University & 3 Others*, the petitioner was an employee when he was sent on compulsory leave; and therefore the dispute had everything to do with his employment. Indeed, the Court of Appeal noted in the latter case that:

"...the drafting, tenor and substance of the reference before her was essentially on breach of the terms of employment. All this shines through the quotations (above) from the petition as regards the orders and prayers stated. The appellant was hired by the 1<sup>st</sup> respondent as Deputy Vice Chancellor according to the Kenyatta University Act. In alleged breach of that employment contract, the 1<sup>st</sup> respondent allegedly sent him on compulsory leave, suspended him from duty and stopped his emoluments before finally firing him. So the appellant had gone before the High Court for declarations/orders that the compulsory leave was void, terminating his employment should be halted and he should be paid compensation..."



17. It was therefore plain that the dispute was an employment dispute and ought to have been filed before the Industrial Court/ELRC in accordance with Article 162(2)(a) of the *Constitution*. What the petitioner herein complains of appear to have nothing to do with his contract of employment save for the fact that the photographs in issue were taken while he was in the course of his employment with the respondent. I consequently agree with counsel for the petitioner that the authorities relied on by the respondent in support of the Preliminary Objection are indeed distinguishable.

18. In the premises, I am persuaded by the position taken by Hon. Ngugi J. in *Suzanne Achieng Butler & 7 Others v Redhill Heights Investment & Others*, High Court Commercial Case No. 2 of 2016 that:

“...it is imperative that a Court should not approach jurisdiction in an ultra-technocratic fashion as an essentialist parsing of sticks in a bundle. Jurisdiction is a substantive standard aimed at ensuring only the right court or tribunal clothed with the legitimate mandate deals with a dispute or controversy. It is not a jurisprudential thaumatrope to keep litigants guessing to which Court their controversy belongs at the pain of having their timeously pleaded case struck out for not pigeon-holing their claim in the correct box. The correct approach to jurisdiction is one which treats the question functionally as opposed to technically; one that looks at the constitutional objectives in creating equal status Courts as opposed to engaging in an essentialist, taxonomical and categorical analysis.” (also see *Patrick Musimba v The National Land Commission & Others*, Nairobi High Court Petition No. 613 of 2014)

19. In the result, I find no merit in the respondent’s Preliminary Objection. The same is hereby dismissed with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**OLGA SEWE**

**JUDGE**

