



Mwangi & 62 others v Steel Makers Limited (Petition E003 of 2024) [2024] KEELRC 1070 (KLR) (9 May 2024) (Ruling)

Neutral citation: [2024] KEELRC 1070 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
PETITION E003 OF 2024**

**M MBARŪ, J
MAY 9, 2024**

BETWEEN

JOHN MWANGI & 62 OTHERS PETITIONER

AND

STEEL MAKERS LIMITED RESPONDENT

RULING

1. The ruling herein relates to the petitioners’ application dated 8 April 2024 and the Notice of Preliminary Objections filed by the respondent dated 24 April 2024.
2. The petitioners filed an application dated 8 April 2024 seeking orders that;

Pending the hearing and determination of this petition inter parties the court be pleased to order the respondent to pay all the petitioner their February and March salaries.
3. The application is supported by the Affidavit of John Mwangi on the grounds that the petitioners are all pensionable and permanent employees of the respondent earning wages ranging from Ksh.10, 000 to Ksh.60, 000 per month, through letters dated 19 February 2024 the petitioners wrote a letter to the respondent with regard to the collective bargaining agreement (CBA) touching on the unionisable employees of the respondent based in Mazeras. Instead, the respondent has victimized them and refused to pay wages.
4. John Mwangi in his affidavit aver that the petitioners wrote a demand letter for the unpaid salaries withheld by the respondent which violates their constitutional rights. The respondent has refused to pay until the petitioners withdraw their demands over the negotiation of a CBA. The petitioners have not been paid for two months, February and March and are suffering and in contravention of their constitutional rights under Articles 19, 21, 23, 27, 28, 41, 43, and 40 of *the Constitution*. The petitioners are seeking court protection to secure their rights and payment of wages held by the respondent.

5. In reply, the respondent filed the Replying Affidavit of Johnson Samuel Vasant the general manager and aver that the petitioner John Mwangi has not filed a letter of authority to act for the 62 other petitioners. Mohamed Hamisi the alleged 19th petitioner has written a letter stating that he is not party to the petition.
6. The petitioners are members of the Kenya Engineering Workers Union (KEWU) which entered into a Memorandum of Agreement Relative to Recognition and Negotiation Procedure. The agreement laid down the procedures for redress of grievances which the petitioners flouted.
7. The respondent and KEWU have a collective agreement (CBA) dated 18 November 2016 and 28 November 2019. Previously there were similar grievances which were handled through the grievance resolution mechanisms and resolved.
8. The respondent's factor and plant are closed, and the petitioners seek payment of salaries for February and March 2024 for a period not at work. The dispute herein is between an employer and employee does not meet the threshold of a constitutional petition and should be dismissed with costs.
9. The Notice of Preliminary Objections dated 24 April 2024 is on the grounds that;
 1. The issue in dispute between the parties is not a constitutional issue hence the petitioners have inappropriately filed a constitutional petition.
 2. The issue in a dispute arising out of a contract of employment any claim by the petitioners should have been filed in accordance with the Rules and Procedure of the Court. The petition filed herein is therefore incompetent and bad in law.
 3. The orders sought in the Notice of Motion cannot be issued under Article 23 of *the Constitution*.
10. Both parties filed written submissions and attended court to highlight the same.
11. The petitioners submitted and reiterated the averments in the Supporting Affidavit of John Mwangi and that the failure by the respondent to pay salaries is a violation of the petitioners' constitutional and legal right not to be discriminated against and not to be placed under inhuman and degrading conditions. They are distressed for lack of salaries from February and March 2024 which infringes on their right to property for wages earned. Such conduct of withholding salaries is unlawful and unfair and in the case of Jonathan Spangler v Centre for African Family Studies (CAFS) [2017] eKLR the court held that when a salary is not paid for work done, the opposite takes place, an employee becomes anxious, demoralized, each day comes with bills and distress and eventually, with delays and no pay, panic sets in and the employee is reduced to begging, scavenging from fellow workers, friends and well-wishers. The employee is reduced to inhuman conditions. Such is slavery and servitude where there is no pay for work done,
12. The petitioners submitted that in the case of Kusow Billow Issack v Ministry of Interior and Coordination of National Government & 3 others [2021] eKLR the court held that the remedies available under Section 49 of the *Employment Act* can be secured through a petition. The petitioners have pleaded violation of their constitutional rights, freedom from discrimination and fair administrative action and such matters can only be urged through a petition and the orders sought should be allowed. The petitioners have applied the principles outlined in the case of R. v Anarita Karimi Njeru that a party wishing to file a constitutional petition must plead with precision and state the provisions of *the constitution* which he alleged to have been violated. The petitioners are properly before the court.

13. The respondent submitted that the petitioners allege that their wages for February and March 2024 have not been paid which is a matter of employer and employee. The claim relates to employment and contractual rights but is filed under the guise of a constitutional petition. In *Alphonse Mwangemi Munga & 10 others v African Safari Club Limited* [2008] eKLR the court held that it is an abuse of the court process where a party alleges violation of constitutional rights where there is no constitutional issue. Parties should make use of normal procedures under the law to pursue their remedies instead of invoking constitutional provisions as a license to file a constitutional petition.
14. Under Article 23 of *the Constitution*, the reliefs the court may grant in any proceedings under Article 22 and the reliefs sought by the petitioner are at variance. The petitioners are members of KAWU with whom the respondent has a Recognition Agreement and has negotiated CBA in recognition of the provisions of Article 41 of *the Constitution*. These Agreements provide for grievance handling mechanisms which the petitioners have failed to apply.
15. The objections filed should allow the petition together with the notice of motion be dismissed with costs.

Determination

16. The petitioners are seeking orders for payment of wages due in February and March [year not stated].
17. In the petition filed together with the application, the main issue giving rise to the matter is the alleged non-payment of wages for February and March.
18. In reply, the respondent denied owing the petitioners any wages and that the plant and firm are closed and there was no work for these months hence no wages are due. The respondent admits that there is KAWU, the union representing unionisable employees. There exists a Recognition Agreement and CBAs regulating terms and conditions of employment.
19. To this end, the petitioners do not challenge the existence of a CBA regulating their terms and conditions of service.
20. In his Supporting Affidavit, John Mwangi avers that;

The petitioners all earn salaries ranging from the gross pay of Ksh.10, 000 to over Ksh.60, 000 per month.

Through a letter dated 19/02/2024 we the petitioners through our advocate wrote a letter about the collective bargaining agreement (CBA) touching on the unionisable employees of the respondent based in Mazaras.

In instructing the advocates to write the aforesaid letter we were exercising our constitutional right as enshrined under Articles ...
21. A Recognition Agreement and a CBA are matters regulated under the *Labour Relations Act*, 2007 (LRA) and exist between a trade union and an employer. The subject trade union if aggrieved by any matter undertaken by the employer is the entity to address the matter under the LRA.
21. Employees who are members of the subject trade union under which the CBA is challenged such as KAWU in this case, must report to the union which should initiate the dispute resolution mechanisms outlined under Section 62 of the LRA. A report to the Minister is required before moving to court unless the matter falls under the protection envisaged under Section 74 of the LRA.

22. Employees on their own, where they seek to assert their constitutional or legal rights and where they earn wages below Ksh.80, 000, under Legal Notice No. 6024 of 10 June 2018 should file their Memorandum of Claim before the magistrate's court.
23. The rationale is that all employment disputes where the subject employee earns a wage of less than Ksh.80, 000 should be heard at the Magistrates Court. Such courts are granted jurisdiction to hear employment disputes and ensure access to justice at the nearest point where the parties are based. In his Supporting Affidavit, John Mwangi avers that the dispute between the parties relates to CBA touching on the unionized employees of the respondent based in Mazeras.
24. Where the petitioners have extricated themselves from their trade union KAWU which has a direct audience before the court, they must file their claim to the court nearest Mazeras.
26. To move as herein done over a claim that touches on a CBA that the negotiating parties and their union are absent cannot achieve the designed result.
27. On the question of whether the court should order the respondent to pay wages due in February and March, these are facts which can only be addressed at a full hearing. On the one hand, the petitioners seek to assert their rights under a CBA. The respondent admitted that the last CBA is dated 28 November 2019 which is between KAWU and the respondent. On the other hand, the respondents assert that the plant and factory are closed. That the salaries sought for February and March 2024 relate to a period where there was no work.
28. The respondent also raised the issue that Mohamed Hamisi the 19th petitioner has written and disowned the petition. These are facts that can only be gone into at a hearing. There is need to ascertain the real petitioners and what authority exists to allow John Mwangi to urge this petition for and on behalf of 62 others whereas his petition is not premised under Article 22 or 258 of [the Constitution](#)?
29. These are matters of fact and require a call of evidence. They cannot be ascertained through affidavits. For the court to fully address the dispute, a call for evidence is necessary.

Is this a proper petition?

30. Whether to file a petition or not is a matter that has now gathered notoriety and the court in several decisions gone into the matter. In the case of *Munir Abubakar Masoud v Kenya Revenue Authority & others Cause No.E088 of 2022* the court held that where the law gives a legal right and a mechanism for redress, the doctrine of constitutional avoidance applies.
31. The Supreme Court in the case of *Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others* held that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis. That;

...where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.
32. The Court of Appeal in the case of *Sumayya Athmani Hassan v Paul Simindi & another [2019] eKLR* held that where an individual has a right or interest or even a legitimate expectation, which he has been deprived of, to move the court through a constitutional petition without seeking for a declaration that the law and or its provisions be declared unconstitutional should not be encouraged. A Memorandum of Claim seeking to enforce employment and labour relations claims should suffice. This is allowed under Rule 7 of the Employment and Labour Relations Court (Procedure) Rules, 2016.

33. Indeed, issues raised in the Petition could have been resolved without invoking the Constitutional route. As a matter of practice and procedure, the constitutional questions advanced by the Petitioners, if any, could have been raised in terms of Rule 7(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016 as held in *Jane Angila Obando v Teachers Service Commission & 2 others* [2020] eKLR. A party is allowed to lodge a claim and assert his constitutional rights. Unless a provision of a statute is challenged as being unconstitutional or a party requires the interpretation of *the constitution*, such a party should avoid invoking the constitutional route as held in *Sumayya Athmani Hassan v Paul Masinde Simidi & another* [2019] eKLR that;

The Article 41 rights are enacted in the *Employment Act* and *Labour Relations Act*. The two Acts and the rules made thereunder provide adequate remedy and orderly enforcement mechanisms. The 1st respondent filed a petition directly relying on the provisions of *the Constitution* for enforcement of contractual rights governed by the *Employment Act* without seeking a declaration of invalidity of the provisions of the *Employment Act* or alleging that the remedies provided therein are inadequate. The petition did not raise any question of the interpretation or application of *the Constitution*.

34. Therefore the principles in the case of *Anarita Karimi Njeru v Republic* [1979] eKLR underscores the importance of defining the dispute to be decided by the court. The procedure is also a handmaiden of just the determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. For this reason, pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. It is not sufficient to cite various provisions of *the Constitution* and hence couch the pleadings into a petition as emphasised by the Court of Appeal in the case of *Mumo Matemo v Trusted Society of Human Rights alliance* [2014] eKLR.

36. The orders sought outside the parties to the Recognition Agreement and CBA cannot issue. The petitioners can only urge their cases, if any, before the magistrate's court.

37. This is also not a proper petition. The objections by the respondent are hereby allowed. The petition is struck out. Application dated 8 April 2024 is hereby dismissed. Costs to the respondent.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 9 DAY OF MAY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

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