



Kennedy v International Rescue Committee Kenya; Kenya Medical Practitioners and Dentist Board (Interested Party) (Employment and Labour Relations Petition E012 of 2024) [2024] KEELRC 1963 (KLR) (26 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 1963 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E012 OF 2024**

**AN MWAURE, J
JULY 26, 2024**

BETWEEN

DR. LILIAN MUMBUA KENNEDY PETITIONER

AND

INTERNATIONAL RESCUE COMMITTEE KENYA RESPONDENT

AND

KENYA MEDICAL PRACTITIONERS AND DENTIST BOARD .. INTERESTED PARTY

RULING

1. The Respondent/Applicant filed a Notice of Motion dated 21st February 2024 seeking the following orders that: -
 1. this Honourable Court be pleased to strike out the Petition dated 19th January 2024 against the Respondent.
 2. the costs of this Application be borne by the Petitioner.

Respondent/Applicant’s Case

2. The Respondent/Applicant avers that it employed the Petitioner as a medical officer on 1/1/2023 and her contract was terminated for gross misconduct on 20/9/2023. Aggrieved by this decision, the Petitioner filed the instant petition.
3. The Respondent/ Applicant avers that the petition does not meet the legal threshold of a constitutional petition as the violations stated do not amount to infringement of a right or fundamental freedom under the bill of rights.



4. The Respondent/Applicant avers that the suit filed is an employment dispute that ought to be adjudicated under the *Employment Act* through an ordinary suit brought by a statement of claim.
5. The Respondent/Applicant avers that the petition is misconceived, incompetent and an abuse of the court process and it is in the interest of justice that it is struck out.

Petitioner/Respondent's Case

6. In opposition to the Application, the Claimant/Respondent filed grounds of opposition dated 21st March 2024 on grounds THAT: -
 1. *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, the Mutunga Rules, don't provide for striking out of constitutional petitions at interlocutory stage.
 2. the petition is detailed as possible and drafted in the highest legal skills respecting constitutional petitions.
 3. the petition sets out various Articles in *the Constitution* and multiple provisions of the *Employment Act*, Fair Administrative Act and Medical Practitioners & Dentists Act that the Respondent violated.
 4. the Respondent's actions take away the Petitioner's professional life and career, an action that can only be remedied by way of constitutional petition.
 5. the Notice of Motion is argumentative yet seeks the drastic action of striking out. Striking out is only in the clearest case on points of law without elaborate arguments or doubts.
 6. current jurisprudence in the court is for petitions to proceed to full hearing on merit. Courts don't strike out suits for being filed in the wrong division which this matter is not.
 7. the petition is filed in the correct court clothed with jurisdiction to determine constitutional issues.
 8. the application alleges a different forum but doesn't indicate which employment disputes are exclusive preserve of this court.
9. the application is extreme abuse of the court process and is for dismissal.

Respondent/Applicant's Submissions

7. The Respondent/Applicant submitted that the issues raised in the petition do not warrant the court to sit in its constitutional capacity which requires priority of hearing and justify departure from the rules by which termination of employment dispute should be initiated and dealt with by a Statement of Claim through a hearing before judgment is delivered.
8. The Respondent/Applicant submitted that judicial precedent is clear that allegations of substantive and procedural unfairness of termination does not amount to a constitutional violation. It relies on the holding in *David Mathu Kimingi v SMEC International PTY Limited* [2021] eKLR and *Sumayya Athmani Hassan vs. Paul Masinde Simidi & Another* (2019) EKLR.



9. It is the Respondent/ Applicant submission that all rights allegedly violated under Article 41 are enacted in the [Employment Act](#) which provides adequate remedy and orderly enforcement mechanisms. The Petitioner’s failure to bring her claim through a statement of claim is fatal to her claim.

Petitioner/Respondent’s Submissions

10. The Petitioner/Respondent submitted that this court has jurisdiction to deal with constitutional matters arising from an employment contract. She relied on the supreme court case of Kenya Tea Growers Association & 2 others v National Social Security Fund Board of Trustees & 13 others; Law Society of Kenya (Intended Amicus Curiae) (Petition (Application) E004 of 2023 & Petition E002 of 2023 (Consolidated)) [2023] KESC 63 (KLR) and [Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others \(Interested Parties\) \(Petition E007 of 2023\)](#) [2023] KESC 113 (KLR).
11. It is the Petitioner/Respondent’s submission that the issues raised in the petition go beyond the employment contract between the Petitioner and Respondent.

Analysis and Determination

12. The main issue for this court’s determination is whether the petition should be struck out.
13. The court is called to determine if the petitioner has raised constitutional issues violations to justify the same to have been filled as a petition or should have been brought to court as a mere claim.
14. The court has perused petition filed by the petitioner and on the face of it alludes to constitutional violations. The court’s mandate is to give audience to all the parties in order to decipher the suit in its entirety. In this case the court would have to take time to listen to the entire suit in order to determine if it is entitled to findings of constitutional violations or not.
15. The court will reference the Supreme Court case cited by the petitioner [Kenya Tea Growers Association and Others vs the National Social Security petition No 004 of 2023](#) (unreported)where the Supreme Court held:

“In our view, there is nothing in [the Constitution](#), the ELRC Act, or indeed in our decision in the Karisa Chengo Case to suggest that in exercising its jurisdiction over disputes emanating from employment and labour relations, the ELRC court is precluded from determining the constitutional validity of a statute. This is especially so if the statute in question lies at the centre of the dispute. What it cannot do, is to sit as if it were the High Court under article 165 of [the Constitution](#), and declare a statute unconstitutional in circumstances where the dispute in question has nothing or little to do with employment and labour relations within the context of the ELRC Act. But, if at the commencement or during the determination of a dispute falling within its jurisdiction, as reserved to it by article 162(2)(a) of [the Constitution](#), a question arises regarding the constitutional validity of a statute or a provision thereof, there can be no reason to prevent the ELRC from disposing of that particular issue. Otherwise, how else would it comprehensively and with finality determine such a dispute? Stripping the court of such authority would leave it jurisdictionally hum-strung; a consequence that could hardly have been envisaged by the framers of [the Constitution](#), even as they precluded the High Court from exercising jurisdiction over matters employment and labour pursuant to article 165(5)(b). We are therefore in agreement with the appellants’ submissions regarding this issue as encapsulated in paragraph 69 of this Judgment.”



16. The court had an opportunity to study the reason for termination of the claimant among others being negligence. The petitioner also alluded to the constitutional violations allegedly violated by the respondent towards the petitioner.
17. The court finds this is a premature stage to struck out this petition and is only just to proceed to full hearing and determine the petition in its entirety.
18. Thus the court finds the application vide notice of motion dated 21st February 2024 is not merited and the petition dated 19th January 2024 should be heard and determined in full.
19. The application by the respondent is dismissed and costs will be in the cause.

Orders accordingly.

Dated, Signed and Delivered virtually in Nairobi this 26th day of July, 2024.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

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