



**African Institute for Peace & Human Rights & another v Attorney
General & another (Employment and Labour Relations Petition
E084 of 2024) [2024] KEELRC 2541 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2541 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E084 OF 2024
MN NDUMA, J
OCTOBER 17, 2024**

BETWEEN

**AFRICAN INSTITUTE FOR PEACE & HUMAN RIGHTS 1ST PETITIONER
CHARLES MAINA KARIUKI 2ND PETITIONER**

AND

**HON ATTORNEY GENERAL 1ST RESPONDENT
BRIGADIER ALICE MATE MURINGO 2ND RESPONDENT**

RULING

1. The petition dated 31/5/2024 was filed by the two petitioners African Institute for peace and Human Rights and Charles Maina Kariuki respectively against the Hon. Attorney General and Brigadier Alice Mate Muringo seeking the following reliefs:
 - a. A declaration that the actions of the 1st respondent amount to violations of Constitutional Principles as enshrined under Articles 2, 3, 10(1), 10(2), 35(1), 73(1)(a)(iv), 73(2)(a) and 232(1)(f)(g) and 232(2) of *the Constitution* of Kenya 2010.
 - b. A declaration that the appointment of the 2nd respondent as the Agency Director, Assets and Recovery Agency was done in violation, 27, 28, 73(2)(d), 232(1)(e) (f) and (g) of *the Constitution*.
 - c. A declaration that the people of Kenya are entitled to a refund of all salaries, benefits and any other moneys paid to the 2nd respondent from public funds guaranteed to public officers.
 - d. An order of certiorari to be issued to quash the decision of the 1st respondent to appoint the 2nd respondent as the Agency Director of the Assets Recovery Agency in April 2021 or thereabout.



- e. Costs of the petition be borne by the respondents.
 - f. Any other relief that the honourable court may deem fit.
2. The petition was accompanied by an application dated the even date on certificate of urgency seeking the following prayers:
 1. Spent
 2. Pending hearing and determination of this application and petition, a conservatory order be issued suspending the appointment of the 2nd respondent by the 1st respondent.
 3. That the costs of the application be provided for
 4. Other orders and/or directions that the honourable court may deem fit to issue.
 3. The court did not grant interim orders sought in the Notice of Motion and set the matter for hearing inter-parties.
 4. The respondents however filed a notice of preliminary objection dated 24th June 2024 in the following terms:
 1. That rights under Article 35 of *the Constitution* cannot be the basis of issuance of a conservatory order and are not enforceable at an interlocutory stage.
 2. That a limited liability partnership does not fall under the definition of a citizen as envisioned by Article 35(1) of *the Constitution*.
 3. That the letter purporting to seek access to information from the 1st respondent was written by M/s Mugeria, Lempaa and Kariuki Advocates LLP.
 4. THAT the Mumbi J (as she then was) in Nairobi Law Monthly Company Limited versus Kenya Electricity Generating Company and 2 others held inter alia that: "...is a Kenyan company and its directors and shareholders are Kenyan citizens, the petitioner itself is a legal person created under the provisions of the *Companies Act*. As a legal 'person', it may enjoy the rights conferred by Article 35(2), which are conferred on all 'persons' but it is not a 'citizen that may have a right to access to information as contemplated under Article 35(1). I therefore fully agree with the decision of Majanja J in Famy Care Limited that a body corporate or a company is not a citizen for the purposes of Article 35(1) and is therefore not entitled to seek enforcement of the right to information as provided under that Article."
 5. That the subject matter in the Notice of Motion and petition as filed is pending before the High Court in Nairobi Petition No. 17 of 2021: Commission for Human Rights and Justice (CHRJ) versus Assets Recovery Agency, the Hon. Attorney General and Alice Mate.
 6. That the current application and petition are sub-judice and contrary to Section 6 of the *Civil Procedure Act* since this honourable court is a court of equal status/concurrent jurisdiction with the High Court.
 7. That the notice of motion does not meet or satisfy the standard for granting conservatory orders.
 8. That preliminary objection be heard and determined in limine.
 9. That the application and petition be dismissed with costs to the respondents.



5. The Court of Appeal in the case of the Owners of the Motor Vessel “Lilian “S” V. Caltex Oil (Kenya) Ltd [1989] KLR 1, held that

“I think 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. 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 down (sic) tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”

6. The court has therefore proceeded to dispose of the preliminary objections first and then determine whether the petitioners/applicants are deserving of the interim orders sought pending the hearing and determination of the petition.

7. At the outset, the court has considered objections (1) (2) (3) (4) and guided by the Court of Appeal decision in Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 69 where the Court held that –

“So far as I am 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”.

these objections do not qualify to be preliminary objections as they do not constitute pure point of law, on the assumption that all facts set out in the pleadings are not in dispute. This matter involves resolution of disputes of fact and must await determination of the petition on the merits.

8. The objections 5 and 6 red together constitute valid preliminary objections that must be determined at the outset.
9. The respondents contend that the notice of motion and the petition as filed is sub-judice as the same and or similar suit is pending before the High Court in Nairobi Petition No. 17 of 2021; Commission for Human Rights and Justice (CHRJ) versus Assets Recovery Agency, the Hon. Attorney General and Alice Mate.
10. That this petition therefore violates section 6 of the Civil Procedure Act 2010 which provides:

‘No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed’.

11. The court in Edward R. Ouko vs. Speaker of the National Assembly & 4 Others [2017] eKLR held as follows:

“This then leads me to the issue whether the said principles apply to this case. For the doctrine to apply the following principles ought to be present:

1. There must exist two or more suits filed consecutively.



2. The matter in issue in the suits or proceedings must be directly and substantially the same.
 3. The parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title.
 4. The suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”
12. The Supreme Court of Kenya in the case of Kenya National Commission on Human Rights versus Attorney General; Independent Electoral and Boundaries Commission and 16 others (interested parties) KLR stated as follows on the sub judice rule:
- “The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the court or judge for determination.” “The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives...” Emphasis added.
13. The foreshadowed authorities demonstrates that the other suit filed must be between same parties or those claiming under them over the same subject matter and must have been filed before a different court of competent jurisdiction. Where it is established that the above has occurred, the matter that is filed later ought to be stayed in order to await the determination to be made in earlier suit.
14. In the matter before court, the respondent has failed to demonstrate that the suit pending at the High Court in Nairobi Petition No 17; Commission for Human Rights and Justice (CHRJ) vs Assets Recovery Agency, the Hon Attorney General and Alice Matte are between the same parties as the parties in the present petition or their representatives. Nor is there any attached pleading from which the Court is able to conclusively reach a determination that the foreshadowed suit is over the same subject matter as the present petition and that the other court have competent jurisdiction to determine the subject matter before this court.
15. The court is satisfied this suit before court is not sub judice and the preliminary objection is dismissed
16. I now turn to consider the Applicant’s Notice of Motion dated the 31st of May 2024.
17. The main issue in this application is whether or not the conservatory orders as sought by the applicants should be granted.
18. A conservatory order is a judicial relief issued by the Court to preserve the subject matter of litigation until the suit/petition is heard and determined. It is therefore an order of status quo ante so that the substratum of the suit/petition is preserved or so that the suit is not rendered nugatory.



19. The nature and principles guiding the grant of conservatory orders are now well settled. The Supreme Court in *Gatirau Peter Munya versus Dickson Mwenda Kithinji & 2 others* (2014) Eklr said that

‘Conservatory orders bear a more decided public law connotation: for these are orders to facilitate ordered functioning within the public law agencies, as well as to uphold the adjudicatory authority of the Court, in public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions linked to such private party issues such as ‘the prospects of irreparable harm’ occurring during the pendency of a case; or ‘a high probability of success’ in the applicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes and priority levels attributable to the relevant issues

20. The Supreme Court summarized the principles for the grant of conservatory orders as follows;

- a. The Appeal or the intended Appeal is arguable and not frivolous
- b. Unless the orders sought are granted, the Appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.
- c. That it is in the public interest that the conservatory orders be granted

21. This Court applying the above ratio from the Supreme Court is not at all convinced that there are compelling reasons for granting conservatory orders at this stage. The Applicants have not persuaded this Court that there is cogent basis, in the interim, to issue orders that have the potentiality to adversely affect the running of a public institution, the Asset Recovery Agency. It is therefore not in public interest that the order suspending the appointment of the 2nd Respondent be granted. Suspending the appointment of the 2nd Respondent will also inevitably lead to the consideration of the key issues going to the merit of the Petition before Court which the Court do not wish to delve into without the benefit of a substantive hearing of the Petition.

22. This application is accordingly dismissed

23. For clarity the Notice of Preliminary Objection dated 24/7/2024 and the Application dated the 31/5/2024 are dismissed.

Costs to be in the cause

DATED AT NAIROBI THIS 17RD DAY OF OCTOBER, 2024

MATHEWS NDERI NDUMA

JUDGE

Appearance:

Petitioner in person

Mr. Mungai for respondent

Mr. Kemboi – Court Assistant

