



REPUBLIC OF KENYA



KENYA LAW
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**Ireri v National Bank of Kenya Limited (Petition E019 of 2022)
[2025] KEELRC 3198 (KLR) (14 November 2025) (Ruling)**

Neutral citation: [2025] KEELRC 3198 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E019 OF 2022
SC RUTTO, J
NOVEMBER 14, 2025**

BETWEEN

NICKSON MUCANGI IRERI PETITIONER

AND

NATIONAL BANK OF KENYA LIMITED RESPONDENT

RULING

1. What is before this Court for determination is the Notice of Motion dated 24th April 2025, through which the Respondent/Applicant seeks the following orders;
 - a. The entire Petition filed herein be struck out for offending the Rule against Constitutional Avoidance.
 - b. In the alternative to prayer 1 above, this Honourable Court be pleased to strike out the entire Appeal herein for want of prosecution.
 - c. The costs of this Application, and of the Petition, be awarded to the Applicant.
2. The Motion is premised on the grounds stated on its face and is further supported by the averments in the Supporting Affidavit of Henry Omino, Advocate on record for the Applicant. Mr. Omino contends that the entire Petition has been instituted in contravention of the doctrine of constitutional avoidance, as all the issues raised and reliefs sought therein are capable of being effectively addressed and determined under existing statutory frameworks, including but not limited to the *Employment Act* and the *Fair Administrative Action Act*.
3. He further avers that in his Petition, the Petitioner alleges violations of Articles 10(2)(a) and (c), 41, 47, and 50(1) of *the Constitution* of Kenya, 2010. However, at paragraph 18 of the Petition, the Petitioner concedes that these constitutional provisions have been actualized through legislation, specifically Sections 2 and 3 of the *Fair Administrative Action Act* and Sections 41 and 45 of the *Employment Act*.



4. Mr. Omino avers that in light of this express admission, the Petition offends the principle of constitutional avoidance and should therefore be struck out for want of jurisdiction.
5. Mr. Omino avers that in the alternative, and without prejudice to the foregoing, the Petitioner has failed to prosecute the matter for over one year, and consequently, the Petition ought to be dismissed for want of prosecution.
6. The Petitioner failed to file a response to the Notice of Motion despite being granted leave to do so on three separate occasions, namely, on 28th May 2025, 21st July 2025, and 23rd September 2025.

Submissions

7. The Motion was canvassed through written submissions. Only the Respondent/Applicant filed submissions, which the Court has duly considered.

Analysis and Determination

8. The gist of the Respondent/Applicant's Notice of Motion is that the present Petition contravenes the doctrine of constitutional avoidance. In the alternative, the Respondent/Applicant prays that the Petition be struck out for want of prosecution.
9. The doctrine of constitutional avoidance precludes Courts from invoking constitutional interpretation or determination where a dispute can be effectively resolved through the application of existing statutory provisions, regulatory frameworks, or established legal principles.
10. The principle of constitutional avoidance was aptly articulated by the Supreme Court in *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others* [2014] eKLR, where the Apex Court held that:

“The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v. Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle 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.”
11. Similarly, in the case of *Gabriel Mutava & 2 others vs Managing Director, Kenya Ports Authority & another* (2016) eKLR, the Court of Appeal held that:

“Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation... Of course, violations of constitutional rights may nonetheless be different, and more serious than the violations of statutory or contractual rights. There is no clear demarcation however, where one violation begins and ends, and when one violation should attract desperate remedies. In employment matters, such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except to the extent that the terms are contrary to the law; or have been superseded by statute.



Certainly invoking the constitutional route in the circumstances of this case was misguided. *The Constitution* should not be turned into a thoroughfare for resolution of every kind of common grievance...In saying all these, we are not oblivious to the fact that a party is entitled to sue under *the Constitution* even if there is an alternative remedy, and or other mechanism for the resolution of the dispute. However, it has since emerged on the authorities that constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. Constitutional Litigation is not a panacea for all manner of litigation, we reiterate that the first port of call should always be suitable statutory underpinned forums for the resolution of such disputes.”

12. The thread running through the Petition is that the summary dismissal of the Petitioner was unfair, unlawful, unprocedural, and unconstitutional.
13. Fundamentally, the Petitioner’s case is anchored on his contract of employment with the Respondent/ Applicant and specifically, the manner in which the disciplinary process against him was undertaken and his eventual dismissal from employment.
14. Consequently, the determination of this matter necessarily calls for the application of Sections 41, 43, 45, and 47(5) of the *Employment Act*. It is worth pointing out that the principal constitutional issue raised by the Petitioner relates to the alleged violation of his right to a fair hearing under Article 50 of *the Constitution*. In this respect, Section 41 of the *Employment Act* is directly relevant, as it prescribes the procedural safeguards that constitute a fair termination process.
15. What’s more, the Petitioner seeks a declaration that the Respondent’s/ Applicant’s actions were null and void ab initio. This leads me to question how such a determination can be made without assessing the facts and evidence in light of Sections 41, 43, and 45 of the *Employment Act*.
16. The bottom line is that the *Employment Act* is the primary statutory framework governing the resolution of the present dispute. Put differently, the resolution of the matters presented in this Petition requires only the interpretation and application of the relevant statutory provisions under the *Employment Act*, as the dispute arises from the termination of the Petitioner’s contract of employment.
17. On this score, the Court aligns itself with the reasoning adopted in Peter Ndegwa Nderitu v Teachers Service Commission [2019] eKLR, where the learned Judge observed that:

“The ultimate remedy sought by the petitioner in his petition is that his disciplinary matter was not given a fair hearing....However best the petition is framed, employment and labour relations rights articulated under the petition, though framed in a different name from that of a Memorandum of Claim, the orders sought relate to what an employee claiming under the *Employment Act*, 2007 should apply.”
18. It is therefore evident that this Court need not invoke *the Constitution* to determine the issues raised by the Petitioner in his Petition. Accordingly, it is clear that the Petition does not raise any constitutional question warranting the Court’s recourse to constitutional interpretation.
19. Consequently, I find that the Petitioner ought to have invoked the Court’s jurisdiction under the *Employment Act* rather than by way of a constitutional petition, since the alleged violations are adequately addressed within the framework of that statute.



- 20. It therefore follows that the Petition fails to meet the jurisdictional threshold of a constitutional dispute.
- 21. In the result, I find merit in the Respondent’s/Applicant’s Motion dated 24th April 2025, which is hereby allowed. Consequently, the Petition dated 10th November 2021 is struck out for contravening the doctrine of constitutional avoidance.
- 22. There will be no order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF NOVEMBER 2025.

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STELLA RUTTO

JUDGE

In the presence of:

Ms. Omenta for the Petitioner/Respondent

Mr. Omino for the Respondent/Applicant

Elijoy Court Assistant

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 had 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 *Civil 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.

