



**Meta Platforms, Inc & 2 others v Motaung & 186 others; Kenya National Human Rights and Equality Commission & 14 others (Interested Parties) (Civil Appeal E232 & E445 of 2023 (Consolidated)) [2024] KECA 1262 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KECA 1262 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL E232 & E445 OF 2023 (CONSOLIDATED)  
DK MUSINGA, MSA MAKHANDIA & JM MATIVO, JJA  
SEPTEMBER 20, 2024**

**BETWEEN**

**META PLATFORMS, INC ..... 1<sup>ST</sup> APPELLANT**

**META PLATFORMS IRELAND LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DANIEL MOTAUNG ..... 1<sup>ST</sup> RESPONDENT**

**SAMASOURCE KENYA EPZ LIMITED T/A SAMA ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**KENYA NATIONAL HUMAN RIGHTS AND EQUALITY COMMISSION ..... INTERESTED PARTY**

**CENTRAL ORGANIZATION OF TRADE UNIONS ..... INTERESTED PARTY**

**THE ATTORNEY GENERAL ..... INTERESTED PARTY**

**MINISTRY OF LABOUR, SOCIAL SECURITY AND SERVICE .... INTERESTED PARTY**

**EXPORT PROCESSING ZONE AUTHORITY ..... INTERESTED PARTY**

**MINISTRY OF HEALTH ..... INTERESTED PARTY**

**OFFICE OF THE DATA PROTECTION COMMISSIONER .... INTERESTED PARTY**

**MINISTRY OF FOREIGN AFFAIRS ..... INTERESTED PARTY**

**KENYA REVENUE AUTHORITY ..... INTERESTED PARTY**

**AS CONSOLIDATED WITH  
CIVIL APPEAL E445 OF 2023**



**BETWEEN**

**META PLATFORMS, INC ..... 1<sup>ST</sup> APPELLANT**

**META PLATFORMS IRELAND LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**SAMASOURCE KENYA EPZ LIMITED T/A SAMA ..... 1<sup>ST</sup> RESPONDENT**

**MAJOREL KENYA LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**KIANA MONIQUE ARENDSE ..... 3<sup>RD</sup> RESPONDENT**

**JAMES AGADA MARK ..... 4<sup>TH</sup> RESPONDENT**

**MEAZA SHURA ..... 5<sup>TH</sup> RESPONDENT**

**MARK AGABA ..... 6<sup>TH</sup> RESPONDENT**

**FASICA BERHANE GEBREKIDAN ..... 7<sup>TH</sup> RESPONDENT**

**CAMERON ROWAN CORNER ..... 8<sup>TH</sup> RESPONDENT**

**ROBEL KHASAY GEBRU ..... 9<sup>TH</sup> RESPONDENT**

**ABEL ABRHA ASGEDOM ..... 10<sup>TH</sup> RESPONDENT**

**EPHREM KIRUBEL MIHRETEAB ..... 11<sup>TH</sup> RESPONDENT**

**DAWIT BIRHANE BERHE ..... 12<sup>TH</sup> RESPONDENT**

**TREVIN BROWINE ..... 13<sup>TH</sup> RESPONDENT**

**LUBEGA EDWARD ..... 14<sup>TH</sup> RESPONDENT**

**NOAD AMANUEL GEBREKIDAN ..... 15<sup>TH</sup> RESPONDENT**

**TEAMIR DELLELEGN ..... 16<sup>TH</sup> RESPONDENT**

**KAUNA IBRAHIM MALGWI ..... 17<sup>TH</sup> RESPONDENT**

**TSIDENA ABADI ZEMO ..... 18<sup>TH</sup> RESPONDENT**

**MESERET DINKU ABDO ..... 19<sup>TH</sup> RESPONDENT**

**AYANA EPHREM GELETA ..... 20<sup>TH</sup> RESPONDENT**

**ALEWIYA MOHAMMED MUSA ..... 21<sup>ST</sup> RESPONDENT**

**TIKKY OLANG'O ..... 22<sup>ND</sup> RESPONDENT**

**KHOTHAMANI MHOLONGO ..... 23<sup>RD</sup> RESPONDENT**

**YONA BEDASA ..... 24<sup>TH</sup> RESPONDENT**

**THRAS GIDEY ..... 25<sup>TH</sup> RESPONDENT**

**SAMRAWIT TEKESTE ..... 26<sup>TH</sup> RESPONDENT**

**ZEGEYE DAWIT GEBREMARIAM ..... 27<sup>TH</sup> RESPONDENT**



JASON ILOVU .....	28 <sup>TH</sup> RESPONDENT
ROSEBELLAH WAKHU. ....	29 <sup>TH</sup> RESPONDENT
CAROLINE NJERI MUCHANGI .....	30 <sup>TH</sup> RESPONDENT
EVELYN NALUWU .....	31 <sup>ST</sup> RESPONDENT
HASSAN ALKANO .....	32 <sup>ND</sup> RESPONDENT
EDINAH LUMUMBA .....	33 <sup>RD</sup> RESPONDENT
PALESA GLORIA KOMETSI .....	34 <sup>TH</sup> RESPONDENT
MAHAT ABDULLAHI SHEIKH .....	35 <sup>TH</sup> RESPONDENT
MAHLET YILMA .....	36 <sup>TH</sup> RESPONDENT
CIELLA IRAMBONA .....	37 <sup>TH</sup> RESPONDENT
MUSA ABUBAKAR .....	38 <sup>TH</sup> RESPONDENT
ABDIKADIR GUYO .....	39 <sup>TH</sup> RESPONDENT
JAMES IRUNGU .....	40 <sup>TH</sup> RESPONDENT
HABEN HAILE YOHANES .....	41 <sup>ST</sup> RESPONDENT
JUANITA JONES .....	42 <sup>ND</sup> RESPONDENT
ODIRILE MOLEBOGE .....	43 <sup>RD</sup> RESPONDENT
TESSLINE TONI KIEWIETS .....	44 <sup>TH</sup> RESPONDENT
ANTIAN JAY-DEAN MOOSA .....	45 <sup>TH</sup> RESPONDENT
SAMUEL EBENIRO .....	46 <sup>TH</sup> RESPONDENT
LIELINA ASSEFA .....	47 <sup>TH</sup> RESPONDENT
MARION IMUYA MUHANDA .....	48 <sup>TH</sup> RESPONDENT
ABDULLATEEF KEHINDE .....	49 <sup>TH</sup> RESPONDENT
BELLA NININHAZWE .....	50 <sup>TH</sup> RESPONDENT
MAGDALENE SILA .....	51 <sup>ST</sup> RESPONDENT
SOPHIA DANIELS .....	52 <sup>ND</sup> RESPONDENT
EPHRATA MAMO .....	53 <sup>RD</sup> RESPONDENT
AMERTI BAYISA .....	54 <sup>TH</sup> RESPONDENT
JEAN DE DIEU UWIDUHAYE .....	55 <sup>TH</sup> RESPONDENT
TUYISHIMIRE MARIE IRENE .....	56 <sup>TH</sup> RESPONDENT
SIBUSISO DUMA .....	57 <sup>TH</sup> RESPONDENT
ARIANE HOGOZA .....	58 <sup>TH</sup> RESPONDENT
FAYO HUSSEIN KADIR .....	59 <sup>TH</sup> RESPONDENT



NGARAMBE CHRYSOLOGUE .....	60 <sup>TH</sup> RESPONDENT
UWAMAHORO STELLA CARINE .....	61 <sup>ST</sup> RESPONDENT
ABDIKHES DAAR .....	62 <sup>ND</sup> RESPONDENT
ESTHER MUKAMANA .....	63 <sup>RD</sup> RESPONDENT
CYLIA SKOSANA .....	64 <sup>TH</sup> RESPONDENT
MUGERWA HAMIDAH .....	65 <sup>TH</sup> RESPONDENT
ISMAIL ALIYU .....	66 <sup>TH</sup> RESPONDENT
LAWAL MOHAMMAD SHUAIBU .....	67 <sup>TH</sup> RESPONDENT
SONIA MATETE KGOMO .....	68 <sup>TH</sup> RESPONDENT
JADA BASHIR SUNDAY .....	69 <sup>TH</sup> RESPONDENT
DAWIT BIRHANE BERHE .....	70 <sup>TH</sup> RESPONDENT
DAVID NKURUNZIZA .....	71 <sup>ST</sup> RESPONDENT
NATHAN NKUNZIMANA .....	72 <sup>ND</sup> RESPONDENT
JOHNSON TWAGIRIMANA .....	73 <sup>RD</sup> RESPONDENT
NASIRU AMINU MADAKI .....	74 <sup>TH</sup> RESPONDENT
STEPHAN VAN DEN BERG .....	75 <sup>TH</sup> RESPONDENT
NALEDI MKHIZE .....	76 <sup>TH</sup> RESPONDENT
ALINOOR MOHAMED ABDULLAHI .....	77 <sup>TH</sup> RESPONDENT
WILBERFORCE APUNGU .....	78 <sup>TH</sup> RESPONDENT
NAFTALI ANDATI WAMBALO .....	79 <sup>TH</sup> RESPONDENT
RAYWINE MUKONAMBI .....	80 <sup>TH</sup> RESPONDENT
IRANYIBUTSE KOFFI .....	81 <sup>ST</sup> RESPONDENT
MUSA ALIYU BAFFA .....	82 <sup>ND</sup> RESPONDENT
DANIEL ELIAS YADETA .....	83 <sup>RD</sup> RESPONDENT
NEO NKWE .....	84 <sup>TH</sup> RESPONDENT
BUSISIWE EGNECIOUS NKOSI .....	85 <sup>TH</sup> RESPONDENT
PHETHILE BRIDGET DLAMINI .....	86 <sup>TH</sup> RESPONDENT
PHETHILE BRIDGET DLAMINI .....	87 <sup>TH</sup> RESPONDENT
KWENZEKILE NGIDI .....	88 <sup>TH</sup> RESPONDENT
PRINCESS NELISIWE MADLEBE .....	89 <sup>TH</sup> RESPONDENT
ANTONY AWUOR .....	90 <sup>TH</sup> RESPONDENT
KIDIST FANTU BUZUNEH .....	91 <sup>ST</sup> RESPONDENT



ASCHALEW SEIFU HUSEN .....	92 <sup>ND</sup> RESPONDENT
ABDIHAMID BULLE .....	93 <sup>RD</sup> RESPONDENT
NAKATE JANAT .....	94 <sup>TH</sup> RESPONDENT
KAME TUYE BADASA .....	95 <sup>TH</sup> RESPONDENT
NYANGARESI DANCAN .....	96 <sup>TH</sup> RESPONDENT
UMAR KABIR .....	97 <sup>TH</sup> RESPONDENT
UMAR KABIR .....	98 <sup>TH</sup> RESPONDENT
HANAN ABDI .....	99 <sup>TH</sup> RESPONDENT
BEATRICE ANI .....	100 <sup>TH</sup> RESPONDENT
INNOCENTIA NEO MABASO .....	101 <sup>ST</sup> RESPONDENT
SAMRAWIT MARKOS WELDESENEBET .....	102 <sup>ND</sup> RESPONDENT
MINASE SISAY .....	103 <sup>RD</sup> RESPONDENT
ESTHER EMOSHOGWE MICHAEL .....	104 <sup>TH</sup> RESPONDENT
LAWAL SUIDI MOHAMMAD .....	105 <sup>TH</sup> RESPONDENT
TUMWEBAZE PROSCOVIA .....	106 <sup>TH</sup> RESPONDENT
KAME BADASA .....	107 <sup>TH</sup> RESPONDENT
NAHOM TEKEST .....	108 <sup>TH</sup> RESPONDENT
ABDIAZIZI HUSSEIN ADAN .....	109 <sup>TH</sup> RESPONDENT
FREDRICK AMOS OKUMU .....	110 <sup>TH</sup> RESPONDENT
ABDULLAHI GULIYA ADAN .....	111 <sup>TH</sup> RESPONDENT
SHEWIT MULUGETA .....	112 <sup>TH</sup> RESPONDENT
MOHAMED DAUD ABDI .....	113 <sup>TH</sup> RESPONDENT
RIYAN ISMAEL IBRAHIM .....	114 <sup>TH</sup> RESPONDENT
HALIMA JILLO .....	115 <sup>TH</sup> RESPONDENT
NAJMA ILYAS HAJI .....	116 <sup>TH</sup> RESPONDENT
GLADYS ATYANG .....	117 <sup>TH</sup> RESPONDENT
TEDDY ODHIAMBO .....	118 <sup>TH</sup> RESPONDENT
SAUSEPETER OJIAMBO .....	119 <sup>TH</sup> RESPONDENT
LESEGO MOTLANTHE .....	120 <sup>TH</sup> RESPONDENT
PASSY NAMYALO .....	121 <sup>ST</sup> RESPONDENT
ADIAM GEBREZGABHER BEYIN .....	122 <sup>ND</sup> RESPONDENT
TIRHAS HAILEKIROS HAILESILASSE .....	123 <sup>RD</sup> RESPONDENT



BOTLHOKWA NONDALI DITSHEPO RANTA .....	124 <sup>TH</sup> RESPONDENT
MOHAMUD AHMED HAJI .....	125 <sup>TH</sup> RESPONDENT
HENRY NTEGE .....	126 <sup>TH</sup> RESPONDENT
MOIPONE MMUSI .....	127 <sup>TH</sup> RESPONDENT
ABDIAZIZ OSMAN ADAN .....	128 <sup>TH</sup> RESPONDENT
SANDILE MKHABELA .....	129 <sup>TH</sup> RESPONDENT
KELVIN MAGU NGILA .....	130 <sup>TH</sup> RESPONDENT
HELLEN NAMUYANJA .....	131 <sup>ST</sup> RESPONDENT
MERCY CHIMWANI .....	132 <sup>ND</sup> RESPONDENT
ROSS KOGOSHE .....	133 <sup>RD</sup> RESPONDENT
AMIR AHMEDMUZ ADEM .....	134 <sup>TH</sup> RESPONDENT
SINIDU YOHANNES JOBA .....	135 <sup>TH</sup> RESPONDENT
YASMIL DAUD ALI .....	136 <sup>TH</sup> RESPONDENT
ADDNA HAJI .....	137 <sup>TH</sup> RESPONDENT
LONWABO MTSHENGU .....	138 <sup>TH</sup> RESPONDENT
HAMZA DIBA TUBI .....	139 <sup>TH</sup> RESPONDENT
FELIX OTIENO MURUKA .....	140 <sup>TH</sup> RESPONDENT
IBRAHIM ALIO GALGALLO .....	141 <sup>ST</sup> RESPONDENT
LARSON ABEL DOMJUL .....	142 <sup>ND</sup> RESPONDENT
BORU HUSSEIN JATTANI .....	143 <sup>RD</sup> RESPONDENT
MOHAMED ABDIKADIR IBRAHIM .....	144 <sup>TH</sup> RESPONDENT
HUSSEIN KORE WAKO .....	145 <sup>TH</sup> RESPONDENT
MOHAMED GURACHA .....	146 <sup>TH</sup> RESPONDENT
JATANI HUSSEIN JATANI .....	147 <sup>TH</sup> RESPONDENT
MOLU ADAN GOLICHA .....	148 <sup>TH</sup> RESPONDENT
FELIX MUNDE ONDIGO .....	149 <sup>TH</sup> RESPONDENT
BONGIWE LAMANI .....	150 <sup>TH</sup> RESPONDENT
BERISA TESFAYE .....	151 <sup>ST</sup> RESPONDENT
SHARMAKE SAID .....	152 <sup>ND</sup> RESPONDENT
CARYN PIETERSE .....	153 <sup>RD</sup> RESPONDENT
SHUKRIA ALI TIFOW .....	154 <sup>TH</sup> RESPONDENT
ASHA ABDULLAHI ABDIRAHIM .....	155 <sup>TH</sup> RESPONDENT



OBSITU ALIYI OMER .....	156 <sup>TH</sup> RESPONDENT
GEORGE KIPSANG .....	157 <sup>TH</sup> RESPONDENT
KEANAN LESLEY JOUSTEN .....	158 <sup>TH</sup> RESPONDENT
ELMI OSMAN .....	159 <sup>TH</sup> RESPONDENT
ABDIRIZAK MUKTAR AHMED .....	160 <sup>TH</sup> RESPONDENT
IBRAHIM ROBA QAMPARE .....	161 <sup>ST</sup> RESPONDENT
MARIAM ADHAN HASSAN .....	162 <sup>ND</sup> RESPONDENT
BIGOMBA LASTO .....	163 <sup>RD</sup> RESPONDENT
KIBIRIGE IVAN GAAYI .....	164 <sup>TH</sup> RESPONDENT
MAWERERE ERIC .....	165 <sup>TH</sup> RESPONDENT
FRANK MUGISHA .....	166 <sup>TH</sup> RESPONDENT
ENDALEW SHIBABAWA .....	167 <sup>TH</sup> RESPONDENT
RETINA ASFAW TEGEGN .....	168 <sup>TH</sup> RESPONDENT
EUNICE WANJIRU MWAURA .....	169 <sup>TH</sup> RESPONDENT
AHMEDNOOR SALAT OSMAN .....	170 <sup>TH</sup> RESPONDENT
MUSTAPHA MUKHTAR .....	171 <sup>ST</sup> RESPONDENT
SANI MUHAMMAD FAISAL .....	172 <sup>ND</sup> RESPONDENT
STEPHEN KOOME .....	173 <sup>RD</sup> RESPONDENT
JOSHUA OTIENO OOKO .....	174 <sup>TH</sup> RESPONDENT
SSENGOOBA ALLAN OSWALD .....	175 <sup>TH</sup> RESPONDENT
ESTHER MAINGI .....	176 <sup>TH</sup> RESPONDENT
MARVIN NKOJO .....	177 <sup>TH</sup> RESPONDENT
ILIYASU ABBA AHMED .....	178 <sup>TH</sup> RESPONDENT
MUHAMMAD ALIYU .....	179 <sup>TH</sup> RESPONDENT
EMMANUEL SAMBO .....	180 <sup>TH</sup> RESPONDENT
FIYORE NUGUS .....	181 <sup>ST</sup> RESPONDENT
ABDI MOHAMED ALI .....	182 <sup>ND</sup> RESPONDENT
ROBA DEREJE AMANTE .....	183 <sup>RD</sup> RESPONDENT
MICHAEL NKOKO .....	184 <sup>TH</sup> RESPONDENT
AYUB HUSSEIN GISHO .....	185 <sup>TH</sup> RESPONDENT

AND

KENYA HUMAN RIGHTS COMMISSION ..... INTERESTED PARTY



KATIBA INSTITUTE ..... INTERESTED PARTY  
KITUO CHA SHERIA ..... INTERESTED PARTY  
NATIONAL HUMAN RIGHTS AND EQUALITY COMMISSION INTERESTED PARTY  
CENTRAL ORGANIZATION OF TRADE UNIONS KENYA .... INTERESTED PARTY  
THE ATTORNEY GENERAL ..... INTERESTED PARTY  
MINISTRY OF LABOUR, SOCIAL SECURITY AND SERVICES ... INTERESTED PARTY  
MINISTRY OF HEALTH ..... INTERESTED PARTY  
MINISTRY OF FOREIGN AFFAIRS ..... INTERESTED PARTY

*(Appeals from the Ruling and Order of the Employment and Labour Relations Court of Kenya, Nairobi (Nderi, J.) dated 20th day of April, 2023 in ELRC Petition No. E052 of 2023))*

## JUDGMENT

1. This judgment determines two appeals, which though not consolidated were heard together, namely, Civil Appeal Nos. E232 of 2023 and E445 of 2023. The two appeals arise from two separate interlocutory rulings delivered on 6<sup>th</sup> February 2023 and 20<sup>th</sup> April 2023 in Nairobi ELRC Petition E071 of 2022 and Nairobi ELRC Petition E052 of 2023 respectively. The two suits before the ELRC involve the same parties as in these appeals.
2. In ELRC Petition No. E071 of 2022, the 1<sup>st</sup> respondent herein, namely, Daniel Motaung, sued Samasource Kenya EPZ Limited t/a Sama (the 2<sup>nd</sup> respondent), Meta Platforms Inc and Meta Platforms Ireland, (the 1<sup>st</sup> and 2<sup>nd</sup> appellants) on his own behalf and on behalf of the current and former Facebook content moderators engaged by the 2<sup>nd</sup> respondent, citing alleged poor working conditions, unfair labour practices and violation of their fundamental rights. He prayed for a raft of reliefs, among them, a declaration that the appellants had jointly and severally violated his constitutional rights under Articles 25, 27, 28, 29, 30, 31, 33, 36, 41, 43, 46, 47, 50, 54 and 55 of the *Constitution* and those of the current and former Facebook Content Moderators engaged through the 2<sup>nd</sup> respondent.
3. The 2<sup>nd</sup> respondent filed grounds of opposition dated 16<sup>th</sup> May 2022 stating that:
  - (i) the 1<sup>st</sup> respondent lacked locus standi to institute the petition because he is a foreign national not residing in Kenya.
  - (ii) the petition is an abuse of court process.
  - (iii) the 1<sup>st</sup> respondent's employment was lawfully terminated.
  - (iv) the 1<sup>st</sup> respondent cannot bring a claim on behalf of undisclosed persons.
  - (v) the petition does not meet the threshold of a representative suit under rule 9 of the *ELRC Rules*
  - (vi) the ELRC lacks jurisdiction to entertain the case because the 1<sup>st</sup> appellant is a foreign corporation that is neither resident, domiciled nor trading in Kenya.



4. By an application dated 30<sup>th</sup> May 2022, the appellants applied for the dismissal of the suit against them on grounds that the ELRC lacked jurisdiction to entertain the case, and that the suit was incompetent, bad in law and unsustainable because the Kenya Constitution does not apply to them. Without prejudice to the foregoing, they prayed that their names be struck out for having been improperly joined. Lastly, they prayed for costs of the application and the petition.
5. The 1<sup>st</sup> respondent filed grounds of opposition dated 24<sup>th</sup> June 2022 stating:
  - (a) The application is bad in law for failure to cite the provisions of the law it was brought under and for lack of a supporting affidavit.
  - (b) The trial Court was competent to entertain the petition.
  - (c) The suit against the appellants was proper and they were necessary parties because they have extensive operations in Kenya.
  - (d) The issues raised in the application were matters for determination during the main hearing.
6. In the impugned ruling delivered on 6<sup>th</sup> February 2023, the learned judge determined the following issues:
  - (a) whether the application was competent;
  - (ii) whether the appellants should be struck off as parties to the petition, and,
  - (iii) whether the 1<sup>st</sup> respondent ought to have sought leave to serve the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. In dismissing the appellants' aforesaid application, the learned judge stated: -
    - “ 117. The crucial question is whether the petitioner's case against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents should be dismissed at this stage for want of proper service. While striking out the petition against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents is one of the options available to the court, as part of procedural justice, it would leave certain questions unanswered, perhaps to the detriment of the petitioner. Moreover, the court is inter alia enjoined to administer justice expeditiously and without undue regard to procedural technicalities.
    118. The court's understanding of the foregoing is that while procedure is an elemental component in the administration of justice, substantive justice is the ultimate goal unless the procedural deficiency is sufficiently grave to render substantial justice unattainable.
    119. In the instance case, the court is persuaded that it is only fair that the petitioner be accorded an opportunity to comply with order 5 rule 21 of the Civil Procedure Rules, 2010 as regards service upon the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.”
7. Aggrieved by the above ruling, the appellants lodged a notice of appeal dated 17<sup>th</sup> February 2023 and a record of appeal on 13<sup>th</sup> April 2023. In their memorandum of appeal dated 5<sup>th</sup> April 2023, the appellants cited 8 grounds which Ms Onyango, the appellants' counsel, in her submissions rationalized into 3 issues as follows:
  - a. Whether the Court's jurisdiction must be determined in limine.
  - b. Whether once the ELRC held that it had not assumed jurisdiction over the appellants, it was duty bound to “down its tools” and strike out the petition against the appellants, and



- c. whether the ELRC properly assumed jurisdiction over the appellants.
8. The 1<sup>st</sup> respondent filed a notice of grounds affirming decision dated 16<sup>th</sup> January 2024 citing 18 grounds. The 1<sup>st</sup> respondent's counsel, Ms Mutemi, in her submissions condensed the said grounds into 4 as follows: -
- (a) whether the appeal is moot.
  - (b) Whether the application before the trial court was competent.
  - (c) Whether the 1<sup>st</sup> respondent required leave to serve the appellants outside the court's jurisdiction.
  - (d) Whether the trial court was justified in failing to strike the appellant's petition.
9. In Civil Appeal No. 445 of 223, by a constitutional petition dated 17<sup>th</sup> March 2023, the 3<sup>rd</sup> to 46<sup>th</sup> respondents sued Meta Platforms, INC and Meta Platforms Ireland Limited (the 1<sup>st</sup> and 2<sup>nd</sup> appellants), Samasource Kenya EPZ Limited t/a Sama and Majorel Kenya Limited (the 1<sup>st</sup> and 2<sup>nd</sup> respondents) before the ELRC in constitutional petition No. E052 of 2023. Subsequently, 133 petitioners joined the petition pursuant to a joinder order granted on 13<sup>th</sup> April 2023. The petitioners sought, *inter alia*, declarations that their constitutional rights had been violated; that the redundancy undertaken by the appellants and 1<sup>st</sup> respondents is without justification; it is a sham and amounts to unfair discrimination.
10. The petition was accompanied by an application dated 17<sup>th</sup> March 2023 in which the petitioners sought several interlocutory orders. On 20<sup>th</sup> March 2023, Nderi, J. granted *ex parte* orders, granting the 3<sup>rd</sup> to 46 respondents leave to serve the appellants in their principal offices at the United States of America. He also issued interim injunction orders against the applicants, essentially preserving the status quo pending hearing of the application.
11. In response to the petition and the said application, the appellant filed an application dated 24<sup>th</sup> March 2023 in which it prayed, *inter alia*, that the petition be struck out and/or dismissed as against the appellants, and the *ex-parte* orders issued on 20<sup>th</sup> March 2023 be set aside and/or discharged on grounds that;
- (a) the court lacked jurisdiction to hear and determine the petition
  - (b) the petition was filed in violation of mandatory provisions of the Constitution and the law, and,
  - (c), the *ex parte* orders issued on 20<sup>th</sup> March 2023 were a nullity ab initio for lack of the court's Jurisdiction.
12. The appellants' aforesaid application was not supported by an affidavit. Nevertheless, the application was converted into a preliminary objection and the same was dispensed with via written submissions. The learned judge isolated the following issues for determination:
- (a) whether the court had jurisdiction to hear and determine the petition;
  - (b) whether the application could be treated as a notice of preliminary objection;
  - (c) whether the appellants were proper parties in the case; and
  - (d) whether the petitioners were guilty of non-disclosure of material facts.



13. By a ruling delivered on 20<sup>th</sup> April 2023, Nderi, J. rendered himself as follows:

- “ 63. The present dispute arises from an employer - employee dispute. The court will consider the nature and extent of liability with regard to the alleged breaches and violations of the *Constitution* arising and or related to employment and Labour relations in Kenya. It is in the Court's considered finding that it is immaterial whether the alleged violations occur in a physical or virtual space within the jurisdiction of this Court in Kenya...
64. The Court has also considered the alleged failure by the petitioners to disclose material facts and have found the said allegations to be without merit. The Court need not emphasize that the dispute of facts alluded to by the 1<sup>st</sup> and 2<sup>nd</sup> respondents shall be fully ventilated, considered and determined upon hearing of the suit on the merits.
65. In the analysis, this court finds that all the Preliminary Objections raised by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, in a Notice of Motion not supported by any affidavit to be without merit...
68. Due to the nature of this matter and the interim orders in place, considering that this Court has just commenced its leave, I refer this matter to the Principal Judge to allocate the matter to another judge within the Judicial Review and Labour Relations Division to hear and determine the pending application and the petition on the merits on a priority basis. The interim orders are extended pending the hearing and determination of the Notice of Motion dated March 17, 2023. (Emphasis added)

14. Aggrieved by the above ruling, the appellants lodged a notice of appeal dated 25<sup>th</sup> April 2023 and their record of appeal on 21<sup>st</sup> June 2023 accompanied by a memorandum of appeal dated 20<sup>th</sup> June 2023, raising 13 grounds of appeal which were mostly repetitive. In support of the appeal, the appellants' learned counsel, Ms. Onyango, condensed the grounds of appeal into 4 issues, namely:-

- (a) whether the application raised pure points of law;
- (b) whether in the circumstances of the case, the ELRC could assume jurisdiction over the appellants;
- (c) whether the 3<sup>rd</sup> to 185<sup>th</sup> respondents concealed material facts from the ELRC with respect to their notice of motion dated 17<sup>th</sup> March 2023, on the basis of which the ex-parte orders of 20<sup>th</sup> April 2023 were issued; and
- (d) whether the ELRC erred in law in extending the ex-parte interim orders issued on 20<sup>th</sup> March 2023.

15. The 3<sup>rd</sup> to 186<sup>th</sup> respondents filed a notice of grounds affirming decision dated 12<sup>th</sup> January 2024 raising eight grounds. Their learned counsel, Ms. Mutemi, in her submissions addressed four issues, namely:-

- (a) whether the ELRC was correct in holding that the preliminary objection was without merit;
- (b) whether the ELRC was justified in extending the ex-parte interim orders granted on 20<sup>th</sup> March 2023, and
- (c) whether the application dated 24<sup>th</sup> March 2023 was fatally defective.



16. The appeals proceeded for virtual hearing on 20<sup>th</sup> May 2024 when the parties highlighted their respective written submissions. Learned counsel Ms Onyango appeared for the appellants in E232 of 2023 together with Mr. Kahura and Ms. Niina. Ms. Mutemi Ms. Achieng and Ms. Gathoni appeared for the 1<sup>st</sup> respondent. Mr. Omino appeared for the 2<sup>nd</sup> respondent, while Mr. Ochiel Dudley and Mr. Nyawa appeared for the 10<sup>th</sup> Interested Party. Mr. Odoyo appeared for the 5<sup>th</sup> interested party and Ms. Akuno appeared for 6<sup>th</sup> to 9<sup>th</sup> interested parties.
17. Ms. Onyango submitted that the application for striking out the petition ought to have been allowed. Further, the moment the court held that it had not assumed jurisdiction over the appellants, it should have downed its tools. Ms. Onyango cited *Yusuf Gitau Abdalla v Building Centre (K) Ltd & 4 Others* [2014] eKLR where the Supreme Court held that a court can only assume jurisdiction conferred upon it by the *Constitution* and/or Statute. Ms. Onyango maintained that the trial court agreed with the appellants that obtaining leave of the court to serve summons outside the jurisdiction in line with Order 5 rule 21 of the *Civil Procedure Rules* was a mandatory prerequisite for the court to assume jurisdiction over a foreign defendant like the appellants.
18. Ms. Onyango further submitted that even though the *ELRC Rules* are silent on the mode of service of summons on foreign defendants, this Court in *TNT Express Worldwide (Kenya) Limited v Timothy Graene Steel* [2022] eKLR held that nothing precluded the ELRC from relying on the Civil Procedure provisions to address the extant gaps. Counsel also cited this Court's decision in *Misnak International (UK) Limited v 4MB Mining Limited C/O Ministry of Mining, Juba Republic of South Sudan & 3 Others* [2019] eKLR in support of the holding that it is only after service of summons that a court assumes jurisdiction over a foreign defendant. Ms Onyango maintained that the appellants are foreign corporates trading outside Kenya and do not have a real or virtual presence in Kenya.
19. Counsel maintained that the court had not yet assumed jurisdiction over the appellants, and cited *Raytheon Aircraft Credit Corporation & Another v Al-Faraj Limited* [2005] eKLR in support of the proposition that even if a court assumes jurisdiction over a foreign defendant by granting leave to serve summons outside Kenya, the foreign defendant retains the right to challenge the jurisdiction. The appellant's counsel maintained that the ELRC could not assume jurisdiction over a foreign corporation since the Kenya Constitution does not apply beyond its geographical limits, nor is the appellant subject to the *Constitution*, therefore, they were not in a position to breach the petitioners' constitutional rights. She also cited the South African case of *Samuel Kaunda & Others v The President of the Republic of South Africa & Others* (CCT 23/04) [2004] ZACC in support of the holding that jurisdiction is territorial and it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.
20. Ms Onyango also submitted that the 1<sup>st</sup> respondent was employed by the 2<sup>nd</sup> respondent, a Kenyan company, and in fact in its pleadings the 2<sup>nd</sup> respondent takes full responsibility as the 1<sup>st</sup> respondent's employer. Therefore, it would be an affront to the appellants' sovereignty and against the principles of natural justice to impose on the appellants' contractual terms when they were not parties to the contract.
21. In opposing the appeal, the 1<sup>st</sup> respondent maintained that the instant appeal was moot because the 1<sup>st</sup> respondent has since been granted leave to serve the appellants and actually served them via an international courier and via e-mail. Counsel cited the Supreme Court's decision in *Dande & 3 Others v Inspector General, National Police Services & 5 Others* [2023] KESC 40 (KLR) (16 June 2023) (Judgment) in support of the proposition that an appeal is moot if a decision will not have the effect of resolving a live controversy affecting the parties' rights.



22. Ms. Mutemi argued that the appellant’s application before the trial Court was incurably defective for want of a supporting affidavit, and, that it raised factual issues such as whether the appellants are foreign corporations who are not domiciled or trading in Kenya. She maintained that the appellants are trading in Kenya, that Facebook has millions of users in Kenya, it draws revenue from the users through Facebook Pay and Facebook Marketplace, and that the appellant pays digital service tax (DST) to the Government of Kenya. Consequently, the appellant’s application ought to have been accompanied by a supporting affidavit as was held by the High Court in *Ashioya & Co. Advocates v Busia Sugar Co. Ltd & 2 Others* [2007] eKLR. In addition, the 1<sup>st</sup> respondent produced uncontroverted evidence that the appellants have activities in Kenya, they pay taxes and have key staff in Kenya. She contended that the appellants’ assertions are not supported by evidence, and stressed that submissions cannot take the place of evidence as was held in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR.
23. The 1<sup>st</sup> respondent also maintained that in today’s digital world it is possible for a foreign company to operate fully in Kenya without a physical office in the country. Therefore, the term ‘carrying on business’ must be interpreted accordingly, taking into account the digital world, and relied on the Federal Court of Australia decision in *Valve Corporation v Australian Competition and Consumer Commission* [2017] FCAFC 224 which found an American company to be carrying on business in Australia because it had many online customers in Australia and earned significant revenue from Australian customers on an ongoing basis.
24. Ms. Mutemi also cited the holding by the Canadian Court of Appeal for British Columbia in *British Columbia (Attorney General) v Brecknell*, 2018 BCCA 5 that it would be formalistic and artificial to draw a distinction between physical and virtual presence of a company, as it is possible in the digital age for companies to exist in more than one place at the same time.
25. Regarding the question whether the trial court was justified in failing to strike out the petition, Ms. Mutemi cited this Court’s ruling in *Meta Platforms, Inc & Another v Samasource Kenya EPZ Limited t/a Sama & 185 Others; Central Organization of Trade Unions Kenya & 8 Others (Interested Parties)* (Civil Application E178 of 2023) [2023] KECA 999 (KLR) (28 July 2023) (Ruling) and in *Meta Platforms, Inc & Another v Motaung & another; Kenya National Humans Rights Equality Commission & 9 Others (Interested Parties)* (Civil Appeal (Application) E232 of 2023) [2023] KECA 996 (KLR) (28 July 2023) (Ruling) that the issue raised by the appellants is not a question of jurisdiction, rather, it is a factual question that needed to be subjected to a full trial.
26. Regarding the contestation that 1<sup>st</sup> respondent’s suit amounted to extra-territorial application of the Kenyan Constitution, counsel cited Korir, J. (as he then was), in *Miguna v Lufthansa Group operating as Lufthansa German Airlines & 6 Others; Kenya National Commission on Human Rights & Another (Interested Parties)* [2021] where he held that for a court to be said to be acting extra-territorially, the violations complained of must have been committed outside the jurisdiction of the court. Counsel maintained that in this case, the 2<sup>nd</sup> respondent brought the 1<sup>st</sup> respondent from South Africa to Kenya where he was to do the content moderation work for the appellants, and indeed the violations complained of took within the jurisdiction of the trial court.
27. On when leave to serve summons outside Kenyan jurisdiction should be sought, counsel submitted that under Order 5 rule 21, there is no time limit, and in any event, the application for leave was filed after filing the suit. Further, that the 1<sup>st</sup> respondent fully interacted with the appellants during his employment and he was made to believe that he did not need to serve them outside the jurisdiction as they already had operations in Kenya. Therefore, there was no failure or indolence on the part of the 1<sup>st</sup> respondent. She cited *Kanti & Co Ltd v South British Insurance Co Ltd* [1981] eKLR where



- Madan, Law and Potter, JJ.A. held that doing business in Kenya amounts to ‘voluntarily bringing oneself within the court’s jurisdiction, therefore no leave is required to serve.
28. Mr. Ochiel Dudley, representing the 10<sup>th</sup> interested party, submitted that these interlocutory appeals arise from the exercise of the trial court’s discretion, therefore, this Court should refrain from making any conclusive views on the matters in dispute pending merit hearing before the ELRC. Counsel noted that the appellants are dissatisfied with a court order permitting them to be served outside the court’s jurisdiction to afford them the opportunity to argue their case. He cited the dictum in *Nesco Services Limited v CM Construction, East Africa Limited* [2021] eKLR, where the court stated that the rationale for service of court processes is to notify the defendant the suit against him so that he can respond to the allegations. Counsel also submitted that under Order 5 Rule 22 (3) of the *Civil Procedure Rules, 2010*, service of court processes is so important that it can precede one of the rare events where an order can precede the question of jurisdiction because the parties will have the chance to challenge the court’s jurisdiction.
  29. Mr. Ochiel also submitted that the threshold under the said rule is an affidavit or evidence stating that in the deponent’s belief, the appellant lives outside the court’s jurisdiction, hence the need for leave to serve under the said rule. Further, grant or refusal of leave under the said rule entails exercise of court’s discretion, therefore, as was held by this Court in *Lucy Wangui Gachara v Minudi Okemba Lore* [2015] eKLR, even if this Court were to be of a different opinion, it’s not allowed to interfere with the discretion of the trial court.
  30. Ms. Akuno, learned counsel for the 6<sup>th</sup> to 9<sup>th</sup> interested parties, informed this Court that he would remain neutral.
  31. In her rejoinder, Ms. Onyango submitted that a foreign company can only trade in Kenya after complying with the provisions of the Company’s Act. Further, the learned judge at page 1213 of the record stated that there was no evidence before the Court that the appellants were trading in Kenya and therefore leave was a requirement to serve them out of Kenya. She submitted that the 1<sup>st</sup> respondent never appealed against the said decision, and there is no basis upon which this Court can disturb the said finding. She maintained that the application before the trial court was incurably defective. Further, the 1<sup>st</sup> respondent is a multinational public company registered in the State of Delaware, registration number 383, with its headquarters in Menlo Park, California, while the 2<sup>nd</sup> appellant is registered as a private company, with its offices in Dublin, Ireland. Therefore, the appellants’ registered offices was a fact that was brought to the trial court’s attention. Counsel maintained that in the absence of a cross appeal, there is no reason for this Court to disturb the trial court’s finding that the 1<sup>st</sup> respondent needed leave to serve the appellant outside the jurisdiction. She cited this Court’s decision in *National Land Commission v Johnson Okiro Misiga* [2021] eKLR in support of the said position.
  32. In support of Civil Appeal No. E445 of 2023, Ms. Onyango submitted that the ELRC erred by holding that the preliminary objection before it did not raise pure points of law and that it was defective, yet the question whether the ELRC could assume jurisdiction over the appellants was a pure point of law and as such there was no need to file a supporting affidavit.
  33. Regarding the question whether the 3<sup>rd</sup> to 186<sup>th</sup> respondents had concealed material information from the court, Ms. Onyango submitted that during the ex-parte hearing of their application, the 3<sup>rd</sup> to 186<sup>th</sup> respondents pleaded that they were Facebook content moderators engaged through the 1<sup>st</sup> respondent to work for the appellants, thereby deceiving the court by failing to expressly disclose that they were employed by the 1<sup>st</sup> respondent pursuant to a written contract, which was also a point of law as defined in *Mukhisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] E.A 696, which is discernible from the pleadings filed by the 3<sup>rd</sup> to 186<sup>th</sup> respondents.



34. Submitting on the question whether the ELRC could have assumed jurisdiction over the appellants, Ms. Onyango reiterated her submissions in [Civil Appeal 232 of 2023](#) and maintained that notwithstanding the grant of leave, the appellants had the right to object to the court's jurisdiction over them because the Kenyan Constitution and laws cannot be imposed on foreign corporate entities, which amounts to breach of the sovereignty of the laws of the appellants' country and unlawful interference with the exclusive territorial jurisdiction of their respective states as was held by this Court in [Raytheon Aircraft Credit Corporation & Another v Air Al-Faraj Limited](#) [Supra].
35. Ms. Onyango also cited [Magnate Ventures Ltd v David Odwori Namubisa](#) [2020] eKLR, where this Court held that the ELRC lacked jurisdiction to deal with a matter which did not arise from an employer-employees relationship and furthermore, it was not the court's business to impose terms on a contract of employment, but rather that it should accept the terms as plainly drafted.
36. On whether the ELRC erred in law in extending the orders issued on 20<sup>th</sup> March 2023 indefinitely and contrary to the mandatory provisions of rule 17 of the ELRC Rules which states that an *ex-parte* injunction may be granted only once for not more than fourteen days and shall not be extended thereafter except once by consent of the parties or by the order of the court for a period not exceeding 14 days, Ms. Onyango maintained that none of the parties consented to the extension of the said orders beyond 14 days, and since the ruling was delivered via email, the appellants did not have an opportunity of addressing the ELRC on the said issue. Counsel maintained that the ELRC lacked the jurisdiction to extend the interim orders beyond the 14 days period, therefore, it acted in excess of its jurisdiction, and hence, the decision was a nullity. Counsel cited [in the matter of the Interim Independent Electoral Commission](#), Constitutional Application Number 2 of 2011 where the Supreme Court underscored that courts cannot expand their jurisdiction through judicial craft and/or innovation.
37. In opposing the appeal, Ms. Mutemi maintained that the 3<sup>rd</sup> to 186<sup>th</sup> respondents' application under Order 5 Rule 21 of the [Civil Procedure Rules, 2010](#) to serve the appellants at their principal office at California and Ireland was allowed because they demonstrated the violations complained of in their petition were committed in Kenya and also established that the appellants brought the 3<sup>rd</sup> to 186<sup>th</sup> respondents to Kenya from different countries to work for them.
38. Counsel pointed out that 10 out of the appellants' 13 grounds of appeal challenge the reasoning of the trial court and only 3 challenge the court's orders. She cited this Court's decision in [Attorney General v Bala](#) (Civil Appeal 223 of 2017) [2023] KECA 117 (KLR) (3 February 2023) (Judgment) that an appeal only lies against a judgment and a decree but not court's reasoning.
39. Regarding the appellants' contestation that they were not the 3<sup>rd</sup> to 186<sup>th</sup> respondents' employers, Ms. Mutemi argued that the trial court correctly held that privity of contract is not an essential element in establishing violation of fundamental rights by a person in control and authority over another. She relied on this court's holding in [C.P.C Industrial Products \(K\) Ltd v Samuel Kirwa Kosgei](#) [2005] eKLR that where employees are engaged through an outsourcing arrangement, the party assigning and supervising their work cannot escape liability when an employee suffers harm from doing the work.
40. On whether the trial court was justified in extending the ex-parte interim orders granted on 20<sup>th</sup> March 2023, Ms. Mutemi maintained that the allegation that the 3<sup>rd</sup> to 185<sup>th</sup> respondents were guilty of material non-disclosure was found by the ELRC to have no merit since the 3<sup>rd</sup> to 186<sup>th</sup> respondents specifically pleaded in the petition that their contracts were with the 1<sup>st</sup> respondent. Furthermore, the 3<sup>rd</sup> respondent annexed a copy of her employment contract signed by herself and the 1<sup>st</sup> respondent in Civil Appeal No. 445 of 2022. Ms. Mutemi also contended that rule 17 of the [ELRC Rules](#) which relates to extension of ex parte orders does not apply to constitutional petitions because rule 7 of



the *ELRC Rules* provides that where a constitutional petition has been filed before the ELRC, the applicable rules are the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules 2013* (the Mutunga Rules) which do not bar extension of interim orders. Further, Rule 23 allows a judge to issue interim orders ex parte.

41. Maintaining that the application dated 24<sup>th</sup> March 2023 was fatally defective, Ms. Mutemi argued that the said application raised factual issues, yet it was not accompanied by a supporting affidavit. Therefore, it did not conform to rule 19 of the Mutunga Rules which requires applications filed in constitutional petitions to be accompanied by a supporting affidavit. Further, the application did not qualify for consideration as a preliminary objection as it did not raise pure points of law. In support of the foregoing argument, counsel cited the Supreme Court holding in *Odinga & 16 others v Ruto & 10 Others; Law Society of Kenya & 4 Others (Amicus Curiae)* (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)) [2022] KESC 54 (KLR) (Election Petitions) (5 September 2022) (Judgment)) that facts introduced by persons who have not deposed an affidavit must be struck out.
42. Ms. Akuno, learned counsel for the 6<sup>th</sup> to 9<sup>th</sup> respondents, remained neutral in this appeal, as she did in No. 232 of 2022.
43. On behalf of the 2<sup>nd</sup> interested party, Mr. Nyawa submitted that striking out constitutional claims is a draconian discretionary power exercised sparingly. Therefore, the ELRC exercised its discretion by refusing to strike out the petition, preferring to hear it on merits, and cited this Court's decision in *Randu Nzai Ruwa & 2 Others v Secretary, the Independent Electoral and Boundaries Commission & 9 Others* [2016] eKLR, in support of the proposition that because striking out a suit is a draconian remedy, it may only be resorted to in plain cases of a frivolous, scandalous, and vexatious pleadings or where the pleadings amount to an abuse of the court process.
44. In addition, Mr. Nyawa maintained that the appellants' application contained contested issues of facts which precluded it from being a preliminary objection and argued that citing *Mukisa Biscuits Manufacturing Company Ltd v Westend Distributors Ltd* [Supra] did not help the appellants' case because as per the said decision, a preliminary objection raises only a pure point of law, and added that the alleged concealment of material facts is a matter of fact. Mr. Nyawa cited the Supreme Court's holding in *Independent Electoral & Boundaries Commission v Jane Chepengerer & 2 Others* [2015] eKLR in support of the proposition that a preliminary objection is a shield and it cannot be used as a sword.
45. We are alive to the fact these two appeals arise from interlocutory rulings. Therefore, we must be careful not to delve into matters whose findings may prejudice the pending dispute before the ELRC. However, all the parties in their respective grounds and submissions digressed into issues directly touching on the merits of the dispute pending determination before the trial court. We shall resist the temptation to travel this forbidden path.
46. The appellants in Civil Appeal No. E232 of 2023 are questioning the jurisdiction of the trial court over them. It is important for us to underscore that the term jurisdiction means the power of the courts to decide and try a case or an issue. It is the power conferred by law upon the court to try and hear the cases and give appropriate judgements. However, from the arguments urged by the appellants, the jurisdictional question they are raising is not challenging the court's power to hear the matter, but they are simply saying the trial court lacks jurisdiction because they are foreign companies incorporated outside Kenya and not carrying on business in Kenya. It is their case that the foregoing being the position, they are not subject to the *Constitution* and the laws of Kenya and therefore Kenyan courts have no jurisdiction over them.



47. The counter argument by the 1<sup>st</sup> respondent is that he was employed by the appellants and brought to Kenya to work for them as a content moderator and that the appellants operate a virtual platform called Facebook which is available or accessible in Kenya and their virtual business is borderless, therefore both appellants have physical and virtual presence in Kenya. Further, the violations cited in the petition took place in Kenya, therefore, the appellants have been properly sued.
48. It is common ground that the appellant's application dated 30<sup>th</sup> May 2022 was not supported by an affidavit. We are aware that rule 19 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* is not couched in mandatory terms. It reads:
- “ 19. A formal application under these rules shall be by Notice of Motion set out in Form D in the schedule and may be supported by an affidavit.”
49. However, even though the above rule is not mandatory, a litigant is required to always put his best foot forward. Determining the factual issues cited by the appellants in these two appeals require evidence to be proved to the required standard. For example, whether or not the appellants are engaged in virtual business is an issue of fact. Whether or not virtual business is borderless and therefore available in Kenya is a matter of fact. Whether or not the violations cited in the petition occurred in Kenya is also a question of fact. Whether the respondent was employed by the appellants is also an issue of fact. All these issues could not be determined by way of an interlocutory application. These are all matters to be determined in a full hearing. Even if the application was supported by an affidavit, the above issues go deep into the dispute between the parties. Contested matters of fact are best resolved in a full hearing as opposed to an interlocutory application. Therefore, the jurisdictional question urged by the appellant collapses.
50. In Civil Appeal No. 445 of 2023, the appellants are faulting the learned judge for dismissing their preliminary objection in which they had sought for the striking out of the case against them. As alluded to earlier, the appellants' application dated 20<sup>th</sup> March 2023 was converted into the preliminary objection. The grounds in support of the application were that the appellants are foreigners; that they were not the employers of the 3<sup>rd</sup> to 186<sup>th</sup> respondents; that there was no employer- employee relationship between them and the said respondents; that there was no basis upon which the court could assume jurisdiction and lastly; and that the petition be dismissed for want of courts' jurisdiction.
51. In dismissing the preliminary objection, the learned judge stated:
- “ 65. In the final analysis, this court finds that all the preliminary objections raised by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, in a Notice of Motion not supported by any affidavit to be without merit.
66. Whereas pure points of law may be raised in any manner and the court may discern them from pleadings and raise same suo moto, the court considers it appropriate for a party who wishes to raise a preliminary objection to do so by a notice of preliminary objection or in a statement of defence where appropriate to avoid unnecessary arguments on the manner in which the points of law have been taken up by the objectors.
67. Accordingly, the preliminary objections raised are found to be without merit and are dismissed with costs in the cause.”



52. A preliminary objection was succinctly defined in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors* [supra] as follows:

“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....a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

53. In *Aviation & Allied Workers Union of Kenya v Kenya Airways Ltd & 3 Others* [2015] eKLR, the Supreme Court stated as follows:

“Thus, a preliminary objection may only be raised on a pure question of law. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts [and that] the facts are deemed agreed as they are prima facie presented in the pleadings on record.”

54. We have considered the appellants’ application dated 24<sup>th</sup> March 2023. We find that the matters raised in the preliminary objection are not pure points of law. For example, whether the appellants are the employers of the 3<sup>rd</sup> to 186<sup>th</sup> respondents is an issue of fact which ought to be reserved for the hearing of the petition. Whether or not the 3<sup>rd</sup> to 186<sup>th</sup> respondents were guilty of material non-disclosure is an issue of fact. Whether an employment contract existed between Samasource Kenya EPZ Limited t/a Sama and the 3<sup>rd</sup> to 186<sup>th</sup> respondents is also an issue of fact. Accordingly, it is our finding that the grounds cited by the appellants do not satisfy the strictures set out in *Mukisa Biscuits* (supra). A preliminary objection must be premised on pure points of law, not contested issues of fact.

55. In both appeals, the appellants had applied for the suits against them to be struck out. The jurisdiction to strike out suits must be exercised sparingly and with circumspection and only where a suit is vexatious, without substance, frivolous or scandalous. As was stated by Madan, JA. in *D T Dobie & Company (K) Ltd v Muchina* [1982] KLR 1, no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. The rationale for the above reasoning is due to a realization that the exercise of the powers of summary procedure are draconian, coercive and drastic. And because a party may thereby be deprived of his right to a plenary trial, the court exercises those powers with the greatest care and circumspection, and only in the clearest of cases as regards the facts and the law.

56. Equally important is the fact that granting or refusing to grant the prayers for striking out a suit and setting aside an ex parte order entail exercise of judicial discretion. Irrefutably, where a court of first instance exercises discretion and it can be shown that it was reasonable in reaching its decision by considering all the relevant facts and principles, it would be inappropriate for an appeal court to interfere. These principles were aptly summed up in *Mbogo & Another v Shah* [1968] EA 93 as follows:

“An appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as



a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”

57. We find no improper exercise of jurisdiction or misdirection by the learned judge in the impugned rulings.

58. On the question whether the ELRC erred in law in extending the orders granted on 20<sup>th</sup> March 2023 indefinitely, we note that the learned judge in extending the impugned orders stated as follows:

“Due to the nature of this matter and the interim orders in place, considering that this court has just commenced its leave, I refer this matter to the principal judge to allocate the matter to another judge within the Judicial Review and Labour Relation’s Division to hear and determine the pending application and the petition on the merits on a priority basis. The interim orders are extended pending the hearing and determination of the notice of motion dated March 17, 2023.”

59. The appellants have maintained that the extension of the said ex parte interim orders indefinitely offends the mandatory provisions of rule 17 of the ELRC Rules since none of the parties consented to the extension beyond the 14 days period. However, the 3<sup>rd</sup> to 186<sup>th</sup> respondents argued that rule 17 of the ELRC Rules does not apply in constitutional petitions as evidenced by Rule 7 of the ELRC Rules which recognizes that the applicable rules are Mutunga Rules which allowed the superior court to issue interim orders ex-parte. Also, the 3<sup>rd</sup> to 186<sup>th</sup> respondents submitted that under Article 23(3), a court hearing proceeding brought under Article 22 may grant any appropriate relief.

60. Rule 7 the ELRC Rules provides:

“7.

- (1) A party who wishes to institute a petition shall do so in accordance with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2012.
2. A person who wishes to institute judicial review proceedings shall do so in accordance with section 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules.
3. Notwithstanding anything contained in this Rule, a party is at liberty to seek the enforcement of any constitutional rights and freedoms or any constitutional provision in a statement of claim or other suit filed before the Court.”

61. Regarding interlocutory application and temporary injunctions, rule 17 (4) of the ELRC Rules stipulates:

“(4) An ex parte injunction may be granted only once for not more than fourteen days and shall not be extended thereafter except once by consent of the parties or by the order of the Court for a period not exceeding fourteen days.”

62. We have considered the provisions of rule 17. We find that it is not in dispute that the ELRC had the jurisdiction to issue ex-parte orders. The contestation is that the said orders were extended indefinitely pending hearing and determination of the application on 17<sup>th</sup> March 2023 contrary to rule 17(4).



63. What was before the trial court was a constitutional petition brought under Article 23 which permits a court to frame appropriate reliefs to vindicate the rights that may have been infringed and/or are under threat of being violated and which reliefs are not limited to the specific (reliefs) outlined in Article 23(3) (a) to (e). The supreme Court in *Mitubell Welfare Society v Kenya Airports Authority & 2 Others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* (Petition 3 of 2018) [2021] KESC 34(KLR) held:-

“ Article 23(1) and (3) of the *Constitution* were the launching pad of any analysis into the place and scope of interim orders in Kenya's human rights enforcement architecture. Article 23(3) provided that for a violation of the Bill of Rights the court could grant any appropriate relief including, a declaration of rights, an injunction, a conservatory order, a declaration of legal invalidity of any law that denied, violated, infringed or threatened a right or fundamental freedom in the Bill of Rights that was not justified under article 24 of the *Constitution*, an order for compensation and an order for judicial review. The list of appropriate reliefs that the court could grant was not exhaustive.”

64. This Court in *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR cited *Dendy v University of Witwatersrand, Johannesburg & 2 Others*, [2006] 1 LRC 291 where the Constitutional Court of South Africa held that:

“...The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.

“...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.”

65. We are satisfied that the trial court appreciated prima facie that there was a threat to the 3<sup>rd</sup> to 186<sup>th</sup> respondents' constitutional right, and therefore, the extension of the orders issued on 20<sup>th</sup> March 2023 in our view was proper and within the jurisdiction of the learned judge being an appropriate remedy to prevent the 3<sup>rd</sup> to 186<sup>th</sup> respondents' rights from being infringed in the intervening period as the parties awaited the application dated 17<sup>th</sup> March 2023 to be heard on merit. Consequently, the appellants' appeal on this ground is without merit.

66. The upshot of our above findings is that the appellants' appeals numbers E232 of 2023 and E445 of 2023 are devoid of merit and both appeals are hereby dismissed with costs to the respondents.

**DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**D. K. MUSINGA, (P)**

**JUDGE OF APPEAL**

.....

**ASIKE-MAKHANDIA**

**JUDGE OF APPEAL**

.....



**J. MATIVO**

**JUDGE OF APPEAL**

**I certify that this is a true copy of the original.**

**Signed**

**DEPUTY REGISTRAR.**

