



**Hadullo & another v Registrar of Trade Unions & 3 others (Petition E050 of 2024) [2025] KEELRC 489 (KLR) (24 February 2025) (Ruling)**

Neutral citation: [2025] KEELRC 489 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
PETITION E050 OF 2024  
JK GAKERI, J  
FEBRUARY 24, 2025**

**BETWEEN**

**JOHN HADULLO ..... 1<sup>ST</sup> PETITIONER**

**ETALE BULALI ..... 2<sup>ND</sup> PETITIONER**

**AND**

**REGISTRAR OF TRADE UNIONS ..... 1<sup>ST</sup> RESPONDENT**

**KENYA UNION OF POST PRIMARY EDUCATION TEACHERS .... 2<sup>ND</sup> RESPONDENT**

**SECRETARY GENERAL KENYA UNION OF POST PRIMARY EDUCATION TEACHERS ..... 3<sup>RD</sup> RESPONDENT**

**CABINET SECRETARY FOR LABOUR AND SOCIAL PROTECTION ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The Petitioners herein filed the instant Petition on 16<sup>th</sup> December, 2024 seeking various orders including restraining the respondents from filing the vacant position of the National Assistant Treasurer until both the application and Petition are heard and determined.
2. The Petitioner also sought the Order of certiorari and mandamus against the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively and declaratory Orders.
3. However, on 14<sup>th</sup> January, 2025, the advocates for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed a Notice of Preliminary Objection arguing that:



1. The Petition does not meet the threshold for a constitutional petition under *Anarita Karimi Njeru V Republic* [1970] eKLR and *Mumo Matemu V Trusted Society of Human Rights Allied & 5 Others* [2013] eKLR, as this is a dispute between a union and its member.
  2. The court lacks jurisdiction to hear the petition for the reason that the matter is subjudice *Nairobi ELRC PET. NO. 28 of 2016 Robert Nyabuto Nyabwocha V Ronald Kiprotich Tonui and KUPPET*.
  3. The Petitioners lack locus standi to bring the Petition as there is no relationship between them and Mr. Ronald Tonui whose dismissal from office forms the basis of the Petition.
  4. The actual complainant Mr. Ronald Tanui, has failed to exhaust all the legal remedies provided for in the Union's Constitution thus making the petition and Application pre-mature.
4. In opposition to the Preliminary Objection the Petitioners filed Grounds of Opposition on 23<sup>rd</sup> January, 2025 stating that the Petition was filed in the public interest, the petition meets the threshold in the *Anarita Karimi Njeru's* case (Supra), sub judice does not apply as Petition NO. 28 of 2016 is not pending as the parties entered into a consent which the court recorded.
5. Moreover, the issue raised by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are not pure points of law. That the Notice of Preliminary Objection does not meet the threshold of a Preliminary Objection.
6. On the doctrine of exhaustion, the Petitioners filed submissions not grounds of opposition.

#### **2<sup>nd</sup> and 3<sup>rd</sup> Respondent's submissions**

7. Counsel for the respondents submitted viva voce on 29<sup>th</sup> January, 2025 on four grounds namely;
  1. Petition NO. E050 of 2024 is sub judice ELRC PET. No. 28 of 2016.
  2. The Petitioners lack locus standi to file the suit and are proxies of the complainant. The complainant is Mr. Ronald Tonui.
  3. The complainant had not exhausted other dispute resolution mechanisms.
8. Counsel submitted that a keen reading of the Petition showed that it is a dispute between a trade union and a member as opposed to a Constitutional Petition, as the dispute is centred on the removal of an official from office and the matter falls under the jurisdiction of the Employment and Labour Relations Court (ELRC) as a claim under Section 12 of the *Employment and Labour Relations Court Act* as opposed to a Petition which does not meet the test in *Anarita Karimi Njeru v Republic* (Supra) and *Mumo Matemu* case (Supra).
9. Secondly, the matter is sub judice under Section 6 of the *Civil Procedure Act* and the court lacks jurisdiction as the issues in both matters are the same. That in ELRC Pet. No. 028 of 2016, Mr. Ronald Kiprotich is sued for contempt of court and in the instant case the Petitioners are complaining of removal of Mr. Ronald Kiprotich Tonui and Ndolo J is handling the Nairobi matter.
10. On locus standi, counsel submitted that the Petitioners were proxies of Mr. Ronald Kiprotich Tonui and described themselves as members of the union yet it is not a representative suit and as such have no locus standi as per Nakuru High Court Case No. 37 of 2013 *Elija Sikona & George Pariken Narok* on behalf of *Trusted Society of Human Rights Alliance V Mara Conservancy & 5 Others* [2014] eKLR.
11. That the real complainant was Mr. Ronald Tonui who was removed from office last year and the suit is pre-mature as the court is not the first part of call.



## 1<sup>st</sup> and 2<sup>nd</sup> Petitioners written submissions

12. On locus standi, the Petitioners submitted that *the Constitution* of Kenya accorded them the right to institute the suit claiming that any constitutional right had been denied, violated or infringed as the Petition herein demonstrated.
13. Reliance was made on *Trusted Society of Human Rights Alliance v Mumo Matemu (Supra)* to urge that the suit is filed as a public interest litigation matter citing the now broadened locus standi.
14. On constitutional issues, the Petitioners cite Articles 47 on fair administrative action, 10 on discrimination, 22(1) on right to institute proceedings, 23, 35 3(3)(g) and 50, to urge that the Petition meets the threshold in *Anarita Karimi Njeru V Republic (Supra)*.
15. On sub judice the Petitioners argue that they are not parties to NRB ELRC Petition No. 28 of 2016 and the issues raised are not similar and in any case ELRC Petition No. 28 of 2016 was compromised through a consent.
16. Reliance was also made on the decision in *Business Partners Kenya Ltd V Otundo & Another KEHC 3288 (KLR)* as well as *Kenya National Human Rights Commission V Attorney General & IEBC & 16 Others [2020] eKLR*.
17. The Petitioners, however did not acknowledge the fact that although NRB ELRC PET. No. 28 of 2016 is marked as closed, there is a contempt application pending before the ELRC at Nairobi.
18. On exhaustion, the Petitioners argue that since Mr. Ronald Tonui's name has already been removed from his position the matter is beyond the 2<sup>nd</sup> respondent.
19. According to the Petitioners the matter is both employment and constitutional.
20. The Petitioners submit that the matter calls for investigation and presentation of facts for examination by the court.
21. As to whether the Notice of Preliminary Objection is merited, the Petitioners argue that it does not meet the threshold in *Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd [1969] EA 696*.
22. Reliance was also made on *Oraro V Mbaja [1975]* to urge that a Preliminary Objection must raise a pure point of law.
23. Finally, reliance was also made on *Republic V Eldoret Water Sanitation Co. Ltd Ex Parte Booker Onyango & 2 Others [2007] eKLR* to urge that the instant Preliminary Objection is not based on a pure point of law.
24. In response to the viva voce submissions, the Petitioners filed a 2<sup>nd</sup> round of submissions on the same issues citing Section 12(4) of the *Employment and Labour Relations Court Act* on the court's jurisdiction to hear appeals from the Registrar of trade unions.
25. That on sub judice the court compares records.
26. The court did not discern any new arguments in the new set of submissions.
27. The issues that commend themselves for determination are:
  - i. Whether there is a competent Preliminary Objection.
  - ii. Whether the Preliminary Objection is merited or sustainable.



28. As to whether the 2<sup>nd</sup> and 3<sup>rd</sup> respondent's Notice of Preliminary Objection meets the threshold of a Preliminary Objection, the sentiments of the Court of Appeal in *Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd (Supra)* case instructive.

In the words of Law JA

... a Preliminary Objection consists of a pure 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 a contract giving rise to the suit to refer the dispute to arbitration”.

29. According to Sir Charles Newbold:

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 are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”

30. Although the Petitioners assail the Notice of Preliminary Objection on the premises that some of the grounds cited touch on facts, they admit that indeed some are valid grounds of a Preliminary Objection.
31. Having regard to the totality of the grounds on which the respondents Notice of Preliminary Objection is grounded, the court is satisfied that it meets the threshold of a Preliminary Objection.
32. On sub-judice, while the respondents submit the Petition herein is sub judice Nairobi Petition No. 28 of 2016, the Petitioners argue that that is not the case as the said Petition was disposed of by way of consent which the court recorded. They also argue that the respondent availed no comparative details.
33. Although counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents cited the Petition, she did not allude to the its details or at what stage the suit was, if it was on-going.
34. According to the CTS, case ELRC PET 28 of 2016 was last mentioned on 9<sup>th</sup> March, 2021 and the file marked as closed as a consent was recorded on 24<sup>th</sup> February, 2021.
35. However, an application was filed under Certificate of Urgency on 4<sup>th</sup> December, 2024 seeking committal of Mr. Ronald Kiprotich Tonui to Civil jail for disobeying court orders among other orders.
36. Strangely, all documents uploaded by Mariaria & Co., Mayende & Busiega Advocates and Joseph Otieno Oluoch on diverse days from 5<sup>th</sup> November, 2020 to 17<sup>th</sup> May, 2021 were inaccessible on account of “Error”.
37. It is unclear to the court whether indeed the documents were uploaded and what the Petition was about.
38. Section 6 of the *Civil Procedure Act* 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.



39. Regrettably, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have not provided details on ELRC Nairobi Petition No. 28 of 2016 for the court to appreciate the issues before the court and how they were resolved by the consent recorded by Onyango J.
40. In the circumstances, the court is in agreement with the Petitioners that it is difficult to interrogate whether the issue in the instant suit was directly and substantially in issue in Nairobi Petition No. 28 of 2016.
41. On exhaustion of other dispute resolution mechanisms, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have not laid any factual basis for the submission that this court is not the first port of call in this instance.
42. The principles that govern exhaustion of internal reliefs have been articulated in the provisions of the *Fair Administrative Action Act* and several Court decisions and are simply that the court should be the last resort and not the first port of call.
43. See, Speaker of National Assembly V James Njenga Karume [1992] eKLR, Republic V Commissioner General Kenya Revenue Authority Ex Parte Sanofi Aventis Ltd [2019] eKLR and Geoffrey Muthinja Kabiru & 2 Others V Samuel Munga Henry & 1756 Others [2015] eKLR.
44. In William Odhiambo Ramogi & 3 Others V Attorney General & 4 Others: Muslim for Human Rights and 2 Others (Interested Parties) [2020] eKLR, the Court of Appeal was unambiguous that:
45. It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the court is invoked. Courts ought to be of last resort and not the first part of call..
46. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. This accords with Article 159 of *the Constitution* which commands courts to encourage alternative means of dispute resolution”.
47. Evidently, this matter was filed after an earlier by Mr. Ronald Kiprotich Tonui and another, which the court struck out on the ground of exhaustion of internal dispute resolution mechanisms which the Petitioners had not invoked.
48. In that case, the Petitioner, the subject matter of this Petition had not responded to the Notice to Show Cause and in this Petition, the Petitioners may be aware of the other matter and have not indicated whether efforts were or had been made to resolve the dispute before the instant Petition was filed coming after the previous one.
49. The argument that the matter being litigated is not amenable to other resolution mechanisms is neither persuasive nor convincing.
50. Some reference ought to have been made to the history of the suit, now that it is apparent that it has a chequered history.
51. Secondly, it has not been demonstrated that the instant suit falls under the exceptions to the doctrine of exhaustion under Section 9(4) of the *Fair Administrative Action Act*.
52. See, Republic V Independent Electoral and Boundaries Commission & Others Ex Parte The National Super Alliance (NASA) Kenya and Republic V Dadan Kimathi University of Technology Ex Parte Muia Stephen Mutuku [2022] KEHC 358 (KLR) among others.



53. Concerning locus standi parties have adopted contrasting positions with the 2<sup>nd</sup> and 3<sup>rd</sup> respondents contending that the Petitioners have no standing and who in turn submit *the constitution* accords them the requisite standing to sue on the issue at hand.
54. According to Black's Law Dictionary 10<sup>th</sup> Edition Standing means –  
A party's right to make alleged claim or seek judicial enforcement of duty or right”.
55. It requires no emphasis that Articles 22 and 258 of *the Constitution* of Kenya confer upon every person locus standi or standing to institute proceedings for the protection of rights and fundamental freedoms and protection of *the constitution*.
56. In addition, public interest is intended to benefit the public at large.
57. However, in *Mumo Matemu V Trusted Society of Human Rights Alliance & 5 others (Supra)*, the Supreme Court of Kenya pronounced itself as follows:  
Public interest litigation plays a transformative role in society. It allows various issues affecting the various spheres of society to be presented for litigation. This was *the constitution*'s aim in enlarging locus standi has a close nexus to the right of access to justice. In instances where claims are in the interest of the public are threatened by administrative action to the detriment of constitutional interpretation and application, the court has discretion on a case by case basis to evaluate the terms and public nature of the matter vis-à-vis the status of the parties before it. This discretion is drawn from the command of Article 259(1) to interpret *the constitution* in a manner that promotes its values and purposes advances the rule of law, human rights and fundamental freedoms, permits the development of the law and contributes to good governance”.
58. The court added that the person suing must not be acting for personal gain, or private profit, political motivation or other unspecified considerations.
59. Similar sentiments were expressed by Mbaluto and Kuloba JJ in *Albert Ratori & J. A. Wanywela on behalf of Kenya Bankers Association V The Minister for Finance & Attorney General & Central Bank of Kenya* as follows:  
In constitutional questions, human rights cases, public interest litigation and class actions ... any person or social action groups acting in good faith can approach the court seeking judicial redress for a legal injury carried to a defined class of persons represented, or for a contravention of *the constitution* or injury to the nation”.
60. See also *John Harun Mwau & 3 Others V Attorney General & 2 Others [2012] eKLR* on the import of Articles 22 and 23 of *the Constitution* of Kenya.
61. Evidently, public interest litigation is not available in all cases, it must have a public element in it as opposed to individual and be on a serious constitutional question, or human rights.
62. The petitioners state that they are both teachers and members of the 2<sup>nd</sup> respondent and the 1<sup>st</sup> Petitioner is both a teacher and a lawyer who specialises in Law and Education, and thus suitable to present the Petition in public interest.



63. Black's Law Dictionary 10<sup>th</sup> Edition defines public interest as:
- The general welfare of a populate considered as warranting recognition and protection. Something in which the public as a whole has a stake”.
64. The Petitioners have not demonstrated the specific aspect of public interest which they are protecting or in which the public as a whole has an interest in the instant dispute.
65. The court is however persuaded that they have standing.
66. Finally, as to whether the instant Petition meets the threshold in *Anarita Karimi Njeru V Republic (Supra)*, while the Petitioners contend that it does, the 2<sup>nd</sup> and 3<sup>rd</sup> respondent's argue that it does not for the simple reason that the pith and substance of the dispute is the removal of a union official from office, a dispute which the Employment and Labour Relations Court could hear and determine as a claim under Section 12 of the Employment and Labour Relations Court.
67. The Petitioners, on the other hand cite various Articles of *the Constitution* of Kenya relating to right to institute an action, fair administrative action, discrimination and fair hearing.
68. The essential question is whether these matters can be litigated under statutory frame works other than *the Constitution* of Kenya.
69. In *Anarita Karimi Njeru V Republic Travelyn and Hancox JJ* stated as follows:
- We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains the provisions said to be infringed, and the manner on which they are alleged to be infringed”.
70. The Court expressed similar sentiments in *Kiambu County Tenants Welfare Association V Attorney General & Another [2017] eKLR*.
71. In addition, the nature and extent of the injury must be demonstrated.
72. Although the Petitioners cite Articles 2(1), 3, 10(1) & (2), 21(1), 22(1), 23(1), 27(1), 28, 35, 41, 47, 162(2) and 258 under jurisdiction, only Articles 41, 47 and 50(1) of *the Constitution* are relied upon on the grounds on which the Petition is based. Thus, only the right to fair labour practices, fair hearing and fair administrative action were allegedly violated, which in the court's considered view are the typical issues the court addresses in ordinary claims and are routinely canvassed as claims and none of them raises a constitutional issue.
74. A constitutional issue is one that requires interrogation of a constitutional right and deals with interpretation of *the constitution*.
75. According to Mativo J. (as he then was) in *Hakiziman Abdul Abdulkarim V Arrow Motors EA Ltd & Another [2017] eKLR*
- A constitutional question is an issue whose resolution requires the interpretation of *the Constitution* rather than that of a statute”.
76. The foregoing is fortified by the sentiments of Nyamu J in *Alponse Mwangemi Munga & Others V African Safari Club Ltd [2008] Eklr*



- 77.. In the instant case, we wish to emphasize the point that parties should make use of the normal procedures under various laws to pursue their remedies instead of all of them moving to the constitutional court and making constitutional issues of what is not. They have as a result lost valuable time to pursue contractual claims and/or to have the Industrial court settle the trade dispute (if any) relating to the matter. The upshot of this petition is that it is an abuse of the court's process and it is hereby dismissed".
78. The court is in agreement with the foregoing sentiments of the learned Judges.
79. Stripped of the legal jargon and any technicalities, the only dispute between the parties is the removal of Mr. Ronald Kiprotich Tonui as an official of the 2<sup>nd</sup> respondent, a dispute covered by Section 12(1) (g) of the *Employment and Labour Relations Court Act* and as the foregoing analysis has shown the pleadings raise no constitutional issue to justify the instant Petition.
80. In the end, it is the finding of the court that the instant petition does not meet the threshold of a Constitutional Petition and ought to have been filed as a cause to enable all the parties adduce evidence in an endeavour to establish their respective cases, a fact the Petitioners are in agreement with.
81. Consequently, the instant Petition is struck out to facilitate its filing as a cause for hearing and determination.
82. In the circumstances parties shall bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 24<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**DR. JACOB GAKERI**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 *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.

