



**Kenya National Union of Nurses v County Government of Kisii & another
(Petition E002 of 2025) [2025] KEELRC 429 (KLR) (19 February 2025) (Ruling)**

Neutral citation: [2025] KEELRC 429 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISII
PETITION E002 OF 2025
NZIOKI WA MAKAU, J
FEBRUARY 19, 2025**

(FORMERLY KISUMU ELRC PETITION NO. E029 OF 2024)

**IN THE MATTER OF: ARTICLES 1, 2, 3, 4(2), 10, 19, 20, 21, 22(1) & (2), 23(1), (2) & (3), 27, 28,
36, 37, 41, 43, 47, 48, 73, 162(2) (A), 165(2)(B) AND (D), 232 & 260 OF THE CONSTITUTION**

AND

IN THE MATTER OF: SECTIONS 5, 35, 45 & 46 OF THE EMPLOYMENT ACT

AND

**IN THE MATTER OF: SECTIONS 4(1)(A) AND (B)
& SECTION 5 OF THE LABOUR RELATIONS ACT**

BETWEEN

KENYA NATIONAL UNION OF NURSES PETITIONER

AND

COUNTY GOVERNMENT OF KISII 1ST RESPONDENT

KISII COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

RULING

1. The Petitioner has filed an application under a certificate of urgency dated 5th September 2024, seeking several prayers from the Honourable Court. Among these, the Petitioner requests declarations that the Respondents have violated its members' constitutional rights under Article 27 as read with Article 41 of the *Constitution* of Kenya, 2010. Additionally, the Petitioner seeks an order of certiorari quashing the Respondents' decision to exclude forty-six (46) of its members from reinstatement, as well as orders compelling the Respondents to reinstate the affected members and to cease any further discriminatory actions against them. Further reliefs sought include the payment of accrued salary arrears and benefits from December 2020, compensation for damages suffered, and costs of the petition.



2. The application is supported by an affidavit sworn by Mr. Seth Panyako, who asserts that some of the Petitioner's members have faced constitutional violations. Providing a chronology of events, the Petitioner narrates that on 23rd November 2020, it issued a nationwide strike notice pursuant to Section 76(c) of the *Labour Relations Act*. The strike was motivated by occupational safety concerns, particularly in light of COVID-19 and other infectious diseases. The Petitioner asserts that despite these concerns, the Respondents failed to address the issues, leading the Petitioner's members to commence a nationwide strike on 7th December 2020. Rather than engaging in meaningful dialogue, the Respondents responded with threats, intimidation, and outright victimization of the Petitioner's members. Matters escalated on 31st January 2021 when the Respondents advertised 450 positions for nursing officers, seemingly to replace the striking workers.
3. In an attempt to resolve the matter, the Petitioner filed Kisumu ELRC Cause No. E013 of 2021, which resulted in an order for engagement in out-of-court settlement discussions. However, instead of negotiating in good faith, the Respondents proceeded to dismiss 403 members of the Petitioner, barring them from their workstations and directing them to hand over government property. Following these dismissals, the Petitioner reported a trade dispute. The subsequent conciliation process recommended that the Respondents reinstate the dismissed workers without loss of benefits and continue deducting and remitting all union dues to the Petitioner. It is asserted that whereas partial compliance was observed, forty-six (46) members were inexplicably excluded from reinstatement. The Petitioner argues that this exclusion violated their rights under Articles 27, 28, 36, 37, 41, and 43 of the *Constitution*, alongside provisions of the *Employment Act* and the *Labour Relations Act*. The affected members have suffered economic hardships, humiliation, and loss of income, with some struggling to service loans. The Petitioner further contends that their exclusion was driven by cronyism, favouritism, corruption, and political patronage.
4. In response, the Respondents filed a notice of preliminary objection, arguing that the court lacks jurisdiction to grant the reliefs sought. They also contend that the petition does not meet the required threshold for a Constitutional Petition, citing a failure to specify with precision the constitutional provisions allegedly infringed upon. Consequently, the Respondents labelled the application and petition an abuse of the court process and sought their striking out with costs.
5. On 22nd October 2024 the court directed that both the application and the Preliminary Objection be canvassed together by way of written submissions. Both parties filed written submissions a precis of which follows.

Petitioner's Submissions

6. The Petitioner highlights that the Respondents have not filed a response to the application and identifies the following issues for determination.
 - i. Whether the notice of preliminary objection dated 18th October 2024 is properly raised
 - ii. Whether the Honourable Court has the jurisdiction to entertain the present application and petition
 - iii. Whether the petition herein has met the threshold of a constitutional petition
 - iv. Whether the Petitioner is entitled to the reliefs sought.
7. On the first issue, the Petitioner submits that the preliminary objection fails to raise any pure point of law for determination. Therefore, it is incompetent, constitutes an abuse of the court process, and is a deliberate attempt to frustrate justice in the face of constitutional violations of its members' rights. The



Petitioner contends that additionally, the preliminary objection has been raised merely to increase costs and confuse the issues at hand. In support of this argument, the Petitioner cites the case of *Attorney General v Independent Medical Legal Unit* [2012] eKLR where the court stated:

"It is equally clear that the improper raising of points by way of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues." The court must, therefore, insist on the adoption of the proper procedure for entertaining applications for preliminary objections. In that way, it will avoid treating, as preliminary objections, those points that are only disguised as such; and will, instead, treat as preliminary objections, only those points that are pure law: which are unstained by facts or evidence, especially disputed points of fact or evidence or such like.

8. The Petitioner submits that provided grounds evincing violation of its members' rights, the Court should interrogate them and not summarily dismiss the suit. In support of this argument, the Petitioner cites the case of *Independent Electoral and Boundaries Commission v Jane Chebererugor & 2 others* [2015] eKLR which stated:

"It is distinctly improper for a party to resort to a preliminary objection as a sword of winning a case, otherwise destined to be resolved judicially and on the merits. "

9. On the second issue, the Petitioner submits that this Honourable Court has jurisdiction to entertain both the application and the petition. Citing Article 162(2)(a) of the *Constitution*, the Petitioner asserts that the Employment and Labour Relations Court (ELRC) holds equal status with the High Court and is vested with jurisdiction to determine disputes arising from employment matters. Further buttressing this position, the Petitioner refers to section 12 of the *Employment and Labour Relations Court Act* and the case of *Kenya Tea Growers Association & 2 others v The National Social Security Fund Board of Trustees & 13 others* (Petition E004 & E002 of 2023 (Consolidated)) [2024] KESC 3 (KLR) (21 February 2024) (Judgment) where the Supreme Court clarified the ELRC's jurisdiction over constitutional matters, stating:

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

10. As to whether the Petition meets the threshold of a constitutional petition, the Petitioner submits that this petition does. The Petitioner cites Rule 4(1) of the Mutunga Rules, which provides for the right



to make an application to the High Court in case of infringement of fundamental rights and freedoms. Additionally, it submits that the Petition has been filed in accordance with the format prescribed in Rule 10 of the Mutunga Rules, and has also pleaded with precision the specific rights infringed upon, in line with the principle established in *Anarita Karimi Njeru v Republic* [1979] eKLR.

11. On the issue of entitlement to the reliefs sought, the Petitioner asserts that it has met the three-pronged test for the grant of interlocutory conservatory orders. The Petitioner submits that the demonstrated violation of the rights of 46 of its members, through the denial of reinstatement, constitutes a prima facie case. The Petitioner further submits that failure to grant the orders sought would render the petition nugatory and that the balance of public interest tilts in its favour.
12. In support of the prima facie aspect of the case, the Petitioner submits that it is not one that must necessarily succeed. It cites the case of *Kevin K Mwiti & others v Kenya School of Law & others* [2017] eKLR where it was held:

“A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, the Petitioner has to show that he or she has a case which discloses arguable issues and, in this case, arguable Constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success. Accordingly in determining this application, the Court is not required-indeed it is forbidden-from making definite and conclusive findings on either fact or law.

13. In conclusion the Petitioner submits that the Preliminary Objection should be dismissed with costs and the motion dated 4th September 2024 should be allowed with costs.

Respondents' Submissions

14. The Respondents submit that filing this petition while three other suits addressing the same issue are still pending constitutes an abuse of the court process. They point to various cases involving the Petitioner and the Respondents such as Kisumu ELRC Cause No. E013 of 2021 and the consolidated cases of Nairobi ELRC Cause E041 of 2021 and Nairobi ELRC Cause 731 of 2019. Additionally, they cite the case of *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others* [2018] eKLR, where instituting multiple actions on the same subject matter, against the same opponent, and on the same issues was deemed an abuse of the court process.
15. Regarding the issue of jurisdiction, the Respondents submit that both the Petition and the motion are time-barred under section 90 of the *Employment Act*. They emphasize that the Petitioner's members were dismissed on 19th January 2021, and the conciliator's report was submitted on 21st April 2021. Accordingly, they assert that the petition should have been filed no later than 19th January 2024 or 21st April 2024. Further, the Respondents assert that the Petitioner has not invoked the Court's jurisdiction in accordance with sections 73 to 75 of the *Labour Relations Act*, thereby rendering the suit both legally and factually baseless. As to whether the petition meets the constitutional threshold, the Respondents submit that it falls short of the standards set in the case of *Anarita Karimi Njeru v Republic* [1979] KLR 54 and that of *Mumo Matemu v Trusted Society of Human Rights Alliance* [2013] eKLR. They contend that the Petitioner fails to specify with precision the constitutional provisions allegedly infringed and how they were violated. Moreover, the Respondents reiterate that the 46 members of the Petitioner were among 53 employees who voluntarily refused to resume their duties. The Respondents refute the constitutionality of the Petition and submit that the Petitioner failed to utilise the remedy



stipulated by sections 74 and 75 of the *Labour Relations Act*. They also assert that the Petitioner did not request for reinstatement following the Conciliator's report, thereby rendering the petition baseless. It is submitted that by failing to pursue the legal avenues available for redress, the Petitioner's members effectively forfeited their claim regarding the alleged violation of their dignity. The Respondents urge the Court to strike out both the application and the petition with costs in light of the foregoing.

Determination

16. The Court has considered the pleadings, submissions of parties and the law in coming to this decision. The Petition herein is the epitome of abuse of court process. It is open secret that there are proceedings over the same matter both here in Kisumu ELRC and the Nairobi ELRC. Indeed, there was a decision by Onyango J. in the case of *Kenya Union of Clinical Officers v Chairman, Council of Governors & 3 others; Ministry of Labour and Social Protection & another (Interested Parties); Ongwari James Elvis & 15 others (Contemnors)* [2022] eKLR in Cause No. 731 of 2019 (consolidated with Cause No. E013 of 2021, Cause No. 8 of 2020, ELRC 42 of 2019, Cause No. E041 of 2021, E6538 of 2020, E6605 of 2020, 877 of 2020, ELRC Misc. Appl. 004 of 2021, Petition 208 of 2020 and Petition No. 211 of 2019). In the case before this Court, there is a question of issue estoppel. The doctrine precludes this Court from making any determination on issues already determined in the prior suits. This doctrine prevents a party from relitigating a finding of fact or law that was already decided in a previous case. As such, despite the assertions by the Petitioner to the contrary, there is no merit in permitting this Petition to have one more day before the Court. It is struck out with costs to the Respondents as the preliminary objection succeeds.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF FEBRUARY 2025

Nzioki wa Makau, MCIArb.

JUDGE

