



Gachuhi v Eagle 1 Concrete & Machineries Limited; Directorate of Occupational Safety and Health Services (Interested Party) (Petition E010 of 2024) [2025] KEELRC 518 (KLR) (13 February 2025) (Ruling)

Neutral citation: [2025] KEELRC 518 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
PETITION E010 OF 2024
ON MAKAU, J
FEBRUARY 13, 2025**

BETWEEN

PAUL KIBUE GACHUHI PETITIONER

AND

EAGLE 1 CONCRETE & MACHINERIES LIMITED RESPONDENT

AND

DIRECTORATE OF OCCUPATIONAL SAFETY AND HEALTH SERVICES INTERESTED PARTY

(Before Hon. Justice Onesmus N Makau on 13th February, 2025)

RULING

Introduction

1. The respondent has objected to the Petition herein vide the Notice of Preliminary Objection dated 8th July 2024 which prays for striking of the petition with costs for the following grounds:
 1. That the petition dated 20th June 2024 is bad in law, frivolous and an abuse of the court process and therefore ought to be dismissed with costs.
 2. That the petition discloses no constitutional issue rather it merely attempts to constitutionalize an ordinary civil employer employee dispute.
 3. That the petition offends the doctrine of constitutional avoidance by seeking application of the constitution to matters fully addressed by statute, specifically the Employment Act Cap and Work Injuries Benefits Act.



4. That the petition is a mere claim of breach of contract of employment merely clothed and framed in the bill of right language.
 5. That the law is clear that a court will not entertain a constitutional issue where there exists a different forum where the matter can be determined.
 6. That the issues and reliefs sought are subject to the provisions of the [Employment Act](#) and the [Work Injury Benefits Act](#) (WIBA).
 7. That entertaining this petition goes contrary to gazette notice No.6024 (Volume cxx No.740 dated 22nd June 2018 which expressly mandates this honourable court to only handle matters where the claimant earns a gross salary of Kenya Shillings Eighty Thousand (Kshs.80,000/-)
 8. That the petitioner earned a gross monthly salary of Kenya Shillings Forty-Five Thousand (Kshs.45,000/-) at the time he absconded work.
 9. That in the circumstances the petition dated 20th June 2024 is a monumental, procedural and substantive legal nullity, fatally defective and an abuse of court process therefore should be struck out with costs of the Respondent.
2. The respondent argued ground 2,3,4 and 5 together to urge that the doctrine of constitutional avoidance had been violated. It was then submitted that where a dispute can be determined through another forum apart from through [the constitution](#), the alternative procedure ought to be followed. It was submitted that Part B of the petition pleads that the petitioner was injured while in the course of employment and therefore seeks compensations.
 3. It was further submitted that the petitioner has referred to provision of the [Employment Act](#) and the Work Injury Benefit Act (WIBA). Consequently, it was submitted that the petitioner's claim is a civil claim of breach of contract capable of being determined before another forum. Reliance was placed on HC Petition No.455 of 2018 Consumer Federation of Kenya v Toyota Motors Corporation & 4 others where the court held that a litigant must seek redress in an appropriate forum as opposed to invoking the constitutional jurisdiction from the onset.
 4. It was argued that the claim before the court concerns performance of contractual obligations which can be addressed under the [Employment Act](#) and WIBA without invoking the constitutional court jurisdiction. Consequently, the court was urged to dismiss the petition with costs for violating the doctrine of constitutional avoidance.
 5. The petitioner, in response submitted that the petition arises out of employment but also concerns enforcement of the Bill of Rights under Article 41 and 47 of [the Constitution](#), namely, right to fair Labour Practices and right to Fair Administrative Action. Reliance was placed on Nairobi ELRC Petition E073 of 2023 Boniface Orubia Wasika v Cadell Construction Co (De)LLC & Directorate of Occupational Safety and Health Services where the court held that by the employer failing to submit itself to the voluntary process under the WIBA violated the employee's rights and fundamental freedoms.
 6. Further reliance was placed on several decisions including Wycliffe Amukowa & 2 others v Machakos University (2022) eKLR where Odunga J held that, in a matter where jurisdiction falls within the jurisdiction of the specialized courts and outside, it would be a travesty of justice for the High Court to decline jurisdiction since it would mean that the litigant would be forced to file two sets of legal proceedings.



7. In the end, this court was urged to find that it has jurisdiction to determine the petition and dismiss the objection with costs.

Determination

8. The main issue for determination is whether the petition herein violated the doctrine of Constitutional avoidance.
9. The respondent contends that the petition is just a civil claim premised on the failure to fulfill a contractual obligation under WIBA and for that matter there is no constitutional violation involved. However, the petitioner maintains that failure by the employer to fulfil the said statutory obligations amounts to violation of his rights to equality, right to human treatment, right to fair labour practices and right to fair administrative action as guaranteed under Article 27, 28 41 and 47 of *the Constitution*. Consequently, he submits that this court has jurisdiction to determine the same.
10. In the case of Boniface Orubia Wasika v Cadell Construction Co (De)LLC & Directorate of Occupational Safety and Health Services (Interested Party) (2023) KEELRC 3383 (KLR) Ongaya J was faced with a similar petition as the one before me and held that: -

“20. To answer the 5th issue, the court returns that Preliminary Objection must fail. It was submitted that the petitioners should not have failed (SIC) the petition as section 16 of the *Work Injury Benefits Act* precludes filing of claims for recovery of damages in respect of any occupational accident or disease resulting in disablement or death of an employee. Further that the petitioner had failed to invoke the provision of that Act. However, the court as submitted for the petitioner, seeks that the respondent who has refused or neglected its voluntarily submission to that Act be compelled to do so. It is not a claim for compensation for the disablement arising from the occupational disease in issue but it is to enforce the Act and to secure rights and fundamental freedoms as claimed. The preliminary objection is therefore liable to dismissal with costs. The evidence is that the respondent while being aware about the Petitioner’s occupational disease failed to report the same to the Director under the Act and trigger the process under the Act.”

11. The facts of the above case were on all fours with the facts of this case. The respondent has not demonstrated why I should depart from the said decision. I am satisfied that the petitioner has made serious allegations of violation of rights and fundamental freedoms guaranteed under *the constitution*, which warrant determination by this court.
12. The issue is not about assessment of compensation for work related injury but the conduct of the employer who refuses to comply with express provisions of the law that regulates compensation of occupational injuries outside the courts of law.
13. In view of the reasons highlighted above, I find no merits in the respondents preliminary objection and hereby dismiss it with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 13TH DAY OF FEBRUARY, 2025.

ONESMUS N MAKAU

JUDGE

Order



This ruling has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

