



Mutuku & 2 others v Registrar of Trade Union & 2 others (Petition E018 of 2024) [2025] KEELRC 278 (KLR) (6 February 2025) (Ruling)

Neutral citation: [2025] KEELRC 278 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
PETITION E018 OF 2024
K OCHARO, J
FEBRUARY 6, 2025**

BETWEEN

**MICHAEL MUTUKU 1ST PETITIONER
PETER OMONDI OLUOCH 2ND PETITIONER
RONALD KIPROTICH TONUI 3RD PETITIONER**

AND

**REGISTRAR OF TRADE UNION 1ST RESPONDENT
THE KENYA UNION OF POST-PRIMARY EDUCATION EDUCATION
TEACHERS 2ND RESPONDENT
THE SECRETARY GENERAL, KENYA UNION OF POST-PRIMARY
EDUCATION EDUCATION TEACHERS 3RD RESPONDENT**

RULING

Introduction

1. By a Notice of preliminary objection dated 15th January 2025, the 2nd and 3rd Respondents object to the Petitioners’ application and petition herein on the grounds, thus: -
 - a. The application and petition do not disclose any constitutional issue.
 - b. The petition is an employment dispute disguised as a constitutional issue.
 - c. The Notice of Motion is incompetent for having been filed without leave of the Court.
 - d. The Court lacks jurisdiction to hear and determine the petition because it is sub-judice.
2. The 2nd and 3rd Respondents filed written submissions dated 21st January 2025 on the Preliminary Objection. The Petitioners filed an affidavit sworn on 21st January 2023, by the 3rd Petitioner, captioned



“Affidavit in Reply to the Respondent’s Preliminary Objection dated 15th January 2025” and written submissions dated 22nd January 2025.

3. When this matter came up before me on 23rd January 2025, Mr. Mariaria, Counsel for the 3rd Petitioner, sought to make a brief oral submission against the preliminary objection, and I allowed him to.

The Respondents’ Submissions

4. Counsel for the 2nd and 3rd Respondents submitted that the law relating to preliminary objections is trite. A preliminary objection properly taken must be on a pure point [s] of law. To buttress this submission, Counsel placed reliance on the case of Mulu Holding Limited -vs- James Mulu Kanjora [2017] eKLR.
5. It was further submitted that a properly taken and presented petition must pass the specificity test as was set out in the case of Analisa Karimi Njeru -vs- Republic [1979] eKLR. To pass the test, the petition must set out with precision, the complaint by the petitioner[s], the provisions of *the constitution* said to be infringed and how the infringement occurred.
6. Counsel submitted further that though the Petitioners have cited several provisions of *the Constitution* as the basis for their petition, they have not explained how those stipulations have been violated. Additionally, the provisions cited do not relate to fundamental rights and freedoms capable of being infringed by the 2nd and 3rd Respondents.
7. The Petitioners’ petition herein has not been pleaded with precision. It does not meet the threshold set in the Anarita case(supra).
8. It was further argued that the matters raised in the instant petition, are matters that could be litigated under the normal suit, not a constitutional petition. The controversy between the parties is not constitutional but contractual.
9. The rights under Articles 41 and 47 of *the Constitution* that are alleged to have been violated are enacted under the *Employment Act* and the *Labour Relations Act*. A dispute flowing therefrom should be considered in the manner provided for under statute. To fortify this submission, reliance was placed on the holding in Summaya Athman Haasan -vs- Paul Masinde Simidi & Another [2019] eKLR

“We adopt and uphold the general principles that where a legislation has been enacted to give affected to a constitutional right it is not permissible for a litigant to found a cause of action directly on *the constitution* without challenging the legislation.....”
10. It was further argued that the fact that the 3rd Petitioner alleged that the reason for losing his position is a flagrant abuse of the union’s Constitution does not by itself elevate an ordinary employment dispute to a constitutional dispute. Substantive and procedural unfairness of termination of employment does not amount to a constitutional violation.
11. It was further argued that it was not the intention of the legislature to allow an employee to raise what is essentially a labour dispute in terms of the Act as a constitutional matter. To buttress this point reliance was placed on the case of Winfred Njeri Ngure -vs- Tear Fund [2023] KEELRC 1324(KLR).
12. Counsel submitted that the Notice of Motion application was originally dated 13th December 2024. It was amended without leave of the Court on 13th January 2021. An application amended and filed without the leave of the Court is so filed irregularly and becomes a fit candidate for striking out. To buttress this, the submission the case of Nathan Chesang Moson & 2 others -vs- Community Uplift Ministries [2013] eKLR was cited.



13. Lastly, Counsel submitted that this Court lacks jurisdiction to entertain the current matter as the same is sub-judice. The Petitioners herein are raising matters that are the subject matter in Nairobi ELC No. 28 of 2016 – Robert Nyabuto Nyabwocha v Ronald Kiprotich Tonui and Kenya Union of Post Primary Education Teachers [KUPPET]. The issues in the Nairobi petition are directly and substantially in issue in this case. The law prohibits any Court from proceeding with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously initiated suit or proceedings between the same parties or between parties under whom they or any of them claim or are litigating under the same title.

The Petitioner’s Submissions

14. The Petitioners submitted that the Respondents’ attack on the application on the ground that it doesn’t raise any constitutional violations and is an employment matter disguised as a constitutional issue is unfounded. The application isn’t a standalone pleading. It was filed to secure interim orders pending the determination of the petition.
15. It was further argued that the petitioners have set out a clear case of violation of constitutional rights for which they are seeking remedies. In paragraphs 38 to 41, the petitioners have elaborately set out the constitutional stipulations that the Respondents breached. They have further set out the prejudice they have suffered following the violations. They have in detail explained the rights that have been violated by the Respondents and how. The particular rights violated are those under, Article 41 [the right to fair labour practices], more specifically Sub-Article 2 [the right to join and participate in activities of a trade union of their choice], Article 47[the right to fair administrative action] and Article 50[right to fair hearing].
16. The duty of both the Secretary General of the Union and the Registrar of Trade Unions under sections 35[2], [3] and [4] of the *Labour Relations Act* is administrative and the same is subject to the provisions of Article 41 of *the Constitution*. The Respondents’ decision to remove and action of removing the 3rd Petitioner from office was a violation of his right to a fair hearing guaranteed under Article 50 of *the Constitution*.
17. The decision in *Mwanzia v National Police Service Commission & 3 Others* [2024] KEELRC 13307[KLR], was cited to fortify the submissions that constitutional issues are raised in the instant petition and as such, the Petitioners were right to initiate the matter herein as a constitutional litigation. Further reliance was placed on the Supreme Court case of *Gladys Boss Shollei vs Judicial Service Commission & Another* [petition 34 of 2014] [2022] KESC 5 [KLR].
18. The Petitioners assert that they intend to amend their petition to challenge the Respondents’ action[s] on account that they were discriminatory contrary to Article 27. Further, the Respondents breached their right to freedom of association. The application to amend the petition shall be premised on the principal ground that the petitioners have new evidence that they were discriminated against because of their ethnicity.
19. At the time of filing the amended application, the initial application dated 13th December 2024 was yet to be responded to. Therefore, amendment of the application without leave of the Court didn’t prejudice the Respondents in any way. As such, there can be no justification for striking out of the application. To support this position, reliance was placed on the case of *Almond Resort Limited v Mohammed Mahat Kuno* [2019] eKLR.
20. Concerning the objection raised that this matter is sub judice and that therefore this Court lacks jurisdiction to entertain the same, Counsel submitted that the ground as raised doesn’t meet the



threshold of a properly raised preliminary objection, as for it to be determined, facts must be ascertained. As such, it cannot be said to be on a pure point of law.

21. Further, Petition ELRC NO. 28 of 2016- Robert Nyabuto Nyabwocha v Ronald Kiprotich Tonui and KPPET is no longer pending. It was finally determined by consent. The doctrine of sub judice is inapplicable in the circumstances, therefore.
22. It was further submitted that the petitioners are strangers to the Kisumu ELRC Petition No E050 of 2024. None of them is a party to that petition. The doctrine of sub judice can only be successfully raised if the party raising it establishes the specific conditions elaborated in the Supreme Court case of Kenya National Commission of Human Rights v Attorney General, Independent Electoral & Boundaries Commission & 16 others. The Respondents haven't brought forth the pleadings in the Kisumu matter to enable the Court to determine whether or not the conditions exist. As a result, this ground must fail.

Analysis and Determination.

23. Before I delve further, into considering the specific grounds that the Respondents raised in their notice of preliminary objection, I am compelled to comment on the "Replying affidavit to the Respondents' preliminary objection" filed herein by the petitioners. In my view, the affidavit is misplaced. Its filing has no legal foundation at all. Preliminary objections are meant to be on pure points of law and should be determined as such. Any attempt by a party to have a preliminary objection determined through the Court considering an affidavit, therefore evidence, makes nonsense of this requirement.
24. Section 6 of the [Civil Procedure Act](#) provides for sub judice thus;

"No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings 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."
25. Undoubtedly, sub judice as a bar to proceedings cannot be successfully raised without the Court being invited to consider facts. The Court cannot properly pronounce itself on the issue without interrogating, and pronouncing itself, on factual matters allied thereto. In my view, therefore, the doctrine of sub judice cannot be properly raised as a preliminary objection.
26. I understand the Respondents as asserting that the doctrine of constitutional avoidance militates against the petitioners' petition herein and as such the petition should be struck out. In my view, the issue is a jurisdictional one and of law, that this Court can take as a preliminary issue and render itself thereon.
27. In *KKB V SCM& 5 others* [Constitutional Petition 014 of 2020] KEH 289[KLR] on the doctrine the Court stated;

"Constitutional avoidance has been defined as a preference of deciding a case on any other basis than one which involves a constitutional issue being resolved. As a principle, constitutional avoidance has been linked to the doctrine of justiciability. In broad terms, justiciability governs the limitations on Constitutional arguments that courts will entertain. It encompasses three main principles which are standing, ripeness and mootness. The doctrine of avoidance was fortified in *Sports and Recreation Commission v Sagittarius Wrestling Club and Anor* [2001] [2] ZLR 501[s], in which Ebrahim JA said as follows;



“.....Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will decline to determine whether there has been in addition, a breach of the Declaration of rights.....”

28. The Constitutional Court of Zimbabwe in *Chewira & others v Minister of Justice Legal and Parliamentary Affairs & others* held;

“As we have already seen, in the normal run of things courts are generally loath to determine a constitutional issue in the face of alternative remedies. In that event, they would skirt and avoid the constitutional issue and resort to the available alternative remedies.”

29. The Supreme Court of Kenya in the case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & others* [2014] eKLR stated on the principle;

“The Appellant in this are seeking to invoke the “principle of avoidance” also known as “Constitutional avoidance”. The principle of avoidance entails that court will not determine a constitutional issue, when a matter may be properly decided on another basis.....”

30. In *COD & Another v Nairobi City Water & Sewerage Company Limited* [2015] eKRL, the Court stated;

“.....Similarly, in *Papinder Kaur Atwal v- Masnjit Singh Amrit*, Nairobi Petition No. 236 of 2011 where after considering several authorities Justice Lenaola remarked as follows: -

“All the authorities above would point to the fact that *the constitution* is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within the Administrative processes..... I must add the following; the Bill of Rights is robust. It has been hailed as one of the best in any constitution in the world. Our courts must interpret it with all the liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violation thereof.”

12. The Supreme Court of India also has held that ordinary remedies available under common law and statutes must be pursued in the ordinary manner as provided under statute. For instance, see *Re Application by Bahadur* [1986] LRC [Cost.] The Court expressed itself as follows at page 307:

“The Courts have said time and again that where infringement of rights is alleged which can be founded in a claim under substantive law, the proper course is to bring the claim under such law and not *the constitution*. This case highlights the un-wisdom of ignoring that advice.....

The constitution sets out to declare in general terms the fundamental concepts, yet, as has been proclaimed by the highest Court in the land, it is not a general substitute for the normal procedures for invoking judicial control of Administrative Action.” [see *Harrison v A.G* [1979]3 WKR.....”

31. This Court in *Kitiku v Council of Legal Education & another* [2023] KEELRC 1357 [KLR] stated;

“147. The common thread across all the decisions cited above is that the constitutional litigation path, is one that is narrow, only to be travelled on, in exceptional and very necessary situations. Not every grievance or dispute shall



be litigated under the Constitution Where a matter can be handled through other processes, the best course is to allow them to be under those processes. It matters not that alternatively, they can be dealt with under a constitutional litigation. I have carefully considered the issues raised and as presented, in the Petitioner's petition. They are largely on the procedural and substantive fairness of the termination of the Petitioner's probationary employment with the 1st Respondent, and failure to confirm him into employment at the end of the probation period that was. Weighing the material presented before me leaves me with no option other than to conclude that the substantive remedies sought by the Petitioner, do not depend upon the "constitutional issues" raised by the Petitioner. The reliefs sought are reliefs that ought to have been under the Employment Act in an ordinary claim, through the procedure provided for under the Employment and Labour Relations Act and the Practice and Procedure Rules of this court."

32. I have carefully considered the Petitioners' submissions on the doctrine and how it relates to the instant petition. I fear the submissions, with respect disclose a lack of deep appreciation of the avoidance doctrine and its applicability. The submissions ignore the principle that a mere allegation that a human right or fundamental freedom, or the Constitution, has been or is threatened to be violated is not sufficient to attract the court to engage its jurisdiction under the Constitution instead of that under the statute.
33. I have fully considered the facts of the controversy between the parties herein, as brought out in the Petition and supporting affidavit of the Notice to the Motion and I take a clear view that the core grievance of the Petitioners is an alleged violation of, the 3rd Respondents' Constitution, and section 35 of the Labour Relations Act.
34. Additionally, in the reliefs section of the petition, the Petitioners have not sought for, a declaration by, or finding of, the Court, that any of those cited constitutional rights were violated by the Respondents through their action[s].
35. Consequently, I hold that the Petitioners ought to have initiated the litigation herein as an ordinary civil suit under statute, the Labour Relations Act and not as constitutional litigation.
36. The doctrine of constitutional avoidance militates against the Petitioners' petition herein. The Petitioners' petition is improperly presented to this court for interrogation. The petition is struck out. Each party is to bear its own costs.

DATED, SIGNED AND DELIVERED THIS 6TH DAY OF FEBRUARY 2025

OCHARO KEBIRA

JUDGE

In the presence of

Mr. Otad for the Petitioners

Mr. Nthurima for Respondents.

