



Commission for Human Rights and Justice v Fursyth t/a Maasai Resort, Mombasa Maasai Beach Bar and Restaurant Maasai Koroga Hotel Mombasa; Ministry of Labour & another (Interested Parties) (Petition E017 of 2024) [2025] KEELRC 996 (KLR) (27 March 2025) (Ruling)

Neutral citation: [2025] KEELRC 996 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
PETITION E017 OF 2024
M MBARŪ, J
MARCH 27, 2025**

BETWEEN

COMMISSION FOR HUMAN RIGHTS AND JUSTICE PETITIONER

AND

**EJOHN FURSYTH T/A MAASAI RESORT, MOMBASA MAASAI BEACH BAR
AND RESTAURANT MAASAI KOROGA HOTEL MOMBASA .. RESPONDENT**

AND

THE MINISTRY OF LABOUR INTERESTED PARTY

KENYA REVENUE AUTHORITY INTERESTED PARTY

RULING

1. The respondent filed a Notice of Preliminary Objections dated 10 January 2025 on the basis;
 - a. The application by the petitioner is incurably defective, bad in law and an abuse of the court process;
 - i. The application is brought contrary to the Constitutional and Human Rights Acts
 - ii. This court should not entertain the petition reasons the petition is filed in the wrong court
 - iii. The court has no jurisdiction to hear and determine the petition.
 - b. The application is frivolous and intended to obscure the process of justice and, more particularly, deliberately curtail and realization of the respondent's rightful freedom.
 - c. The application lacks merit and should be dismissed with costs.



2. The respondent submitted that the petition touches on human rights issues outside this court's jurisdiction. It is unrelated to employment matters and meant to curtail the respondent's freedoms. The petition should have been filed at the High Court and dismissed with costs.
3. The respondent submitted that the petitioner purports to act for persons who have not been named or filed their affidavits. The petition is thus improperly before this court, which is denied jurisdiction as held in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR; *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR.
4. The petitioner submitted that Article 162(2) (a) of *the constitution* establishes the court to hear all employment and labour relations disputes. Article 165 of *the Constitution* removes all matters for the court from the High Court's jurisdiction. Section 87 of the *Employment Act* gives the court the power to determine the rights and responsibilities of an employer or employee.
5. The petition states that the respondent has been illegally deducting salaries of employees contrary to section 19 of the *Employment Act*, in breach of *the constitution* and the law. Under section 87 of the *Employment Act*, the court has jurisdiction to hear the petition as the High Court is removed from addressing such matters.
6. Section 12 of the *Employment and Labour Relations Court Act* confers jurisdiction on the court to hear disputes between employers and employees. According to Article 23 of *the Constitution*, the court has the power to grant the reliefs sought in the petition where the rights of employees have been violated. The objections by the respondent should be dismissed with costs to allow the court to hear the petition on merit.

Determination

7. The petitioner filed the petition because it has been brought to its attention that the respondent, without lawful cause, has been deducting its employees' salaries, including salaries for October 2022, to recover monies paid to the Kenya Revenue Authority (KRA) in tax arrears and penalties; contrary to Section 19 of the *Employment Act*.
8. The petition is also that through a letter dated 8 November 2024, the petitioner, under the right to access information, wrote to the respondent seeking the following;
 - a. Copies of the payroll/master roll;
 - b. Copies of all the employees' pay slips for October;
 - c. Any other necessary document.
9. The petitioner seeks a declaration against the respondent for failing to provide the documents sought in the letter dated 8 November 2024. The declaration should state that the failure to issue such documents violates the petitioner's constitutional rights under Article 35 of *the Constitution* and that an order of mandamus should be issued for such documents.
10. The petitioner has defined itself as a free-spirited non-governmental organization that addresses human rights. The petition is filed under various articles of *the Constitution*, including Article 22.
11. As established under Article 162(2)(a) of *the Constitution*, the court has jurisdiction to hear employment and labour relations disputes. Further, under section 12 of the *Employment and Labour Relations Court Act*, the court is given jurisdiction over various employment and labour relations disputes and for connected purposes as held in *National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others* [2023] KECA 80 (KLR).



12. On constitutional petitions and enforcing rights and freedoms, whereas the High Court jurisdiction is defined under *the Constitution* to enforce constitutional rights and freedoms, Article 165(5) removes employment and labour relations disputes from the High Court. Such matters must be heard and addressed by the court as held in *Arendse & 182 others v Meta Platforms, Inc & 3 others*; Kenya Human Rights Commission & 8 others (Interested Parties) [2023] KEELRC 921 (KLR). This position was affirmed by the Court of Appeal in *Daniel N Mugendi v Kenyatta University & 3 others* [2013] KECA 41 (KLR).
13. The court is clothed with jurisdiction to hear and determine constitutional petitions.
14. On the petition and orders sought, the respondent filed a letter and documents dated 17 January 2025 with a list of its employees who declare that they have not authorized the petitioner to file the petition on their behalf.
15. The documents sought by the petitioner, like payrolls/master rolls and pay slips under article 35 of *the constitution*, are by their nature records with personal details and information of employees. Ordinarily, such records should be sought by the subject employee under their rights in sections 19 and 20 of the *Employment Act*. The employer should protect the personal data therefrom and not release it to third parties without the employee's consent and approval. As much as the petitioner seeks to enforce its rights under Article 35 of *the constitution*, such rights must stop where they are likely to infringe on the personal rights and freedoms of other persons who are likely to suffer the violation of their right to privacy.
16. The right to know and the right to privacy weighed, the petitioner's rights outside the employment relationship with the respondent, and the employees' rights to privacy within their employment with the respondent must prevail.
17. The respondent's employees have a right to seek and secure information on their employment. It has not been stated that they have made efforts to secure such rights, but they have been denied them. As a third party to the employment relationship, the petitioner's need to seek the provision of payroll/muster roll and pay slips for the employees is not justified.
18. In the case of *Okiya Omtatah Okoiti, Wyclife Gisebe Nyakina & Law Society of Kenya v Attorney General, Kenya Railways Corporation, Public Procurement Oversight Authority, China Road and Bridge Corporation, Okiya Omtatah Okoiti & Nyakina Wycliffe Gisebe* [2020] KECA 589 (KLR) the court in addressing the need to balance the right to information and privacy held that;

... if litigants choose to use clandestine means to procure information, such actions would heavily compromise the need for Article 35 of *the Constitution* and would violate the other parties' fundamental right to privacy under Article 31 of *the Constitution* that had the appellants follow lawful channels and procedures available in law in obtaining the information, the question of violation of the respondent's right to privacy would not have arisen. ...
19. This position is reiterated in *Okiya Omtatah Okoiti v Communications Authority of Kenya & others* Petition No. 53 of 2017. The court held that;

A person's right to privacy entails that such a person should have control over their personal information and be able to conduct his or her own affairs relatively free from unwanted intrusions. Information protection is an aspect of safeguarding a person's right to privacy. It provides for the legal protection of a person in instances where another person or institution



is processing such a person's personal particulars. Information processing generally refers to the collection, storage, use and communication of information.

20. The court has jurisdiction to hear constitutional petitions, save that the information sought by the petitioner is personal and cannot be secured outside the employment relationship, which is lacking in this case. The affected employees have not been given the authority to petitioner to source the information on their employment through a letter dated 8 November 2024.
21. Objections by the respondent thus addressed, the orders sought in the petition shall not be issued. The petition is struck out. Each party is to bear its costs.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 27 MARCH 2025.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant:

..... and

