



Wambugu v H Young & Company East Africa Limited (Employment and Labour Relations Constitutional Petition E006 of 2024) [2025] KEELRC 1498 (KLR) (16 May 2025) (Ruling)

Neutral citation: [2025] KEELRC 1498 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS CONSTITUTIONAL PETITION E006 OF 2024
ON MAKAU, J
MAY 16, 2025

BETWEEN

PETER WACHIRA WAMBUGU PETITIONER

AND

H YOUNG & COMPANY EAST AFRICA LIMITED RESPONDENT

(Before Hon. Justice Onesmus N Makau on 16th May, 2025)

RULING

1. This ruling relates to the respondent's Notice of Preliminary Objection dated 24th September 2024 whereby the respondent prays for striking out of the Petition herein and costs be awarded on the following grounds:
 - a. That the petition violates the doctrine of avoidance.
 - b. That the petition is a misuse or abuse of constitutional process.
 - c. That the petition misapprehends the exclusive jurisdiction of the statutory framework.
 - d. That the petition violates the principle of judicial restraint.

Background

2. The Petitioner was employed by the respondent as a driver for a gross monthly salary of Kshs. 33,593.00. On 16th August 2014, he was involved in a road traffic accident along Othaya- Ruruguti road while on duty aboard motor vehicle registration number KBZ 518L Toyota Double Cabin and he sustained a complete spinal injury among other injuries leading to total paralysis. He averred that he is paraplegic requiring physio bladder and bowel care.



3. As a result of the said injuries, his employment was terminated on 12th September 2014 on medical grounds. On 21st April 2016, the County Occupational Safety and Health Officer Nyeri County, wrote to the Respondent directing them to fill the prescribed form DOSH 1-part for purposes of assessment of the award but up to now the Respondent has not yet to complied with the directive and has refused to grant the Petitioner any audience.
4. The petitioner was aggrieved and filed the petition herein contending that the said actions by the Respondent are in gross violation of the Constitutional values and principles under Article 10, Article 27 and Article 41 of *the Constitution*. He then prayed for the following relief:
 - a. A declaration that the Petitioner was unfairly discriminated upon on his employment status on account of his medical status upon sustaining a work injury.
 - b. A declaration that the Petitioner was subjected to unfair labour practices contrary to the provisions of:
 - i. Article 27 of *the Constitution* which provides that every person is equal before the law and has right to equal protection and equal benefit of the law.
 - ii. Article 28 guaranteeing every person the right to inherent dignity which must be respected and protected at all times.
 - iii. Article 41 guaranteeing every worker the right to fair labour practices including the observance of the provisions of the *Work Injury Benefits Act* 2007.
 - c. A declaration that the actions of the Respondent were in violation of *the Constitution*
 - d. A declaration that the Respondent violated the Petitioner's right to compensation under WIBA.
 - e. Award of 96 months' salary under WIBA totalling to Kshs. 3,224,928 for 100% incapacity suffered.
5. The Respondent did not dispute the facts of the case but filed the instant Notice of Preliminary Objection urging the court to strike out the petition with costs on the aforementioned grounds.
6. The objection was canvassed by written submissions which I have carefully considered alongside the pleadings. The issues for determination are:
 - a. Whether the cause of action is time barred.
 - b. Whether petition offends the doctrine of constitutional avoidance.
 - c. Whether the petition offends the doctrine of exhaustion.

Time bar

7. The objector submitted that the cause of action is time barred and the petition is a mischief calculated to circumvent the fact that the claim is now time barred by dint of section 26(3) of the WIBA and section 4(2) of the *Limitation of Actions Act* which provides for limitation period of 12 months and 3 years respectively.
8. However, I have noted from the pleadings that the report of the injury was made to the Occupational Safety and Health but the respondent failed to fill the relevant Dosh Form for assessment of compensatory damages to be complete. Accordingly, the cause of action cannot become stale after the



adjudication under the WIBA was kicked off by the report of the accident many years ago. In fact, it the respondent who bears the blame for frustrating the statutory process by failing to fill the said DOSH Form. The default amounts to a continuing injury within the meaning of section 90 of the *Employment Act*. Consequently, that ground fails.

Constitutional avoidance

9. It was submitted that the doctrine of constitutional avoidance dictates that a court should not determine a constitutional issue when a matter can be adequately determined through existing statutory mechanisms. Reliance was placed on the case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR.
10. It was submitted that the Petitioner has failed to show why the statutory mechanism of compensation by DOSH is inadequate or ineffective. It was submitted that it is evident that the Petitioner is attempting to bypass the statutory process. However, the respondent has not demonstrated to the court that there a mechanism provides by statutes through which a defaulting employer can be compelled to fill the statutory forms.
11. Rule 56 (5) (a) and (c) of the ELRC Procedure Rules provides as follows concerning holding suits:
 - “(a) a person being a party to a dispute may file a suit and seek appropriate interlocutory relief pending exhaustion of such alternative dispute resolution mechanisms or pending determination of the suit.”
 - “(c) a suit filed prior to exhaustion of such alternative dispute resolution mechanisms may be stayed and not struck out on account of such exhaustion.”
12. Having considered the facts of the case before me, I opine that the petitioner was entitled to file a holding suit with a view to compel the respondent to comply with statutory process contemplated under WIBA. Failure to comply with statutory process would lead to violation of fundamental rights and freedoms as the petitioner would lose compensation. Consequently, I am satisfied that the most suitable holding suit for the petitioner was the constitutional petition herein and the same does not offend the doctrine of avoidance. I say so because the holding suit is seeking to give effect to the statutory dispute resolution mechanism.

Exhaustion doctrine

13. It was submitted that the court lacks jurisdiction to entertain the matter as the Petitioner has not exhausted the statutory mechanisms. Reliance, was placed on the case of Law Society of Kenya v Attorney General & Another [2019] eKLR in urging the Court to dismiss the Petition with costs to the Respondent.
14. I agree with the respondent that there is a mandatory procedure for settling WIBA dispute before the Director of Occupational Safety and health. Under section 52, this court only enjoys appellate jurisdiction after the remedies from the Director are exhausted. That was the decision by the Supreme Court in Law Society of Kenya v Attorney General & Another [2019] eKLR. Consequently, I find that the petition offends the exhaustion doctrine to the extent that the petitioner seeks assessment of damages for the bodily injuries arising from the said occupational accident by this court.
15. Notwithstanding the foregoing finding, I reiterate that the suit, is competent under this Court’s procedure Rules, in so far as it operates as a holding suit to compel a defaulting party to comply with statutory obligations towards alternative dispute resolution mechanism. A defaulting party cannot



be allowed to invoke procedural technicalities as a shield from court proceedings which are initiated to remedy its default. Consequently, I must find and hold that, save for the prayer for assessment of damages, highlighted above, the Notice of Preliminary Objection dated 26th September 2024 lacks merits, and it is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 16TH DAY OF MAY, 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.

