



Naipanoi & 2 others v Kenya Wildlife Service & another (Employment and Labour Relations Petition E194 of 2024) [2025] KEELRC 1858 (KLR) (26 June 2025) (Ruling)

Neutral citation: [2025] KEELRC 1858 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E194 OF 2024**

**MN NDUMA, J
JUNE 26, 2025**

BETWEEN

**PURITY NAIPANOI 1ST PETITIONER
ABUBAKAR OMAR ABDALLAH 2ND PETITIONER
CYNTHIA WANDIA MULINGE 3RD PETITIONER**

AND

**KENYA WILDLIFE SERVICE 1ST RESPONDENT
THE COMMANDANT, LAW ENFORCEMENT ACADEMY, MANYANI 2ND
RESPONDENT**

RULING

1. The 1st and 2nd Respondents filed notice of preliminary objection dated 8/1/2025 to wit
“This honourable court does not have the jurisdiction to hear and determine the petition dated 20/11/2024 because the petition contravenes the doctrine of constitutional avoidance.”
2. The parties have filed submissions in which the Respondents state that the issues raised by the Petitioners are not constitutional in nature and can be dealt with by way of a claim since the petition seeks declaration/injunction/ setting aside a letter of discontinuation dated 23/11/2024 issued to the Petitioners and an order of mandamus compelling the Respondents to jointly and/or severally pay compensation of Kshs. 5 million to the Petitioners on account of breaching the Petitioners constitutional rights.



3. The Respondents cite the Court of Appeal decision in Sumayya Athmani Hassan versus Paul Masinde Simidi and another [2019] KECA 107 (KLR) in which the court spelt out the doctrine of constitutional avoidance thus: -

“The Article 41 rights are enacted in the *Employment Act* and *Labour Relations Act*. The two Acts and the rules made thereunder provide adequate remedy and orderly enforcement mechanisms. The 1st Respondent filed a petition directly relying on the provisions of *the constitution* for enforcement of contractual rights governed by the *Employment Act* without seeking a declaration of invalidity of the provisions of the *Employment Act* or alleging that the remedies provided therein are inadequate. The petition did not raise any question of the interpretation or application of *the constitution*.

We adopt and uphold the general principle in the persuasive authority in Barbara De Klerk {supra} that where a legislation has been enacted to give effect 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 in question. That principle has been reinforced by the Supreme Court in Communications Commission case (supra).”

4. The Applicants further invoke the Supreme Court decision which emphasized the need to seek statutory remedies where clearly provided by statute and avoid filing suit based on constitutional provisions in the case of Communications Commission of Kenya & 5 others versus Royal Media Services Limited and (Petition 14, 14 of 14B and 14C of 2014 KESC 55 (KLR) (29 September 2014) (Judgment).
5. The Petitioner submits that the petition discloses matters involving interpretation and enforcement of the fundamental rights and freedoms entrenched in *the constitution* and the Petitioners have rightly invoked the provisions of Article 22 and 23 of *the constitution* together with Mutunga rules to have their rights vindicated and protected. That the preliminary objection lacks merit and it be dismissed.
6. The court has carefully perused the petition and the supporting documents, which petition has not been responded to by the Respondent and is of the view that the matters raised by the Respondents involve determination of mixed issues of law and facts and so the objection does not meet the criteria set out by the Court of Appeal in Mukisa Biscuits Manufacturing Ltd. v West End Distributors Ltd (1969) EA 696 that: -

“A preliminary objection consists of a point of law which has been pleaded, or which arises from a clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit ---- A preliminary objection is in the nature of what used to be called a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

Similarly, in Oraro v Mbaja [2005] 1 KLR 141 the court held as follows: -

“...A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.”



7. Accordingly, the objection is not ripe and the same remain alive and shall be considered and determined in the judgment of the petition on the merits.

The objection is not upheld therefore.

Costs in the petition

DATED AT NAIROBI THIS 26TH DAY OF JUNE 2025.

MATHEWS NDUMA

JUDGE

Appearance:

Mr. Kirimi for Petitioners

M/s. Feksi for Respondents

Mr. Kemboi – Court Assistant

