



Wachira v Commercial International Bank Kenya Limited (Employment and Labour Relations Petition E204 of 2024) [2025] KEELRC 1706 (KLR) (10 June 2025) (Ruling)

Neutral citation: [2025] KEELRC 1706 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E204 OF 2024**

**HS WASILWA, J
JUNE 10, 2025**

BETWEEN

ROSEMARY NYAMBURA WACHIRA PETITIONER

AND

COMMERCIAL INTERNATIONAL BANK KENYA LIMITED ... RESPONDENT

RULING

1. In response to the Petition dated 6th December 2024, the Respondent filed a Notice of Preliminary Objection dated 30th December 2024 on the following points of law:
 1. The Petition offends the doctrine of constitutional avoidance.
 2. The Petition is an abuse of the constitutional jurisdiction particularly given Rule 10(3) of the Employment & Labour Relations Court Rules, 2024.

Respondent's Submissions

2. It is the Respondent's submissions that the Petitioner was employed by the Respondent as a Senior Branch Manager- Westlands Branch on the terms of contract dated 31st May 2023.
3. The Respondent highlighted the Petitioner's argument that she was exemplary in her duties but to her shock her probation period was irregularly extended which meant the interest rate on her mortgage facility moved from 5% per annum staff rate to market rate; an attempt to reduce her salary and redeploying her to a different branch in a lesser capacity as Branch Manager-Upper hill Branch.
4. The Respondent further highlighted the Petitioner argument that she was re designated as a Senior Relationship Manager-Wealth, a role she allegedly performed well, however, she was wrongfully accused of poor performance and put on a performance improvement plan. This conduct by the



Respondent was allegedly so stressful that she was in and out of hospital in August 2024 and eventually led to her resignation on 5th September 2024.

5. The Respondent submitted that the Petitioner's claim that her hand was forced by the unbearable conditions at the workplace brings to mind the concept of constructive dismissal dealt with in *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] KECA 394 (KLR) wherein an ordinary claim was filed and appropriate awards were made against the employer.
6. It is the Respondent's submission that nothing in the Petition cannot be raised and dealt with in an ordinary claim. All the reliefs sought in the Petition, if merited, are available in an ordinary claim, therefore, there is no justification to trivialise the constitutional jurisdiction in this claim.
7. The Respondent relied in the Court of Appeal case of *Gabriel Mutava, Elizabeth Kwini & Mary Martha Masyuki v Managing Director Kenya Ports Authority & Kenya Ports Authority* [2016] KECA 411 (KLR) wherein, the Court noted that: "Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation."
8. The Respondent submitted that the ELRC Rules 2024 which were in force when the petition was filed, declares that even alleged constitutional; violations should be presented in the form of an ordinary claim as reiterated in *Munga v Kenya Maritime Authority & another; Inspector General (Corporations) & another (Interested Parties)* [2024] KEELRC 2740 (KLR) as follows: "The reliefs sought can well be heard under a Memorandum of Claim. The orders sought against the interested parties can well be addressed under the provisions of the *Employment and Labour Relations Court Act*, the *Employment Act*, and the Rules of the Court, which permit a party to articulate any constitutional violation under a Memorandum of Claim."

Petitioner's Submissions

9. The Petitioner submitted that by virtue of Articles 23 and 162(2)(a) of *the Constitution* read with Articles 165 and 258(1) of *the Constitution* and Section 12 of the *Employment and Labour Relations Court Act*, the Petitioner is accorded an opportunity to institute court proceedings in protection of their fundamental rights.
10. The Petitioner submitted that Articles 258(1) and (2) of *the Constitution* read with Articles 3(1), 22(1) and (2), 27 (1) and (2), 28 and 29(d) guarantees the right to equal protection of the law through a fair hearing and charges the Petitioner to bring actions where *the Constitution* is violated or threatened with a violation; it is with standing that the Petitioner exercises within the subject matter.
11. On the second issue, the Petitioner submitted that a peremptory consideration must be made of the factual situation relied upon; this would either entitled or disentitle the Petitioner from invoking this court's jurisdiction as a constitutional court. She relied in the Court of Appeal decision in *Diana Katumbi Kiio v Reuben Musyoki Muli* [2018] KECA 860 (KLR) which cited Lord Diplock's definition of a cause of action in *Letang vs. Cooper* [1964] 2 All ER 929.
12. The Petitioner submitted that the existence of a particular factual situation is material in determining whether a litigant is entitled to obtain audience and urge for the grant of reliefs against another. however, in inquiring the existence of a particular fact as observed in *Oraro v Mbaja* [2005] KEHC 3182 (KLR).



13. It is the Petitioner's submission that the petition not only discloses a violation of the Petitioner's right to fair labour practices but also unveils a series of violations of her constitutional rights by the Respondent. The factual premise is disputed and cannot be determined without evidence being led at a full hearing.
14. The Petitioner submitted that the Respondent has misapprehended the matters in dispute by mischaracterising her grievances as a mere claim. However, the issues revolve around identified and pleaded violations of constitutional rights which this court has jurisdiction to entertain; and the Petitioner will need to substantiate this in trial but that is not available under a P.O.
15. The Petitioner submitted that the doctrine of constitutional avoidance does not deprive this court of the jurisdiction to hear and determine this matter. This position was affirmed in *Brookside Dairy Limited v Mohamed & another* [2022] KEHC 13627 (KLR) where the court held: "The doctrine of constitutional avoidance does not divest this court of the jurisdiction to hear and determine this matter. What the doctrine means is that while this court can indeed hear and determine this matter, it restrains itself to hear the same because there is another appropriate forum that can hear and determine the matter effectively."
16. It is the Petitioner's submissions that the Respondent has downplayed the issues in question by suggesting the only issue at hand is a violation of article 41 that can be addressed by an ordinary claim.
17. The Petitioner submitted that the petition has stated with precision the constitutional violations which are clear and of direct relevance to the matter; by this court's intervention, the Petitioner's rights under *the constitution* will be guaranteed and upheld.
18. I have examined all the averments and submission of the parties herein. The applicants contend that there is nothing in form of a constitutional violation in this petition that would warrant this court hearing this petition.
19. The petitioners argue that their rights under *the constitution* have been violated. Indeed, it is premature for this court to determine whether or not there are any constitutional violations or not without hearing the parties. This would also entail delving into the issue of evidence/facts which then goes beyond the purview of a preliminary objection as held in the *Mukisa Biscuit* case.
20. The preliminary objection as it is cannot therefore stand and is dismissed. The parties to proceed with main petition. Costs in petition.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 10TH OF JUNE, 2025.

HELLEN WASILWA

JUDGE

