



REPUBLIC OF KENYA



**Moffat & 14 others v Nthurima & 3 others (Petition E019 & E048 of 2025  
(Consolidated)) [2025] KEELRC 2144 (KLR) (21 July 2025) (Ruling)**

Neutral citation: [2025] KEELRC 2144 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E019 & E048 OF 2025 (CONSOLIDATED)**

**HS WASILWA, J  
JULY 21, 2025**

**BETWEEN**

**EXECUTIVE SECRETARIES OKISAI OMUNYIN MOFFAT ..... 1<sup>ST</sup> PETITIONER  
PETER OMONDI OLUOCH ..... 2<sup>ND</sup> PETITIONER  
PAUL ROTICH ..... 3<sup>RD</sup> PETITIONER  
PAUL KIMETTO ..... 4<sup>TH</sup> PETITIONER  
ROBERT MIANO ..... 5<sup>TH</sup> PETITIONER  
MARY ROTICH ..... 6<sup>TH</sup> PETITIONER  
MOSES KIMWERE ..... 7<sup>TH</sup> PETITIONER  
CHARLES NGENO ..... 8<sup>TH</sup> PETITIONER  
GENTRIX OGOLLA ..... 9<sup>TH</sup> PETITIONER  
MATHEW MERMUK ..... 10<sup>TH</sup> PETITIONER  
LEONARD SIELE ..... 11<sup>TH</sup> PETITIONER  
FAITH KEBUT ..... 12<sup>TH</sup> PETITIONER  
WILLIAM MUTUKU ..... 13<sup>TH</sup> PETITIONER  
ZEF YEBEI ..... 14<sup>TH</sup> PETITIONER  
ZABLON RONO ..... 15<sup>TH</sup> PETITIONER**

**AND**

**MOSES NTHURIMA ..... 1<sup>ST</sup> RESPONDENT  
HON JEREMIAH OMBOKO MILEMBA ..... 2<sup>ND</sup> RESPONDENT  
REGISTRAR OF TRADE UNIONS ..... 3<sup>RD</sup> RESPONDENT**



**RULING**

1. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a Notice of Preliminary Objection dated 19<sup>th</sup> February 2025 in opposition to the petition herein on grounds THAT:
  1. the Petitioners have not exhausted their alternative remedies in the matter contrary to the doctrine of constitutional avoidance.
  2. the Petitioners have not raised any objections to the letter dated 6<sup>th</sup> February 2025 from the Registrar of Trade Unions inviting objections to the Notice of Amendment to the Constitution of Kenya Union of Post Primary Education Teachers (KUPPET) gazetted in the Kenya Gazette on 7<sup>th</sup> February 2025 in the Gazette Volume CXXVII-No. 25 Gazette Notice No. 1403 OF 2025.
  3. the Petitioners have not sought any relief in the prayers for relief that could be beneficial to them should the Petition be heard to its logical conclusion.
  4. Petitioners are guilty of concealment of material facts, to wit, there is a similar petition pending in Nairobi ELRC Petition E044 of 2024 concerning the same subject matter.
  5. the application and petition are an abuse of the court process.
2. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents further filed Grounds of Opposition dated 19<sup>th</sup> February 2025 on ground That:
  1. the Honourable court lacks jurisdiction to hear the matter given that this Petition is sub judice Nairobi ELRC. PET/ E044/2024, which is coming up in court on 4<sup>th</sup> March 2025.
  2. the 3<sup>rd</sup> Petitioner is an interested party in the said petition ELRC. PET/ E044/2024 pending before this court and yet in paragraph 95 of the instant petition deceived the court thus: “As far as is within the knowledge of the humble petitioners, the dispute in this petition is not the subject of any other court proceedings whether pending or decided.”
  3. the Petition does not meet the threshold for a constitutional petition as held in the cases of Anarita Karimi Njeru v Republic [1979] KEHC 30 (KLR) and Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] KECA 445 (KLR)
  4. the Petition and application are threefold bad in law, an abuse of the court process and ought to be dismissed with costs.
3. In respect to ELRC Petition No. E048 of 2025, the 1<sup>st</sup> Respondent, Kenya Union of Post Primary Education Teachers (KUPPET) therein raised a Notice of Preliminary Objection dated 5<sup>th</sup> May 2025 on grounds THAT:
  1. the petition is misconceived and an abuse of the process of the court as the Petitioners have not exhausted the mechanisms provided in Section 27(4) of the Labour Relations Act.
  2. the petition violates the principle of constitutional avoidance.
  3. the petition was filed prematurely.



## Petitioners' Case

4. In opposition to the Respondents' preliminary objection and grounds of opposition, the Petitioners filed a replying affidavit dated 28<sup>th</sup> February 2025 sworn by the Executive Secretary of KUPPET Union, Maralal Branch, the 3<sup>rd</sup> Petitioner herein. They further filed a response to the grounds of opposition dated 27<sup>th</sup> April 2025.
5. The Petitioners aver that the preliminary objection is improperly raised and lacks merit and should be declined by the court as it is trite law that a case based on mixed issues of facts and law cannot be determined on preliminary objection. They relied in *Mukhisa Biscuit Manufacturing Ltd Vs West End Distribution Ltd (1969) E.A 697* where it was held: -

“Preliminary Objection is 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”
6. It is the Petitioners' case that the petition is based on forged KUPPET ADC minutes and the illegal procedure of attempting to wrongly amend KUPPET's constitution without following the law and contrary to Article 25.0 of the Union's constitution. These are issues the court must investigate through oral evidence and not available for preliminary objection.
7. The Petitioners aver that they wrote to the Registrar of Trade Unions who responded in writing to the union informing them she could not proceed with the registration since there was forgery of the minutes. Therefore, the only remedy availed to them is to invoke the jurisdiction of this court under Section 12 of the Employment & *Labour Relations Act* or through a criminal since forgery is both criminal trial since forgery is both a criminal process and civil claim.
8. It is the Petitioners' case that they reported the matter at Kilimani Police Station whereby the police asked them to conclude the civil case in this court first. Therefore, they exhausted the remedies available to them.
9. The Petitioners avers that the doctrine of exhaustion is not applicable as it falls with exception to the rule, that notwithstanding, the court still retain jurisdiction to intervene in exceptional circumstances despite existence of alternative remedies as criminal prosecution and the remedy is not sufficient to address the issue at hand.
10. The Petitioners aver that the main legislation being used in the gazettelement of procedurally amended KUPPET constitution is the *Labour Relations Act*, 2007, which is yet to be realigned to Kenyan Constitution, therefore, the *Constitution* overrides and precedent over the law.
11. The Petitioners aver that they are not the movers of Nairobi Petition E044 OF 2024 and they only got to know about the irregular move by KUPPET Secretary General and applied to be enjoined as Interested Party; and the petition is the hands of the Secretary General and his proxies who can withdraw the petition at any time to prejudice the affected members and officials.
12. The Petitioners aver that this court is clothed with jurisdiction under Articles 22,23 and 165 (3) of the *Constitution* to hear and determine the petition.
13. The Petitioners' in Petition E049 OF 2025 aver that the Registrar of Trade Unions committed an illegality by advertising outside the stipulated period of 21 days and illegality cannot be mediated upon. Once a question of illegality is raised, it overrides all other considerations such as subjection of a matter to alternative dispute resolution.



14. The Petitioners aver that an illegality, procedural impropriety or unconstitutionality or breach of rights and fundamental freedoms would amount to exceptional circumstances justifying the court's intervention.

### **Respondents' Submissions**

15. The Respondents submitted on three issues: whether the application is based on a pure point of law; whether the Petitioners have exhausted their alternative remedies in the matter; and whether the Petition offends the doctrine of sub-judice.
16. The Respondents submitted that the preliminary objection is based on a non-contest of facts pleaded by the Petitioner but rather it raises a jurisdictional question that challenges the appropriateness of the court as the primary forum for the resolution of the dispute. Thus, it meets the threshold set out in *Mukisa Biscuits* (supra).
17. The Respondents submitted that the doctrine of exhaustion of alternative remedies is both a constitutional and statutory imperative. Article 159(2)(c) of the *Constitution* emphasizes the use of alternative forms of dispute resolution, while Section 9(2) and (3) of the *Fair Administrative Action Act* expressly require that courts shall not review administrative action or decisions unless all internal mechanisms for appeal or review have been exhausted. Further, Section 27 (4) of the *Labour Relations Act* reads:
- “Upon receipt of the notice of change of name or constitution, the Registrar shall give a notice of at least twenty-one days in the Gazette and in three daily newspapers of national circulation inviting any objections to the proposed change of name or constitution by members of the trade union and where any such objection is raised, the Registrar shall investigate the complaint and the grounds relied upon and may—
- a) refer the matter to the Employment and Labour Relations Court;
  - b) refuse to accept the proposed amendments; or
  - c) make any orders that he may deem fit in the circumstances.”
18. It is the Respondents' submissions that on 6<sup>th</sup> February 2025, the Registrar of Trade Unions issued a notice of 21 days inviting objections to the Notice of Amendment of the KUPPET Constitution. The Notice was published in the Kenya Gazette on 7<sup>th</sup> February 2025. However, the Petitioners filed the instant Petition on 11<sup>th</sup> February 2025 before the lapse of the 21-day objection period. This premature filing not only bypassed the prescribed statutory process but also deprived the Registrar of the opportunity to discharge her investigative and adjudicative role under Section 27(4).
19. The Respondents submitted that the issues raised by the Petitioners pertain primarily to internal union affairs, specifically the process of amending the union constitution which are labour disputes contemplated and governed under the *Labour Relations Act*. They do not automatically raise constitutional questions warranting the invocation of the court's constitutional jurisdiction as affirmed in *Kadukha & 3 Others v Kenya National Private Security Workers Union (KNSPSWU) & 2 Others; Yongo & 11 Others (Interested Parties)* [2023] eKLR, where the Court held that Section 27(4) of the *Labour Relations Act* is not a mere alternative remedy but a mandatory statutory procedure that must be followed before approaching the Court.



20. It is the Respondents' submissions that the Petitioners' failure to exhaust this procedure renders the petition premature and in violation of the principle of judicial restraint, also referred to as the doctrine of constitutional avoidance.
21. The Respondents submitted that the Supreme Court in Kenya National Commission on Human Rights Vs Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) 2020 eKLR defined the doctrine of sub-judice as intended to prevent the filing of multiple suits involving the same subject matter and parties before courts with competent jurisdiction. The doctrine safeguards against the risk of conflicting decisions and the abuse of court process. It held that for sub-judice to apply, one must demonstrate that there is more than one suit over the same subject matter, between the same parties or their representatives, and that both suits are pending before competent courts, with one filed before the other.
22. It is the Respondents' case that the doctrine of sub-judice applies herein as Petition E044 of 2024 is currently pending before the Employment and Labour Relations Court; it raises the same issues concerning the amendment of the KUPPET constitution and involves the same parties, including the 3<sup>rd</sup> Petitioner. Therefore, Section 6 of the *Civil Procedure Act* becomes operative, as it expressly prohibits a court from proceeding with a suit where the matter in issue is directly and substantially the same as one already pending before a competent court.

### **Petitioners' Submissions**

23. The Petitioners submitted that they satisfied deferred doctrine of exhaustion before approaching this court. As soon as the union unlawfully passed the resolution to adopt the impugned changes on 20<sup>th</sup> December, 2024, they wrote numerous letters to the 3<sup>rd</sup> Respondent objecting to the proposed changes to their union constitution. However, the 3<sup>rd</sup> Respondent either failed/refused or neglected to respond to the said letters and instead wrote to the Respondents requesting for explanations.
24. The Petitioners submitted that the 1<sup>st</sup> Respondent in response to the 3<sup>rd</sup> Respondent's letter gave his version of the facts vide a letter dated 27<sup>th</sup> February, 2025, which was not shared with the Petitioners denying them a forum to respond. Subsequently, the 3<sup>rd</sup> Respondent persuaded by the response, initiated the process of registering the amendments to the *Constitution* by issuing a notice for the amendment of the union constitution in the Kenya Gazette.
25. Based on these events, the Petitioners submitted that they deferred to the doctrine of exhaustion of administrative remedies under Section 27 (4) of the *Labour Relations Act* and only sought the intervention of this court after the 3<sup>rd</sup> Respondent had nothing more to offer. Additionally, this limb of the Notice Preliminary Objection is no longer available to the Respondents because the 3<sup>rd</sup> Respondent has already registered the impugned constitution.
26. They further submitted that the petition was not challenging the registration of the amendment to the union constitution but challenging the process especially, reliance on fake documents.
27. The Petitioners submitted that the doctrine of exhaustion is not absolute and does not oust the jurisdiction of the courts to do justice where the alternative remedy is inadequate, ineffective, or illusory as in the instant case. Additionally, the Petition raises serious violations of constitutional rights, namely the right to fair administrative action and the right to fair hearing under Articles 47 and 50 of the *Constitution* which merit direct intervention by this court.
28. The Petitioners submitted that the doctrine of sub-judice is not applicable to the instant petition. Even if it is true, that a similar petition is pending determination in another court, the issues raised



herein especially the use of forged documents are distinct constitutional violations that have not been substantially raised in the other matter.

29. On the allegation that one of the Petitioners is an interested party in the Nairobi ELRC Petition No E044 of 2024, the Petitioners submitted that that an overlap of parties does not render a matter sub-judice.
30. It is the Petitioners' submission that it trite law that a preliminary objection should raise a pure point of law, however, in order to prove sub-judice, one needs to exhibit evidence, which renders this point impure.
31. The Petitioners submitted that to decide on whether the administrative remedies was exhausted or not one must look beyond the pleadings to the evidence. Therefore, the preliminary objections raised are not pure points of law because they have been blurred by facts.
32. The Petitioners submitted that the constitutional violations pleaded in the petition are serious, justiciable, and properly before this court. The Respondents failure to follow the law in proposing amendment to the union constitution does not only offend the provisions of Section 27(4) of the *Labour Relations Act* but it also violates the Petitioners rights to join a trade union and to participate in its programs and activities guaranteed under Article 41 of the *Constitution*.
33. I have examined all the averments and submissions of the parties herein. The applicants herein raise a preliminary objection to this petition on the ground that the petitioners have not exhausted the process envisaged under section 27(4) of the *Labour Relations Act* which allows time to objections once an application for registration of an amended constitution is received by the Registrar of Trade Unions.
34. They submit that the petitioners have not exhausted the alternative remedies in the matters contrary to the doctrine of constitutional avoidance. They also submit that the petition is prematurely filed.
35. The respondent petitioner contend that the preliminary objection goes beyond the purview of the Mukhisa Biscuit case and should therefore be dismissed.
36. The petitioners aver that the *Constitution* has already been registered and therefore the process of objection to an intended registration has already been overtaken by events.
37. Section 27(3) of the Labour Relation Act (supra) as cited herein relates to a notice of change of name or constitution. Once an application is received by the Registrar of trade Unions, the registrar gives 21 days period asking for any objections. The respondents aver that the process envisaged was followed but the respondents applicant herein proceeded without consulting them.
38. It is their contention that they exhausted all processes envisaged. What I notice from the pleadings herein, is that it seems the issues leading to the amendment of the unions constitution are contested issues on minutes and attendance which issues were raised by the petitioners even before the 3<sup>rd</sup> respondent registered any constitution or issued any notice of registration inviting objection. There is contention in process used in the process to establish whether this is true or not.
39. To this end, the issues being raised in the preliminary objection are factual and not necessarily legal. The preliminary objection as raised goes beyond the purview of the Mukhisa Biscuit case. I will therefore decline to find any merit in the application.
40. I dismiss this application and direct the parties to proceed with the main petition. Costs in the petition.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21<sup>ST</sup> DAY OF JULY 2025.**

**HELLEN WASILWA**



**JUDGE**

