



REPUBLIC OF KENYA



KENYA LAW
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**Oreo v National Assembly & 2 others (Petition E199 of 2023)
[2024] KEELRC 470 (KLR) (27 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 470 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E199 OF 2023
AN MWAURE, J
FEBRUARY 27, 2024**

BETWEEN

DOMINIC MASINYA OREO CLAIMANT

AND

NATIONAL ASSEMBLY 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

CABINET SECRETARY MINISTRY OF HEALTH 3RD RESPONDENT

RULING

1. The 1st respondent filed a preliminary objection dated 26th October 2023 seeking the prayers that the preliminary objection be determined on the following grounds:
 1. The honourable court lacks jurisdiction to determine the petition because;
 1. The petition does not disclose any dispute arising out of an Employment and Labour Relations dispute as required under section 12(1) and (2) of the *Employment and Labour Relations Court Act*, 2011 (“ELRC Act”) to invoke the jurisdiction of this honourable court.
 2. The issues raised in the petition are matters reserved for the High Court’s jurisdiction under article 165(2) (d) of *the Constitution* and as such the Employment and Labour Relations Court does not have the requisite jurisdiction to consider the matter.
 3. The petition is sub judice. The matters in issue in the petition are also directly and substantially in issue in a similar petition filed by the petitioner before the High Court of Kenya in constitutional petition E413 of 2023 *Dominic Masinya Oreo v The National Assembly & Others*.



2. The petition amounts to forum shopping and abuse of court process, a practice barred by the law.
 3. The petitioner's actions are bad practice in law as it flies in the face of the legal provisions governing filing and determination of suits, which seek to avoid multiplicity of suits so as to avoid conflicting determinations which would be embarrassing to the judiciary and also to save the precious judicial time.
2. Similarly the 2nd and 3rd respondent filed a preliminary objection dated 27th October 2023 seeking the following orders:
1. That even though this court has the status of the high court, this court lacks jurisdiction to hear and determine the matter at hand as it does not have unlimited original jurisdiction and this matter does not fall under the provisions of article 162(2) (a) and (3) as well as section 12 of the *employment and labour relations court act* no 20 of 2011 consequently the court should strike out this petition in limine.
 2. That the issues raised in the application and petition dated 19th October 2023 are sub judice under section 6 of the *civil procedure act* as the parties, issues, and orders sought are similar to those in High Court petition number E413 of 2023, which is pending before the hon. Justice Chacha Mwita.
 3. That the orders sought in the application dated 19th October 2023 are similar to those sought in high court petition number E413 of 2023 which is scheduled to be mentioned in court on 31st October 2023.
 4. That the application and petition herein is an utter abuse of the court process and should be dismissed with costs as this amounts to forum shopping.
 5. That the employment and labour relations court can determine constitutional issues only if they arise from employer-employee disputes. There is no apparent employment dispute in this matter and there is no apparent employer employee relation between the petitioner and the respondents but rather the issue is the interpretation and determination of the constitutionality of Social Health *Insurance Act* 2023 and the digital *Health Act* 2023.
 6. In view of the foregoing the petition is contrary to the binding court of Appeal holding in National Social security Fund Board of trustees v Kenya Tea Growers association & 14 Others (civil Appeal 656 of 2022) [2023] KECA 80 (KLR) and Attorney general & 2 Others v Okiya Omtata Okoiti & 14 Others [2020 eKLR.
 7. That the petition is incompetent and fatally defective as it is not supported by any evidence.
3. The notice of motion and the petition referred to are dated 19th October 2023 and they deal with the implementation of Social Health *Insurance Act* 2023 and digital *health act* 2023.
 4. The court has considered the submission of the 2nd and 3rd respondents dated 6th November 2023 and the 1st respondents grounds of opposition dated 26th October 2023.
 5. The main issues for determination are basically whether this court has jurisdiction to deal with the petition filed on 19th October, 2023 considering there is no employer and employee relationship.
 6. The other issue is that this case is subjudice having been filed also before a court of concurrent jurisdiction at the High Court in Petition E 413 of 2023 Dominic Musinya Ore vs National Assembly & Others. This is a High court Petition.



7. On the issue of whether the ELRC court has jurisdiction to deal with matters Social Health Insurance Fund (SHIF) and Digital *Health Act* going by the Supreme Court judgment petition No 0004 of 2023 as consolidated with petition 002 of 2023 Kenya Tea Grower Association & Others vs National Social Security Fund Board of Trustees & Other the apex court held “ we have already held that contrary to the Court of Appeal’s finding the ELRC has jurisdiction to determine the constitutional validity of the NSSF Act 2013” (dated and delivered on 21st February 2024).
8. Subject to the peculiar clauses of these two acts the ELRC would equally have jurisdiction to deal with the constitutional validity of the two legislations.
9. As pertains to the fact that the same case has been filed before Justice Chacha Mwita of the High Court Petition No. 413 of 2023 and Judge had already given directions this court finds the case is subjudice and indeed an abuse of the court process. Filing same cases in two different courts at the same time can only be termed abuse of court process as well as waste of judicial’s precious time. In that case the court lacks mandate to proceed with the application and Petition dated 19th October 2023 and so the two preliminary objections filed by the 1st respondent and the 2nd and 3rd respondents which are more or less the same are allowed. The notice of motion and petition referred thereto are struck off and each party will bear their own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27TH DAY OF FEBRUARY, 2024.

ANNA NGIBUINI MWAURE

JUDGE

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

