



**Musau v Schneider Electric (Kenya) Limited (Employment and Labour Relations
Petition E107 of 2023) [2024] KEELRC 273 (KLR) (13 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 273 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E107 OF 2023
AN MWAURE, J
FEBRUARY 13, 2024**

BETWEEN

ENG. STANLEY KALILE MUSAU PETITIONER

AND

SCHNEIDER ELECTRIC (KENYA) LIMITED RESPONDENT

RULING

1. The Respondent filed a Notice of Preliminary Objection dated 9th August 2023 in opposition to the Petitioner’s Petition dated 26th June 2023 on grounds that:
 1. The Honourable court lacks jurisdiction to hear, entertain and/or determine the suit by dint of Rule 7 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* and thus is an abuse of the court process.
 2. The Petition raises no bona fides constitutional issue and does not demonstrate a violation of a constitutional right. The issues raised in the Petition are contentious and cannot be dealt with by a constitutional Petition.
 3. The Petitioner’s claims can be addressed in an ordinary civil suit and thus this court lacks jurisdiction to entertain the Petition.
 4. The Petitioner has come to court under the wrong procedure and the Petition filed is thus bad in law.
2. The Notice of Preliminary Objection was canvassed by way of written submissions.



Respondent/ Applicant's Submissions

3. The Respondent submitted that the Petition raises employment and labour relations issues and the orders sought therein are statutory remedies available under section 49 of the Act. Therefore, the provisions of the Act should apply in the instant Petition.
4. The Respondent submitted that the dispute emanates from the Employment Contract between the Petitioner and the Respondent and that he has not outlined the alleged violations of his constitutional rights.
5. The Respondent submitted that filing a contentious employment matter vide a constitutional petition is that the Respondent will be denied the right to cross-examine the Petitioner, noting that the Respondent has a right to challenge any adverse evidence against him and relied in the case, *Nicholas Mayieka & 22 others v Judicial Service Commission* Petition No 260 of 2016 (Nakuru).
6. The Respondent submitted that the constitutional questions raised by the Petitioner can well have been raised in terms of Rule 7(3) of the *ELRC Rules* without the need to invoke the route of a constitutional petition. It relied on the case of *Gabriel Mutava & 2 others v Managing Director of Kenya Ports Authority and Kenya Ports Authority* [2016] eKLR.

Petitioner's Case

7. The Petitioner submitted that this court has jurisdiction to hear and determine all labour matters whether filed by way of statement of claim, plaint, originating summons or petition as vested in Article 162 (2) of the *Constitution* and Section 12 (3) of the *Employment and Labour Relations Court Act*.
8. The Petitioner submitted that a Petitioner or Claimant reserves his/her right to move the court. Rule 7 of the *Employment and Labour Relations Court Act* cannot defeat the purpose of the constitutional power donated to this court.
9. The Petitioner submitted that the Respondent does not have the right to assess the constitutional rights accruing to the Petition and this right is only reserved to the court to evaluate and assess the pleadings in order to do justice without unnecessary technicalities and embedment.
10. The Petitioner submitted that the Respondent will suffer no prejudice if the Petitioner moved the court by way of Petition or Statement of Claim as the facts will not change.

Analysis and Determination

11. The main issue for determination is whether the preliminary objection is merited.
12. The Petitioner submitted that the dispute herein emanates from the Employment Contract between the Petitioner and the Respondent and that he has not outlined the alleged violations of his constitutional rights. Further, the Respondent will be denied the right to cross-examine the Petitioner if the same is not filed as a Statement of Claim
13. However, the Petitioner maintains that the Petition raises constitutional issues that this court is able to hear and determine.
14. In the case of *Mukisa Biscuits Manufacturers Ltd v West End Distributors Ltd* [1969] E.A 696, it was well-stated that a preliminary objection consists of:

“...a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples



are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.”

15. Further, in *Oraro v Mbaja* [2005] 1 KLR 141 the principle was restated thus by Hon. Ojwang, J. (as he then was):

“...The principle is abundantly clear. 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 processes 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...Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

16. It is clear that the Notice of Preliminary Objection herein raises disputed facts which will require this court to delve into the substance of the Petition so as to determine whether the Petition raises any constitutional issues or not. This can only be done during the hearing of the substantive suit.
17. The court will proceed with the petition as the issue raised in the preliminary objection do not justify granting of the same. The preliminary objection is dismissed therefore for lack of merit.
18. Costs will be in the course.

Orders accordingly

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 13TH 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

