



Kagocha v Multimedia University of Kenya & 11 others (Employment and Labour Relations Petition E222 of 2023) [2024] KEELRC 1718 (KLR) (27 June 2024) (Ruling)

Neutral citation: [2024] KEELRC 1718 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E222 OF 2023**

AN MWAURE, J

JUNE 27, 2024

BETWEEN

NANCY WARUGURU KAGOCHA PETITIONER

AND

MULTIMEDIA UNIVERSITY OF KENYA 1ST RESPONDENT

**THE VICE CHANCELLOR, MULTIMEDIA UNIVERSITY OF
KENYA 2ND RESPONDENT**

LIVINGSTONE NGOO 3RD RESPONDENT

FESTUS KABERIA 4TH RESPONDENT

ROSEBELLAH MARANGA 5TH RESPONDENT

PAUL MBATIA 6TH RESPONDENT

CORNELIUS MUTANGILI 7TH RESPONDENT

ANDERSON MAINA 8TH RESPONDENT

COLLINS WAGUMBA 9TH RESPONDENT

FRANCIS MANYA 10TH RESPONDENT

LENEAH W. MUNENE 11TH RESPONDENT

PUBLIC SERVICE COMMISSION 12TH RESPONDENT

RULING

1. The 1st and 2nd Respondents filed a Notice of Preliminary Objection dated November 23, 2023 on grounds that:



1. The subject matter in the application and the entire petition is a dispute relating to the application by the Petitioner for promotion from the position of Assistant Registrar, Grade NT12 to Senior Assistant Registrar Grade NT 13 in the 1st Respondent institution.
2. the Petitioner's main grievance is the refusal by the committee appointed to consider the applications for promotions in the 1st Respondent institution to grant the Petitioner the promotion sought and instead thereby to issue her with a regret letter as pleaded at paragraph 52 of the petition.
3. the petition also raises issues regarding the disciplinary process of the 1st Respondent against the Petitioner on grounds of non-performance and gross misconduct and the grounds thereof as pleaded at paragraph 24 to 36 of the Petition.
4. The Petitioner relies in her grievances on the Multimedia University Statutes as pleaded at paragraph 26 and further on the *Human Resources Policies and Procedures Manual for the Public Service* together with the Code of Conduct and Ethics of the 1st Respondent as provided at paragraph 74 to 82 of the Petition.
5. Schedule 5 of the Multimedia University Statutes provided for a disciplinary process and committee and which has jurisdiction in the first instance to hear and determine any appeals arising from the disciplinary process of any academic staff. This includes an Appeal mechanism to hear and determine any appeal arising from a decision of the disciplinary committee.
6. Petitioner did not invoke these forums, bodies and platforms of internal dispute resolution before approaching court and hence the present petition is premature and speculative.
7. The court therefore has no jurisdiction as the petition offends the doctrine of ripeness and exhaustion of remedies and the same should be struck out in limine.
8. The petition and the application is an abuse of court process.

Petitioner's Case

2. In opposition to the Notice of Preliminary Objection, the Petitioner filed a replying affidavit dated April 9, 2024.
3. The Petitioner avers that the Notice of Preliminary Objection is misplaced and offends the basic principles enunciated in the *Mukhisa Biscuits Case* as it seeks to canvas evidentiary matters that can only be determined upon the Honourable Court receiving and assessing the parties' evidence to ascertain if a disciplinary process was conducted and if it was against the 3rd Respondent or the Petitioner.
4. The Petitioner avers that her grievances include sexual harassment at work by the 3rd Respondent, misallocation of duties, non-payment of annual increment, non-remittance of pension contributions and denial of promotion.
5. The Petitioner avers that no disciplinary process was conducted by the 1st Respondent against herself or the 3rd Respondent despite written complaints to allow the 1st Respondent to initiate the process pursuant to principles of fairness.
6. The Petitioner avers that by her written complaints, she invoked the internal forums which failed to do their part to investigate the issues and to form a committee to address them, therefore, she had nowhere to turn to since the 1st Respondent failed to address the issues.



7. The Petitioner avers that the 1st Respondent only has only 2 council members but needs to meet the statutory quorum of atleast 6 members to address complaints or appeals before it is in accordance to the Statutes of the 1st Respondent.
8. The Petitioner avers that the application and the petition are properly before this Court that has jurisdiction to hear and determine employment matters once all available internal avenues have been exhausted.

Respondents' Submissions

9. The Respondent submitted that the main ground of objection is that the Petitioner's claim is premature and offends the doctrine of ripeness for judicial determination. This court lacks jurisdiction as the Petitioner has not exhausted the available internal dispute resolution mechanisms.
10. It is the Respondents' submission that these are pure points of law and if upheld shall dispose off the entire Petition.
11. The Respondents' submitted that by the Petitioner's own admission, complaints against the disciplinary process was taken out against her by the Respondent for non-performance and gross misconduct. She seeks the court's intervention to stop the disciplinary process by way of this Petition.
12. The Respondents submitted that the Multimedia University Statute, Schedule 5 and clause K10(1) of the *Human Resources Manual of the Public Service* provide forums of dispute resolution that the Petitioner ought to have invoked before approaching this Court. Therefore, this Court cannot arrogate itself jurisdiction to hear the matter before the forums are invoked and exhausted.

Petitioner's Submissions

13. It is the Petitioner's submission that the Notice of Preliminary Objection by 1st and 2nd Respondents is misplaced and offends the basic principles of enunciated in the *Mukbisa Biscuits Case* to the extent that it seeks to canvas evidentiary matters that can only be determined upon the Court receiving and assessing the parties' evidence to ascertain if there was a disciplinary process that was conducted and if it was against the 3rd Respondent or the Petitioner.
14. The Petitioner submitted that it can only be proved from the pleadings whether or not disciplinary process occurred against the Applicant or the 3rd Respondent.
15. The Petitioner submitted that she has demonstrated in the Petition and in the Affidavits that there was no Council properly constituted to handle complaints or appeals on promotion or any unaddressed disciplinary issue, therefore she had nowhere to turn to since the 1st Respondent did not want to address her issues.
16. The Petitioner submitted that the Petition and Application is properly before this Court as it has the jurisdiction to hear and determine employment matters given that she has exhausted all available internal avenues and given that there was no Council to handle any disciplinary appeals for people of her Grade as provided in Clause 6.3.7 in page 10 of the Terms and Conditions of Service for Grades 5-15 of Non-Teaching Staff.

Analysis and Determination

17. Having considered the application, affidavits and submissions on record, the court will deal with the issue of whether the preliminary objection raises a pure point of law and so is it merited.



18. It is trite law that a preliminary objection is only merited if it enunciates pure point of law. If an application raises evidentiary matters that can only be determined upon analysis of evidence by the fact then clearly such does not justify the tenets of preliminary objection.
19. The famous *Mukbisa Biscuit Manufacturing Co Ltd Vs West End and Distributors Ltd* (1969) EA 696 the Court of Appeal emphasised that a preliminary objection should consist of a point of law which has been pleaded or which arises by clear implication out of the pleadings. If the court would need to call for evidence or to use its discretion to determine an application that applicant fails to merit being a preliminary objection.
20. In this case the respondent has raised a plethora of issues in their application.
21. They have raised issues pertaining to the refusal to promote the petitioner and failure by the petitioner to rely on existing forum and platforms of internal dispute mechanism processes. Clearly, these are not matters of pure law.
22. The court persuaded by numerous authorities inclusive Civil Suit 021 of 2021 *DJC vs BICL* the court again reiterated that a preliminary objection as argued disposes the suit. Such examples would pertain to jurisdiction of court or limitation plea or contracts with an arbitration clause.
23. In this case the issues raised are not on pure law and so the court finds this does not justify pure point of laws. Therefore, the preliminary objection application dated March 28, 2024 is not merited and is dismissed accordingly.
24. Costs in the cause.
Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27TH DAY OF JUNE, 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

