



**Lichina v National Police Service Commission & another (Cause E017 of 2024) [2024] KEELRC 2635 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2635 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
CAUSE E017 OF 2024  
JW KELI, J  
OCTOBER 24, 2024**

**BETWEEN**

**KEVIN ASIDAGAH LICHINA ..... CLAIMANT**

**AND**

**THE NATIONAL POLICE SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The ruling is on the Notice of Preliminary Objection dated 15<sup>th</sup> May 2024 by the 1<sup>st</sup> Respondent/Applicant.
2. The Claimant/Respondent filed a Statement of claim dated 30<sup>th</sup> April 2024 and supported by a verifying affidavit of an even date seeking judgement against the respondent, as follows:-
  - a. A declaration that the Claimant's employment was unlawfully and wrongfully terminated by the Respondent in violation of Article s 28, 41(1), 47, 48 and 50(1) of *the Constitution* of Kenya, 2010, as well as Section 45 of the *Employment Act*, No. 11 of 2007, Laws of Kenya.
  - b. Reinstatement of the Claimant to the employment and to the rank that he could have been had the respondents not unfairly and illegally terminated the Claimant's employment.
  - c. An Order that the Claimant be paid monthly salary of Kshs. 23,430/= from January 2022 until his reinstatement to his job.
  - d. An award of damages for breach of contract an unlawful and wrongful termination of employment as hereunder:-
    - i. Damages for unlawful termination (12 months' salary) Kshs. 281,160/=
    - ii. One month's salary in lieu of notice- Kshs. 23,430/=



Total Kshs. 304,590/-

- e. Costs of this suit and interest on (c) above at Court rates until payment in full.
  - f. General, exemplary and aggravated damages to be quantified.
  - g. Any other relief that the Court may deem fit to grant.
3. The 1<sup>st</sup> Respondents have filed the present Notice of Preliminary Objection, the subject of this ruling premised on the grounds that:-
- a. No cause of action arises in the suit against the 1<sup>st</sup> respondent.
  - b. The suit is frivolous, vexatious, and a palpable abuse of the Court process.

### **Written Submissions**

4. The Court directed that the Notice of Preliminary objection be canvassed in limine by way of written submissions. The 1<sup>st</sup> Respondent's written submissions dated 20<sup>th</sup> August 2024 were drawn by Valerie Kasaiyan. The Claimant/Respondent's submissions dated 23<sup>rd</sup> August 2024 were filed by Reece Mwani & Company Advocates and received in Court on 27<sup>th</sup> August 2024.

### **Determination**

#### **Issues for determination.**

5. The 1<sup>st</sup> Respondent/Applicant addressed the following issue in its written submissions: -
- a. Whether any cause of action arises against the 2<sup>nd</sup> defendant
6. The Claimant/respondent submitted globally asserting that the Applicant's Notice of Preliminary Objection does not meet the test of what amounts to a Preliminary objection as there is a need to call for evidence to ascertain facts pleaded and the same ought to be dismissed.
7. The Court having perused the pleadings by the parties and their submissions was of the considered opinion that the issue for determination in the ruling is whether the Notice of Preliminary Objection by the 1<sup>st</sup> Respondent was merited.

#### **The 1<sup>st</sup> Respondent's submissions**

8. The 1<sup>st</sup> Respondent in support of the notice of preliminary objection submitted that it was a constitutional commission within the context of Article 248 of *the Constitution* and established under Article 246 of *the Constitution* of Kenya. That its mandate was as outlined under Article 246(3) of *the Constitution* to wit:- '(3) The Commission shall—
- (a) recruit and appoint persons to hold or act in offices in the service, confirm appointments, and determine promotions and transfers within the National Police Service;
  - (b) observing due process, exercise disciplinary control over and remove persons holding or acting in offices within the Service; and
  - (c) perform any other functions prescribed by national legislation."



9. The 1<sup>st</sup> Respondent further submits that its functions are as stated under section 10 of the National Police Service Commission Act to wit:-

“10.(1) In addition to the functions of the Commission under Article 246(3) of the Constitution, the Commission shall—

- a. keep under review all matters relating to standards or qualifications required of members of the Service;
- b. with the advice of the Salaries and Remuneration Commission, determine the appropriate remuneration and benefits for the Service and staff of the Commission;
- c. approve applications for engagement by police officers in trade and other businesses, in accordance with the law relating to matters of leadership and integrity under Article 80 of the Constitution;
- d. co-operate with other State agencies, departments or commissions on any matter that the Commission considers necessary;
- e. provide for the terms and conditions of service and the procedure for recruitment and disciplinary measures for civilian members of the Service;
- f. develop fair and clear disciplinary procedures in accordance with Article 47 of the Constitution;
- g. investigate and summon witnesses to assist for the purposes of its investigations;
- h. exercise disciplinary control over persons holding or acting in office in the Service;
- i. promote the values and principles referred to in Articles 10 and 232 of the Constitution throughout the Service;
- j. ensure that the Service is efficient and effective;
- k. hear and determine appeals from members of the Service;
- l. develop policies and provide oversight over training in the Service;
- m. approve training curricula and oversee their implementation;
- n. investigate, monitor and evaluate the organization, administration and personnel practices of the Service;
- o. receive and refer civilian complaints to the Independent Policing Oversight Authority, the Kenya National Commission on Human Rights, the Director of Public Prosecutions or the Ethics and Anti-Corruption Commission, as the case may be, where necessary;
- p. review and make recommendations to the national government in respect of conditions of service, code of conduct and qualifications of officers in the Service;



- q. evaluate and report to the President and the National Assembly on the extent to which the values and principles referred to in Article s 10 and 232 are complied with in the Service;
- r. monitor and evaluate the performance of the Service;
- s. receive complaints and recommendations from police associations registered in accordance with the applicable law;
- t. perform such other functions as are provided for by *the Constitution*, this Act or any written law.”

10. The 1<sup>st</sup> Respondent submits that in the face of the claim, the Claimant has not provided proof that the 1<sup>st</sup> Respondent had terminated his employment from the national police service. It was the 1<sup>st</sup> Respondent’s constitutional mandate to exercise disciplinary control according to section 3(2) of the National Police Service Commission Disciplinary Regulations 2015 which includes :

- a. The development and prescription of fair and clear disciplinary procedures and mechanisms in accordance with Article 47 of *the Constitution*;
- b. Ensuring compliance with the prescribed disciplinary procedures and guidelines formulated by the Inspector – General;
- c. Ensuring compliance with the due process in disciplining members of the service ;
- d. Receiving regular reports from the Inspector – General on disciplinary matters handled by the Service;
- e. Reviewing or ratifying of disciplinary actions taken by the Inspector- General;
- f. Hearing and determining appeals from the members of the Service; and
- g. Observing the process , removing persons holding or acting in offices within the Service.

11. The 1<sup>st</sup> Respondent relying on the forgoing provisions of the law and the regulations, submits it is only the National Police Service Commission that can remove an officer from the national police service.

12. The 1<sup>st</sup> Respondent contends that termination from the national police service is an elaborate process that commences with disciplinary proceedings as outlined in the Disciplinary Regulations 2015 and the service standing orders and ends with written communication from the commission of the termination of his/her employment to the officer through the Inspector- General according to Article 47 of *the Constitution*.

13. The 1<sup>st</sup> Respondent contends that no cause of action arises against it in the claim for wrongful termination as it had not terminated the services of the Claimant as officer in the national police service. To buttress their submission the 1<sup>st</sup> respondent relied on the decision of Court of Appeal in Crescent Construction Co Ltd v Delphis Bank Ltd (2007) where the Court stated:- ‘We think, when, as Madan JA. said in the case of D.T. Dobie vs. Muchina (1982) KLR 1 (to which we will later refer) a plaint is weak but shows some form of a cause of action, the Court can, under Order VI rule 13(1) (a), order it to be amended, but when it lacks cause of action completely, then it stands to reason that it ought to be struck out for in such a situation, there is nothing to be amended. Be that as it may, in all cases brought under Order VI rule 13(1) (a), the Court is obliged in law to look at no evidence i.e. no affidavit or any evidence from the bar in considering whether or not a plaint or a pleading raises a cause of action. The



Court must look at the pleadings only and not go beyond the pleadings. The predecessor to this Court stated in the case of *Jevaj Shariff & Co. vs. Chotali Pharmacy Stores* (1960) EA 374 as follows:

“The question whether a plaint discloses a cause of action must be determined upon a perusal of the plaint alone, together with anything attached so as to form part of it, and upon the assumption that any express or implied allegations of fact in it are true.” This is proper because once the Court incorporates evidence in its consideration of the pleading at this stage, then the aim of the rule which is to dispose of unnecessary and baseless litigation speedily will be defeated. However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realisation that the rules of natural justice require that the Court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drug a person to the seat of justice when the case purportedly brought against him is a non-starter.”

14. The 1<sup>st</sup> Respondent relying on the foregoing submits that there is no evidence of the termination of the employment of the Claimant save for the allegation of verbal termination and reinstatement. That without termination of employment it is impossible for the 1<sup>st</sup> respondent to defend the claim, as essentially, the 1<sup>st</sup> respondent has not aggrieved the Claimant. The 1<sup>st</sup> Respondent further submits that the claim disclosed no cause of action against it and is otherwise an abuse of the oricess of the Court and to buttress this submission relied on the provisions of Order 2 Rule 15 which states:- ‘15. Striking out pleadings [Order 2, rule 15]

- (1) At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that—
  - (a) it discloses no reasonable cause of action or defence in law; or
  - (b) it is scandalous, frivolous or vexatious; or
  - (c) it may prejudice, embarrass or delay the fair trial of the action; or
  - (d) it is otherwise an abuse of the process of the Court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

### **The Claimant’s submissions**

15. The Claimant relied on the same legal framework of his employment as outlined by the 1<sup>st</sup> Respondnet above, to contended that his claim falls within the mandate of the 1<sup>st</sup> Repondnet as provided under *the Constitution* of Kenya. That it is the mandate of the 1<sup>st</sup> Respondnet to observe due process, exercise disciplinary control and remove persons holding offices within the national police service. The parties were in agreement on the legal mandate of the 1<sup>st</sup> Respondent.

16. The Claimant submits that the Notice of Preliminary Objection by the 1<sup>st</sup> Respondent did not meet the test of what amounts to a preliminary objection. That Notice of Preliminary Objection did not raise pure points of law and cannot be determined without ascertainment of facts from elsewhere. The Claimant relied on the definition of preliminary objection under the Black Law Dictionary to wit:- ‘In case before the tribunal, an objection that if upheld ,would render further proceedings before triabunal impossible or unnecessary....”

17. The Claimant further relied in the landmark decision of the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969)EA 696 to the effect that the



Notice of Preliminary Objection should only be raised if the facts are ascertained and on pure points of law. The Claimant submits that the instant Notice of Preliminary Objection is improper as it relied on facts as outlined in the written submissions hence not a pure point of law.

## Decision

18. The 1<sup>st</sup> Respondent outlined the applicable legal process of termination of service under the National Police Service and contended that the Claimant's service had not been terminated. On the other hand in paragraph 11 of the statement of claim, the Claimant states that from February 2023 to date he has yet to receive any salary or communication from the Respondents and he has not been assigned any duties hence there is an implied termination of employment contract.
19. The Respondents are yet to file response to the claim but from the 1<sup>st</sup> Respondent's submissions, the Court holds that the facts are not ascertained. This is contrary to the settled law that a preliminary objection should be on pure points of law and only when the facts are ascertained. The Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969]EA at page 700 paragraphs D-F Law JA as he then was had this to say on preliminary objection :

“....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point 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.”

At page 701 paragraph B-C Sir Charles Newbold, P. added the following:

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion....” I uphold the authority to apply in the instant case and to hold that the Notice of Preliminary Objection by the 1<sup>st</sup> Respondent is improper.”
20. The Court upholds the legal position that striking out of pleadings is an exercise of discretionary powers of the Court which ought to be exercised with great caution as observed by the Court of Appeal in *Crescent Construction Co Ltd v Delphis Bank Ltd* (2007) that; ‘However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the Court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle.’
21. The Court on a prima facie basis holds the instant claim is not hopeless as it raises issues that may amount to a breach of the Claimant's contract rights like the fact of non-payment of salary and non-assignment of work. The issues raised by the Claimant of non-assignment of work and non-payment of salary and not yet controverted are at the core of an employment contract. They are very serious issues affecting the employer-employee relationship and the Court has jurisdiction to determine the veracity of the claims.
22. Applying the holding in *Crescent Construction Co Ltd v Delphis Bank Ltd* (2007) the Court holds that it would be a grave injustice to drive the Claimant away from the seat of justice on a preliminary basis in the circumstances.



23. Consequently, the Notice of Preliminary Objection is held as improper and dismissed with costs to the Claimant in the cause.
24. To make progress in the suit, the Respondents are granted 21 days to file defence. The Claimant is at liberty to reply. Mention before the trial Court on the 18<sup>th</sup> November 2024 for pretrial directions.
25. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN VIRTUALLY AT NAIROBI THIS 24<sup>TH</sup> DAY OF OCTOBER 2024.**

**JEMIMAH KELI**

**JUDGE**

In The Presence Of: -

Court Assistant: Caleb

1<sup>st</sup> Respondent/Applicant: - Absent

Claimant/Respondent: Rita h/b Mukabani

