



**Kisenga v Ongair Limited (Petition 18 of 2020)
[2024] KEELRC 13226 (KLR) (25 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13226 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 18 OF 2020
JW KELI, J
NOVEMBER 25, 2024**

BETWEEN

LILY MKANJALA KISENGA PETITIONER

AND

ONGAIR LIMITED RESPONDENT

RULING

1. The applicant/petitioner vide Notice of Motion dated 28th September 2023 brought under Sections 1A, 1B, & 63(e) of the Civil Procedure Act, Section 3(1), 12, 16 & 20 of the Employment and Labour Relations Court Act Cap. 234B, Rule 4,7(3), 14(5), 14(6), 14(7),17&21 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and Article 50 and 159 (d) & (e) of the Constitution of Kenya 2010 & Section 28 of the Limitation of Actions Act sought the following orders: -
 1. This Honourable Court be pleased to set aside its Orders/Directions issued on 24th April 2023 directing that the instant Petition be heard by way of written submissions.
 2. This Honourable court be pleased to grant leave to amend and or convert the Petition dated 31st January 2020 to an ordinary employment cause as per the annexed draft pleadings marked “LMK-1”.
 3. Upon grant of prayer 2, this Honourable Court be pleased to deem the pleadings marked “LMK-1” as properly filed upon payment of the requisite fees.
 4. In the alternative, this Court be pleased to grant the Petitioner leave to institute a fresh employment cause against the Respondent notwithstanding the Limitation of Actions Act and Section 90 of the Employment Act, 2007.
 5. The cost of the application be in the cause.



Grounds of the application

2. The Applicant stated that on the 24th April 2023, the Petition came up for mention for directions. Neither did the Respondent nor its Advocates appear. The Court was informed that the Respondent had not filed a response to the petition and the Court directed the petitioner to file submissions on the main Petition within 21 days whereupon the Respondent shall have 21 days after service to file its submissions and the matter shall be mentioned on 20th September 2023 to take a judgement date.
3. The Applicant stated that the ends of justice will be defeated if the dispute is heard and determined as a constitutional one. To facilitate a fair and just adjudication of the matter, the petition be converted and or amended to an ordinary employment cause. Striking out/ dismissing/ withdrawing the suit would leave the issues between parties unresolved and render a grave injustice to the Petitioner. The Petitioner cannot file a fresh as it will be statute-barred (Pursuant to section 90 of the [Employment Act, 2007](#)) if the suit is withdrawn/struck out on a technicality. The Petitioner's only recourse to ensure her suit is still within statutory timelines is for the petition to be converted and or amended to a normal suit. The conversion and or amendment will allow for a comprehensive review of the case, ensuring the protection of the petitioner's rights and the pursuit of an equitable resolution of the issues in controversy.
4. The Applicant submitted that the Court has the powers to grant the Orders sought. That the conversion and or amendment of the suit is guided by the overriding objectives under Sections 1A and 1B of the [Civil Procedure Act](#) which call upon the courts to facilitate just, expeditious, efficient, and proportionate resolution of disputes. Similar objectives are echoed in Section 3(1) of the [Employment and Labour Relations Court Act](#). The Court has jurisdiction to convert and or amend the suit and no prejudice would be occasioned to the Respondent by the said conversion and or amendment. That the inherent power of the court can come to its aid to act ex debito justitiae for doing real and substantial justice between the parties. By converting and or amending the petition to a normal employment cause, the procedural rules and rights afforded to employees in standard employment disputes will be fully applicable, allowing for a fair and impartial hearing.
5. The applicant submitted on the doctrine of Constitutional avoidance being likely to defeat the suit. That the existing Petition is framed as a constitutional dispute. Courts abhor this practice. The doctrine of constitutional avoidance dictates that a dispute ought to be decided in another mode available other than a constitutional one.
6. The Applicant submitted that the mistake of counsel should not be visited upon an innocent litigant. That the decision to constitutionalize the dispute was made by the Petitioner's previous advocate who has since left the firm of Wamae & Allen Advocates. Filing a Constitutional Petition as opposed to an ordinary employment claim was previous counsel's mistake which should not be visited upon the innocent litigant who is not a lawyer. The issues in dispute are payment of dues/withheld salary and constructive dismissal. The reliefs sought flow therefrom. These reliefs can be pursued through an ordinary claim.
7. The Applicant contended that no prejudice will be occasioned to the Respondent if the application is allowed as it has never filed a response to the Petition. That the Respondent and/or their advocate has also failed to appear in Court in all the scheduled mentions despite proper service. This application has been filed expeditiously once counsel currently in conduct of this matter took over. Conversion and or Amendment of the suit will meet the overriding objectives of our Constitution and the Civil Procedure Rules, principles to achieve substantive justice and afford parties a fair day in court.



8. The application was supported by the affidavit of the petitioner 28th September 2023. The court found the affidavit was a duplicate of the application.
9. The Court finds that the Respondent only filed a memorandum of appearance on 21st day of September 2020 through the law firm of Muthoni Maina & Associates Advocates. The application was unopposed.

Decision

10. Rule 34 of the Employment and Labour Relations Court (procedure) Rules 2024 reads:- “A party may amend pleadings before service or before the close of pleadings: Provided that after the close of pleadings, the party may only amend pleadings with the leave of the Court on oral or formal application, and the other party shall have a corresponding right to amend its pleadings.”
11. The application is unopposed. The application seeks the following substantive orders:-
 - a. This Honourable Court be pleased to set aside its Orders/Directions issued on 24th April 2023 directing that the instant Petition be heard by way of written submissions.
 - b. This Honourable court be pleased to grant leave to amend and or convert the Petition dated 31st January 2020 to an ordinary employment cause as per the annexed draft pleadings marked “LMK-1”.
 - c. Upon grant of prayer 2, this Honourable Court be pleased to deem the pleadings marked “LMK-1” as properly filed upon payment of the requisite fees.
 - d. In the alternative, this Court be pleased to grant the Petitioner leave to institute a fresh employment cause against the Respondent notwithstanding the Limitation of Actions Act and Section 90 of the Employment Act, 2007.
 - e. On the alternative prayer the court holds it has no power to extent time under section 89 of the Employment Act (Revised 2024) which reads:-“ Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.” The applicant in the submissions agreed that the prayer was not tenable.
12. On the prayer that, the court be pleased to grant leave to amend and or convert the Petition dated 31st January 2020 to an ordinary employment cause as per the annexed draft pleadings marked “LMK-1”, the Court finds no fetter is placed on exercise of its judicial discretion on the application. The main issue would be prejudice to the respondent. The respondent is yet to file a response to the petition. There is therefore no prejudice they can suffer if leave is granted to amend the petition to convert to claim. The claimant invoked the doctrine of constitutional avoidance and blamed the mistake of his former advocate in the same law firm who made the mistake of filing a constitutional petition instead of a claim offending the doctrine of constitutional avoidance. The petitioner in the application seeks to remedy the mistake.
13. The court noted the authorities cited on the mistake of an advocate. In the Court of Appeal decision in Tana and Athi Rivers Development Authority V Jeremiah Kimigho Mwakio & 3 Others (2015) e KLR the court stated that “ from past decisions of this court , it is without doubt that courts will readily excuse a mistake of counsel if it affords a justifiable, expeditious and holistic disposal of a matter.” Indeed the filing of a petition instead of a claim can only be a mistake of the advocate.



14. The Kenyan Courts have consistently relied on the doctrine of constitutional avoidance to strike out constitutional petitions presented before Court where it is shown that there exist alternative, sufficient and adequate avenues for parties to ventilate their grievances. The Courts have consistently maintained that when a party has an appropriate forum before which to seek redress, it is incumbent upon them to raise their concerns before the said forum as opposed to invoking the constitutional jurisdiction of the Court at the outset. The Applicant agreed with foregoing position. The Court of Appeal has in a past decision held that contracts of services cannot be adjudicated as a constitutional matter. In Kenya Revenue Authority v Menginya Salim Murgani [2010] eKLR the court held:- ‘As observed elsewhere in this judgment, the introduction of a constitutional dimension concerning the right of hearing into a contractual setting was a misapprehension of the law. This view has the solid backing in the case of Watkins vs Secretary of State for the Home Department and Others [2004] 4 ALL ER 1158 where it was held that infringement by a holder of a public office of a right identifiable as a constitutional right, together with the requisite mental element could give rise to a cause of action for the infringement of that right. There was no infringement of a constitutional right in the matter before us. Any departure by the appellant, as employer, from the strict provisions of the Code of Conduct would in a worst case scenario, only constitute a breach of contract and such a breach would spring from a contractual obligation and not from exercise of power conferred by statute or *the Constitution*.’(emphasis given)
15. The Supreme Court of Kenya in Communication Commission of Kenya & Others v Royal Media Services Limited & 5 others [2014] e KLR observed :-

‘The appellants in this case are seeking to invoke ‘the principle of avoidance’; also known as ‘constitutional avoidance’.

The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis.”
16. The court under Article 159 (2)(d) of *the Constitution* is obliged to pursue substantive justice as follows:- ‘(d) justice shall be administered without undue regard to procedural technicalities; and;’” The Rules of the Court, 2024 only address amendment of pleadings. The inherent power of the court comes to its aid to act ex debito justitiae for doing real and substantial justice between the parties. The court relying on the power to allow amendment of pleadings by granting leave allows the amendment to convert the petition to a claim in the interest of pursuit of substantive justice between the parties. The application seeks to bring the cause in the right forum being claims for breach of contract. The application is allowed as follows:-
 1. The Court sets aside its Orders/Directions issued on 24th April 2023 directing that the Petition be heard by way of written submissions.
 2. The Court grants leave to the Applicant to amend and or convert the Petition dated 31st January 2020 to an ordinary employment cause as per the annexed draft pleadings marked “LMK-1”.
 3. The Applicant to file and serve the amended pleadings, now claim, to the Respondent in person and the advocates, in the interest of justice, seeing no appearance by the advocate in the petition.
 4. No order as to costs.
17. Mention on the 14th January 2025 for further directions in the matter.
18. It is so Ordered.



READ, DELIVERED AND SIGNED IN OPEN COURT AT NAIROBI THIS 25th DAY OF NOVEMBER, 2024.

JEMIMAH KELI

JUDGE

In The Presence Of:

C/A- Caleb

Applicant – Lawrence Ogeri

Respondent – Absent

