



**Munga v Kenya Maritime Authority & another; Inspector General  
(Corporations) & another (Interested Parties) (Petition E004 of 2024)  
[2024] KEELRC 2740 (KLR) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2740 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
PETITION E004 OF 2024  
M MBARŪ, J  
NOVEMBER 7, 2024**

**BETWEEN**

**MARTIN DZOMO MUNGA ..... PETITIONER**

**AND**

**KENYA MARITIME AUTHORITY ..... 1<sup>ST</sup> RESPONDENT  
CABINET SECRETARY, MINISTRY OF HOUSING, BLUE ECONOMY &  
MARITIME AFFAIRS ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**INSPECTOR GENERAL (CORPORATIONS) ..... INTERESTED PARTY  
JULIUS KOECH ..... INTERESTED PARTY**

**RULING**

1. The respondents filed a Notice of Preliminary Objections dated 2 September 2024 on the grounds that;
  1. The petition dated 25 September 2024 contravenes the doctrine of ripeness and ought to be struck out.
  2. The petition dated 25 September contravenes the doctrine of constitutional avoidance and ought to be struck out with costs.
2. Parties attended and agreed to address the objection by oral submissions and filed written submissions.
3. The respondents submitted that the petitioner filed a petition dated 25 September 2024 and stated that he is the director of the first respondent vide letter dated 15 December 2023.



4. The board of the 1st respondent sent the petitioner on compulsory leave through a letter dated 20 September 2024, and another notice of equal date conveyed a decision to appoint the 2nd interested party as acting director general.
5. The petition states that, under Article 10 of the Constitution, the respondents violated his rights and made up allegations against him. The respondents contended that a meeting was contrary to the Human Resource Manual (HR Manual), which is contrary to the law, and that the appointment of another person in an acting capacity violates Articles 232, 41, and 47 of the Constitution.
6. The respondents submitted that in the case of Sumayya Athmani Hassan v Paul Masinde Simidi & another [2019] eKLR, the Court of Appeal held that the court has jurisdiction to declare and define fundamental rights of employees and article 41 of the Constitution rights are enacted in the Employment Act and the Labour Relations Act. The act and the rules provide adequate remedies and orderly enforcement mechanisms.
7. In this petition, the petitioner does not challenge the Employment Act or the rules or allege that the remedies provided are inadequate. The petition does not raise any questions on the interpretation of the Constitution. Hence, the petitioner is guilty of contravening the doctrine of constitutional avoidance. The Supreme Court enunciates the principle of constitutional avoidance in the case of Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others Pet. 14A, 14B and 14C of 2014 [2014] eKLR that the court should not determine a constitutional issue when a matter may correctly be decided on another basis.
8. In the case of John Harum Mwau v Peter Gastrow & 3 others [2014] eKLR and Faraj & 3 others v Police & 2 others [2022] KEHC 287 (KLR), the court held that courts will not normally consider a constitutional question unless the existence of a remedy depends on it. The effect of the doctrine of constitutional avoidance is that where there are adequate statutory avenues for resolving a dispute, the constitutional court should defer to the statutory options and decline to entertain the dispute. When formulating his claim, a claimant must pursue statutory relief where it is available through an ordinary suit instead of a constitutional petition.
9. The respondents submitted that in this case, the orders sought by the petitioner can well be addressed under an ordinary suit without invoking the constitutional petition route and hence should be struck out.
10. The petitioner submitted that the petition does not offend the doctrine of ripeness as defined in the case of Chovu v Director of Criminal Investigations & 7 others; Awale Transporters Limited & 2 others (interested parties) [2022] KEHC. Ripeness concerns the timing of judicial intervention and prevents courts from entangling themselves in abstract disagreements by adjudicating disputes early.
11. The petitioner alleges the actual violation of constitutional rights and threatened violations. If the conservatory orders are not granted, public funds may be used contrary to Article 232 of the Constitution. In this regard, the doctrine of ripeness has no application.
12. The petitioner submitted that the petition does not violate the constitutional avoidance doctrine. The court will not deal with ordinary suits presented through constitutional petitions as held in Njue v Kenya Maritime Authority & another [2023] KEELRC, primarily where a statute has provided adequate relief. The constitutional jurisdiction is not to be invoked. However, under this general application, there are exceptions, as held in the case of Willian Odhiambo Ramogi & 2 others v Attorney General & 6 others [2018] eKLR. The doctrine does not apply where its effect would be to defeat critical constitutional values, especially when the party seeking to approach the court has pleaded issues verging on constitutional interpretation.



13. In this petition, the petitioner seeks not only to vindicate labour rights under Article 41 of the Constitution but also a determination whether the 1st respondent's operations violate Article 10 of the Constitution. The petitioner seeks the court to determine whether the 2nd respondent has abdicated its statutory function to supervise the 1st interested party to do investigations that the 2nd respondent ought to have and then compel on the outcome. The question of selecting the 2<sup>nd</sup> interested party to replace the petitioner should be addressed in Article 232 of the Constitution. These issues can only be addressed after a full petition hearing on the merits.
14. The range of reliefs under Section 12(3) of the Employment and Labour Relations Court Act applies to an employer-employee relationship. This is not the case as relates to the petitioner and the interested parties, who can only be sued under a petition, as herein done.
15. The petitioner submitted that his petition is premised on facts that the 1st respondent has purported to terminate the compulsory leave communicated through a letter dated 20 September 2024 and continues to act arbitrarily and contrary to Article 10 of the Constitution. Terminating the compulsory leave is not founded on any law or procedure.

### **Determination**

16. The ripeness doctrine constitutes a prudential doctrine primarily designed to avoid premature adjudication of issues that might become more clearly defined later. Ripeness dictates dismissal when the suit lacks a clearly defined dispute.
17. In assessing whether the court might benefit from waiting without impairing litigants' legitimate interests in prompt dispute resolution, the court must assess the hardship to the parties from postponing addressing the substantive issue at hand.
18. The ripeness doctrine avoids unnecessary decisions on constitutional issues. But this avoidance rationale begs the question of when a constitutional decision is necessary. The Court does not invoke this principle to avoid ruling on constitutional issues having real-world consequences. Instead, it invokes this principle to justify not adjudicating a challenge to a statute that has not been enforced and is, therefore, extremely unlikely to injure any party.
19. In employment and labour relations, the doctrine of ripeness can be discerned from the Court of Appeal in the case of *Sumayya Athmani Hassan v Paul Masinde Simidi & National Oil Corporation of Kenya* [2019] KECA 107 (KLR) that;

The Article 41 rights are enacted in the Employment Act and Labour Relations Act. The two Acts and the rules made thereunder provide adequate remedy and orderly enforcement mechanisms. The 1st respondent filed a petition directly relying on the provisions of the Constitution for enforcement of contractual rights governed by the Employment Act without seeking a declaration of invalidity of the provisions of the Employment Act or alleging that the remedies provided are inadequate. The petition did not raise any question of the interpretation or application of the Constitution.

20. Is the Employment Act a sufficient statute to remedy the claims made by the petitioner herein?
21. As correctly submitted by the petitioner, Section 12(3) of the Employment and Labour Relations Court Act sets out various remedies available to a party whose rights in employment and labour relations are violated or threatened. These include remedying conservatory orders, providing compensation, and paying damages.



22. Indeed, under Rule 9(3) of the Employment and Labour Relations Court Rules, 2024, a party can file a Memorandum of Claim and seek to enforce any constitutional rights.
- (3) Notwithstanding anything contained in this rule, a person may seek the enforcement of any constitutional right and freedom or any constitutional provision in a statement of claim or other suit filed before the court.
23. The petitioner is, therefore, not without need of a forum urging the alleged violation of his rights. As held in *Faraj & 3 others v Police & 2 others* [2022] KEHC 287 (KLR);
- ...the doctrine of ripeness and the doctrine of avoidance. Like *res judicata* or the doctrine of exhaustion, these two doctrines can preclude a court from entertaining a case. Constitutional avoidance has been defined as a preference for deciding a case on any basis other than one which involves a constitutional issue being resolved. As a principle, constitutional avoidance has been linked to the doctrine of justiciability. In broad terms, justiciability governs the limitations on the constitutional arguments that the courts will entertain. It encompasses three main principles: standing, ripeness, and mootness. The avoidance doctrine was fortified in *Sports and Recreation Commission v Sagittarius Wrestling Club and Anor.* ...
24. Equally, in this case, without seeking any constitutional interpretation vis-a-vis the remedies sought and the substantive issue at hand, the assertion that the petition relates to the violation of rights under Article 10 of the *Constitution* that cannot be enforced in an ordinary suit is to avoid the obvious, the petition is not ripe.
25. The reliefs sought can well be heard under a Memorandum of Claim. The orders sought against the interested parties can well be addressed under the provisions of the *Employment and Labour Relations Court Act*, the *Employment Act*, and the Rules of the Court, which permit a party to articulate any constitutional violation under a Memorandum of Claim.
26. In this regard, the respondents' objections dated 2 September 2024 have merit and are hereby allowed. The petition is hereby struck out. Each party will bear its costs.

**DELIVERED IN OPEN COURT AT MOMBASA ON THIS 7<sup>TH</sup> DAY OF NOVEMBER 2024.**

**M. MBARŪ**

**JUDGE**

