



**Mwathi & 75 others v Embu Water and Sanitation Company (Employment and Labour Relations Petition E013 of 2021) [2023] KEELRC 129 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 129 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI**  
**EMPLOYMENT AND LABOUR RELATIONS PETITION E013 OF 2021**  
**ON MAKAU, J**  
**JANUARY 26, 2023**

**BETWEEN**

**OBED MWATHI & 75 OTHERS ..... PETITIONER**

**AND**

**EMBU WATER AND SANITATION COMPANY ..... RESPONDENT**

**JUDGMENT**

1. The petitioners are employees of the respondent and on October 14, 2021, they brought this petition alleging violation of their labour rights due to unconducive working environment by their employer in the following manner:-
  - a. Threat to terminate their contracts for agitating for conversion to permanent and pensionable terms.
  - b. Victimization for an industrial action contrary to a memorandum of agreement signed on September 24, 2021 which promised that there would be no victimization for participating in the said industrial action.
  - c. High handedness and failing to genuinely consider the plight of the petitioners' workplace wellbeing.
2. The petition seeks the following reliefs:
  - a. An order of prohibition restraining the respondent from violating, breaching or in any way acting contrary to the provisions of the memorandum of agreement between the petitioners' representatives and the respondent dated September 24, 2021.
  - b. An order compelling specific performance of the memorandum of agreement dated September 24, 2021 between the petitioners' representatives and the respondent.



- c. Costs of the petition.
  - d. Any other relief that the court may deem fit to grant.
3. In response to the petition, the respondent filed a notice of preliminary objection dated November 4, 2021, and a replying affidavit sworn on even date by Dr Johanness Njagi Njoka, chairman of the respondent's board of management. The gist of the said responses are that the petition does not meet the threshold of a competent constitutional petition as was enunciated in the case of *Anarita Karimi Njeru v Republic* (1979) 1 KLR 154; that the petitioners have not adduced any evidence to prove the alleged violation of their constitutional rights; that the court lacks jurisdiction to determine the suit; and that there is another petition No E006 of 2021 which seeks similar orders but it still pending.
  4. The petition was delayed by the numerous applications which were filed by the parties subsequent to the filing of the petition and which saw 71 out of 78 petitioner withdraw from the case. Finally the court directed the parties to file submissions to dispose of the main petition and they complied.

### Submissions

5. It was submitted for the petitioner that the court is clothed with jurisdiction to determine the petition herein pursuant to section 12 of the *Employment and Labour Relations Court Act* and article 162 (2) of the *Constitution*.
6. Further, it was submitted that the petition is properly pleaded by enumerating the articles of the *Constitution* that have been violated including article 19, 20, 21, 22, 23, 27, 28, 35, 41, 43, 46, 47, 48 and 50. For emphasis reliance was placed on the Anarita Karimi Njeru case and the case of *Trusted Society of Human Rights Alliance v Attorney General and 2 others* (2012) eKLR.
7. It was submitted that the acts of the respondent's board of management has violated the constitutional rights of the petitioners. The said acts were cited as intimidation of the top management with threat of sacking, subjecting them to irregular appraisals in order "cower them and make them subservient to the board of directors and/or compelling them to their bidding." The said ill motive, had allegedly caused them to down their tool to agitate for sobriety in the management of the respondent's affairs, which action unfortunately disrupted supply of water to Embu county and its environs.
8. As regards the alleged breach of the memorandum of agreement dated September 24, 2021, it was submitted that it was signed voluntarily between the petitioners' representatives and the respondent's officials, and as such it constituted a valid contract binding upon all the parties. Reliance was placed on the case of *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd & Another* (2011) eKLR and *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* (2017) eKLR where it was held that the court has no business rewriting contracts between parties but to enforce the contracts since the parties are bound unless there exists a vitiating factor. According to the petitioners, there is no prove that the respondents' officials signed the memorandum of agreement through coercion, fraud or undue influence.
9. It was further submitted that Dr Samuel Nginyi, who described himself as the acting chairperson of the respondent was not lawfully in office and all his actions including swearing the replying affidavit was unlawful. It was therefore contended that Dr Samuel Nginyi should first sanitize her appointment before acting on behalf of the respondent.
10. Finally, it was submitted that the petitioners are entitled to the reliefs sought because the respondent's actions are outright violations of article 3 and 27 of the *Constitution* by being denied right to equal protection and benefit of the law as employees of the respondent. For emphasis, reliance was placed on



the South African case of *Minister of Health & Others v Treatment Action Campaign & Others* (2002) 5 LRC 216 page 249.

11. On the other hand, it was submitted for the respondent that the court lacks jurisdiction to hear and determine the suit. Reliance was placed on the case of *Kennedy Stanley Njindo Matiba v Daniel Toroitich Arap Moi* (1994) eKLR, the *Owners of Motor Vessel Lilian "S" v Caltex Oil (Kenya) Ltd* (1989) KLR 1, and *Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd* (2012) eKLR where courts in this country are unanimous that jurisdiction flows from the constitution or statute and without which, court of law proceeds in vain.
12. Further, it was submitted that the petition does not meet the threshold of a constitutional petition in that it has not pleaded with reasonable precision by enumerating the articles of the Constitution allegedly violated and particulars set out as how the said violations are alleged to have been violated. Further, the petitioner has not presented evidence to substantiate the extent of the alleged violation.
13. For emphasis, the case of *Anarita Karimi Njeru* (1976-1980) KLR 1272 and *Mumo Matemu v Trusted Society of Human Rights Alliance & Others* (2013) eKLR were cited.
14. It was further argued that the petitioner refers generally to various articles of the Constitution without specifying at all how, who, when and in what manner their constitutional rights were infringed by the respondent. Further it was submitted that no evidence was tendered to prove the issues raised. For emphasis the case of *Leonard Otieno v Airtel Kenya Ltd* (2018) eKLR was cited.
15. It was further submitted that there is another mechanism provided by statute by the Employment Act to regulate the right to fair administrative action and right to fair hearing and as such the petitioners should not be allowed to avoid that procedure by merely citing provisions of the Constitution. To fortify that submission, reliance was placed on *Gabriel Mutava & 2 Others v Managing Director, Kenya Ports Authority* (2016) eKLR, *Josphat Ndirangu v Henkel Chemicals (EA) Ltd* (2013) eKLR and *Daniel N Mugendi v Kenyatta University & 3 others* (2013) eKLR.
16. As regards the alleged incompetence on the part of Dr Nginyi's replying affidavit, it was submitted that the petitioners did not raise that issue in their pleadings and therefore they are bound by their pleadings. Reliance was placed on the case of *Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & Others* (2014) eKLR where the court held that parties are not allowed to depart from their pleadings.
17. Finally, it was submitted that the petitioners have failed to prove how and when the respondent violated their constitutional rights and therefore they are not entitled to the reliefs sought.

### **Analysis And Determination**

18. Having carefully considered the pleadings and the submissions by the parties, the following issues commend themselves for determination:-
  - a. Whether the court has jurisdiction to determine the dispute herein.
  - b. Whether the petition meets the competence threshold of a constitutional petition.
  - c. Whether there is an alternative procedure for settling the dispute provided by the statute law.
  - d. Whether the respondent has violated the petitioners' constitutional rights as alleged.
  - e. Whether the reliefs sought are merited.



## Jurisdiction

19. The jurisdiction of this court to hear and determine constitutional disputes have been the discussion by all the superior courts of Kenya. In the case of *International Centre for Insect Physiology and Ecology (ICIPE) v Nancy McNally* (2018) eKLR, the Court of Appeal held that:-
- “27. There cannot be any argument that the ELRC is clothed with jurisdiction to hear and determine such constitutional issues as when they arise from employment and labour relations. Any doubts on that jurisdiction were settled in the case of *United States International University (USIU) v Attorney General* (2012) eKLR which was upheld by this court in *Daniel N Mugendi v Kenyatta University & 3 others*.”
20. In view of the foregoing binding authority, I must dismiss the respondent’s submission on the issue of jurisdiction of this court and hold that this court has the requisite jurisdiction to hear and determine the dispute herein which is between an employer and its employees.

## Competence Threshold

21. The respondent contends that the petitioners have not pleaded with reasonable precision the provisions of the *Constitution* which they allege were violated and they have also not set out particulars of how the violations were done and the extent of the alleged violations.
22. The petitioners are in denial and contend that they have enumerated article 19, 20, 21, 22, 23, 27, 28, 35, 41, 43, 46, 47, 48 and 50 of the *Constitution* of Kenya as having been violated and therefore the court has the discretion to render justice to the petitioners.
23. In the case of *Anarita Karimi Njeru v Republic* the High Court held that:-
- “If a person is seeking redress from the High Court on a matter which involves a reference to the constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they were alleged to be infringed.”
24. The above decision by the High Court, was affirmed by Court of Appeal in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* (2013) eKLR and went to hold that:-
- “The petition in the High Court referred to articles 1, 2, 3, 4, 10, 19, 20 and 73 of the Constitution in its title. However, the petition provided little on the particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the respondent averred that the appointing organ ignored concerns touching on integrity of the appellant. No particulars were enumerated. Further paragraph 4 of the petition alleged that the government of Kenya had overthrown the Constitution, again without any particulars....”
25. In this case, part d of the petition has the title “constitutional and statutory provisions violated”. Paragraph 20 to 26 mentions the articles of the Constitutions but no particulars are pleaded with reasonable clarity on how the provisions have been violated and the extent of the violation. In my own assessment, the petitioners have just made general statement that fall below the threshold established by the High Court in *Anarita Karimi Njeru* case and affirmed by the court of Appeal in *Mumo Matemu* case aforementioned.



### **Alternative Mechanism Under Statutes**

26. If there is any dispute that can be deciphered from the petition herein is allegation that the respondent is breaching a memorandum of agreement negotiated between the petitioners' trade union and the respondent. The said agreement is what in Kenya is called "return to work formula" and it is normally signed to bring to an end an industrial action. A common term of such agreement is that, the employer would not victimize any employee for participating in the industrial action.
27. The said alleged breach of the agreement did not require to be elevated into a constitutional dispute. There exists an alternative procedure under the *Employment and Labour Relations Court Act* for seeking redress. Consequently, I agree with the respondent that the filing of a constitutional case was not warranted.
28. I gather support from the case of *Gabriel Mutava & 2 others v Managing Director, Kenya Ports Authority* (2016) eKLR where the Court of Appeal held that:-

"Constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. Constitutional litigation is not a panacea for all manner of litigation; we reiterate that the first port of call should always be suitable statutory under pinned forums for the resolution of such disputes."

### **Violation of Rights**

29. I have already made a finding that the petition falls short of the threshold of a competent constitutional pleading and that therefore there no case of constitutional violations has been established herein. There is also no evidence adduced to support the alleged violations of constitutional rights.
30. I have further found that the only dispute discernible from the petition is an alleged breach of a memorandum of agreement signed to end an industrial action called by the petitioners which could have been filed as a normal suit by way of a memorandum of claim under the rules of procedure of the court. it follows that the petition lacks merits and the reliefs sought are not warranted. Consequently, the petition is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 26<sup>TH</sup> DAY OF JANUARY, 2023.**

**ONESMUS N MAKAU**

**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 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N. MAKAU**

**JUDGE**

