



REPUBLIC OF KENYA



**Njue v Kenya Maritime Authority & another (Petition  
E012 of 2022) [2023] KEELRC 820 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 820 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
PETITION E012 OF 2022  
M MBARÚ, J  
MARCH 28, 2023**

**BETWEEN**

**ROBERT MUTEGI NJUE ..... PETITIONER**

**AND**

**KENYA MARITIME AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**BOARD OF DIRECTORS KENYA MARITIME AUTHORITY .... 2<sup>ND</sup>  
RESPONDENT**

**RULING**

1. The respondents, Kenya Maritime Authority and Board of Directors, Kenya maritime Authority Filed Notice of Preliminary Objections dated September 16, 2022 on the grounds that;
  1. The petitioner dated July 18, 2022 does not comply with the requirements of Rule 10 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules and therefore cannot be sustained.
  2. The petition dated July 18, 2022 contravenes the doctrine of Constitutional Avoidance and ought to be struck out with costs.
2. The petitioner filed Amended Petition filed on October 12, 2022 and Grounds of Opposition on October 6, 2022 on the reasons that under Rule 10 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules a petitioner is guided on the matters to address which is herein done and the articles upon which the petitioner is seeking remedy addressed pursuant to Article 22 of the Constitution. the petitioner was denied his rights secured under the Bill of Rights when the 2nd respondent interdicted him without being properly constituted and then proceeded to dismiss him from his employment. for these violations, the petition before court is proper and the objections made should be dismissed with costs.



3. Both parties attended and agreed to address the objections by way of written submissions and also made oral highlights.
4. The respondents submitted that the petition was filed has gone contrary to the Doctrine of Constitutional avoidance because it is premised on alleged unfair termination of employment and not on any constitutional issue. In the case of *Communication Commission of Kenya & others v Royal Media Services Limited & 5 others [2014] eKLR* the Supreme Court held that where a party fails to apply the Doctrine of Constitutional avoidance and apply the dispute resolution mechanism available under a given statute, such suit should be struck out.
5. The Court of Appeal in *Sumayya Athmani Hassan v Paul Masinde Simidi [2019] eKLR* addressed a similar matter such as the petitioner's case and held that Article 41 of *the Constitution* is now addressed under the *Employment Act* and *Labour Relations Act* and where a petition is not premised on the question of the constitutionality of any statute, such matter ought to be addressed under the applicable statute. To invoke constitutional provisions is not sufficient and the court hearing the petition should have struck it out.
6. In *Isaac Makokha Okere v Mumias Outgrowers Sacco Society Limited & 9 others [2021] eKLR* and in *Okoiti v Parliamentary Service Commission & 2 others; Speaker of the National Assembly & another (interested parties) Petition E166 of 2022* the courts held that there was constitutional avoidance doctrine and filing of ordinary suits couched as a petition will attack the sanction of being struck out.
7. The petitioner submitted that under the principles of *Mukisa Biscuits manufacturing Limited v West End Distributors (1969) EA* a preliminary objection should be on a point of law and not based on fact to be discerned at a hearing. The petitioner has complied with the rules in terms of filing a petition and cannot be faulted and the matters of fact addressed by the respondents in its objections have no merit. The petitioner has since amended the petition herein and the court has jurisdiction to hear and determine the same as it relates to employment and labour relations where articles 41 and 47 are applied. The petitioner is not seeking any interpretation of the *constitution* but a finding that his labour rights have been violated giving this court power to address.

### **Determination**

8. The Supreme Court in the case of *Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others* addressed the principle of avoidance to means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis, through other mechanisms or under a regulated framework in law. the rationale is that under the doctrine of avoidance, although a courts can take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved.
9. Under the doctrine of constitutional avoidance, therefore, deals with instances where a Constitutional Court will decline to deal with a matter because there exists another remedy provided in law which the aggrieved party is yet to utilize. That is also referred to as the doctrine of exhaustion as held in the case of *Anthony Miano & others v Attorney General & others [2021] eKLR*.
10. The petitioner does not deny that his claim is premised on an employment relationship and following which his employment was terminated by the respondents and for which he has filed his Petition and Amended Petition and the remedies sought are mainly that the 2<sup>nd</sup> respondent board made decisions while not properly constituted and hence its decision to terminate employment was null and void and there should be compensation and payment of terminal dues.



11. Whereas a party is allowed to file a petition to urge his case with regard to violation of constitutional rights and freedoms as held in the case of *United States International University (USIU) v Attorney General [2012] eKLR* and affirmed by the Court of Appeal in *Mugendi v Kenyatta University – Civil Appeal No 6 of 2012 [2013] eKLR* to include interpretation and application of the *Constitution*, 2010 with regard to matters related and or arising from employment and Labour Relations as set out under Article 162(2) read with Section 12 of the *Employment and Labour Relations Court Act*, 2011 great caution must be given to the nature of remedies sought to be secured. To invoke the constitutional route must be with regard to interpretation of a statutory provisions vis-a-vies a constitutional provision of lack of it or the application of a statutory provisions that is not secured even with the best reading of the *constitution* as held in *Elias Kibathi & another v Attorney General [2021] eKLR*. so that, where a matter is regulated in a statute, a remedy and procedure to secure such matter addressed, the invocation of the *constitution* should be avoided as held in *Sumayya Athmani Hassan v Paul Masinde Simidi & another [2019] eKLR*.
12. Rights in employment and labour relations though secured under the provisions of Article 41 of the *Constitution* have now been further addressed under the *Employment Act*, 2007 read together with the *Employment and Labour Relations Court Act*, 2011 and for all intents and purposes, the court has the Employment and Labour Relations Court (Procedure) Rules, 2006 under which parties are guided on when to file a Petition, a Memorandum of Claim or any other matter. To therefore invoke the constitutional provisions and file a petition, it is imperative that a party interrogates the Court Rules and the application of the same.
13. This is captured in *Jane Angila Obando versus TSC & 2 others, Petition No 4 of 2020* and where the court held that;

The right to apply to the High Court under ....of the *Constitution* for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under .... the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court or being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.

14. This position is reiterated by the Court of Appeal in the case of *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another [2016] eKLR* and where the court held as follows;

The *Constitution* is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can found a claim under substantive law, the proper cause is to bring the claim under that and not under the *Constitution* ...

If an employer adopts a labour practice which is thought to be unfair, an aggrieved employee would in the first instance be obliged to seek remedy under the *Labour Relations Act*. If he or she finds no remedy under the act, the Act might come under scrutiny for not giving adequate protection to a constitutional right...



15. In this case, the rights sought to be enforced by the petitioner are well addressed under the [Employment Act](#), 2007. He has not stated that such law is inadequate in any form so as to invoke the constitutional route to urge his case. He has not stated that the remedies sought cannot be enforced or urged under a Memorandum of Claim upon application of the [Employment Act](#), 2007 and the [Employment and Labour Relations Court Act](#), 2011 and the Court Rules thereto.
16. These are statutes which allow a party with a proper grievance to move the court and urge any matter including the violation of constitutional rights. Under a Memorandum of Claim, a party is allowed to file a claim urging constitutional violations and apply Rule 8 of the Employment and Labour Relations Court Procedure Rules, 2016 to frame the orders sought. this in my view, is the implication of the position in *Sumayya Athmani Hassan v Paul Masinde Simidi & another* [2019] eKLR 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 1<sup>st</sup> 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 therein are inadequate. The petition did not raise any question of the interpretation or application of the [Constitution](#).
17. In this case, the respondents' objections that there should be constitutional avoidance where there is an adequate dispute resolution mechanism available is correct save, the petitioner having moved the court under the honest belief that he applied the right procedure, he will be allowed a fair chance to apply under the [Employment Act](#), 2007 read together with the [Employment and Labour Relations Court Act](#), 2011 and the Rules thereto and move the court thereto. The objections by the respondents being premised on the requirements of Rule 10 of the [Constitution](#) of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules which are subsidiary to the [Constitution](#) and the doctrine of constitutional avoidance being the central basis of such objections are not be equated to the substantive law upon which the petition can be dismissed.
18. The above taken into account, the admission by the petitioner that the petitioner has no matter requiring any constitutional interpretations save urging employment and labour claims is hereby struck out. The petitioner shall be at liberty to move the court as appropriate.
19. For the development of the law and good practice, the court wishes to thank the State Counsel, Emmanuel M Makuto.

Each party shall bear own costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 28TH DAY OF MARCH, 2023.**

**M. MBARŪ JUDGE**

In the presence of:

Court Assistant: Japhet Muthaine

