



**Abuki v Tata Chemicals Magadi Limited (Petition E007 of 2022)
[2023] KEELRC 677 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 677 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E007 OF 2022**

L NDOLO, J

MARCH 16, 2023

**IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 22, 41, 47, 48,
50, 165, 258, 259 AND 260 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF SECTIONS 42 AND 45 OF THE EMPLOYMENT ACT, 2007

BETWEEN

JAMES NYAKEOGA ABUKI PETITIONER

AND

TATA CHEMICALS MAGADI LIMITED RESPONDENT

JUDGMENT

The Petition

1. By his Petition dated January 4, 2022, the Petitioner seeks the following remedies against the Respondent:
 - a. A declaration that the Respondent's decision to terminate the Petitioner's employment breached and/or threatened his rights to freedom from discrimination, dignity, family as well as fair administrative action under Articles 27, 28, 41(1), 45(2) & (3) and 47 of the Constitution;
 - b. A declaration that the Respondent's decision to terminate the Petitioner's employment was unlawful, wrongful and unfair as it was in contravention of Sections 41, 43 and 45 of the Employment Act and Section 4(3) of the Fair Administrative Action Act;



- c. A declaration that the Petitioner is entitled to 12 months' salary in compensation for unfair termination under Section 49 of the *Employment Act*;
 - d. Damages for violation of the Petitioner's constitutional rights under articles 27, 28, 41(1), 45(2) & (3) and 47 of the *Constitution*;
 - e. An order of mandamus compelling the Respondent to pay the Petitioner 12 months' salary for unlawful, wrongful and unfair termination;
 - f. Compensation for pain, suffering, mental anguish, emotional turmoil and decrease in quality of life caused by the unfair termination of employment;
 - g. An order compelling the Respondent to issue the Petitioner with a certificate of service;
 - h. An order directing the Respondent to pay the Petitioner costs of the Petition.
2. The Petitioner states that he was offered employment by the Respondent as a Final Plant Operator, by letter dated October 22, 1997. He rose through the ranks to the position of Assistant Plant Manager.
 3. The Petitioner further states that sometime in the month of November 2016, the Respondent's Human Resource Manager published an advertisement notifying residents of Magadi Township of an opportunity to run businesses within the Township, at various premises owned by the Respondent.
 4. The Petitioner made an application, on behalf of his wife, Irene Moraa Abuki, for the opportunity to run a business at one of the Respondent's business premises known as 'Swimming Pool Bar & Restaurant'.
 5. The Petitioner avers that pursuant to the application, his wife entered into a 5 year and 1-month lease agreement with the Respondent.
 6. The Petitioner's wife ran the business until June 23, 2020, when the Respondent issued her with a notice to repossess the business premises before expiry of the lease term.
 7. Subsequently, the Petitioner's wife filed a suit against the Respondent for breach of the terms of the lease agreement, being Kajiado CMCC No 89 of 2020: Irene Moraa Abuki v Tata Chemicals Magadi Limited.
 8. Irene Moraa Abuki obtained an interim injunctive order on 10th September 200 barring the Respondent from disturbing her quiet occupation of the business premises. The order directed Moraa to ensure compliance with government Covid-19 preventive restrictions.
 9. The Petitioner avers that on July 13, 2020, prior to the filing of the suit by his wife, he had been summoned by the Respondent's Human Resource Manager, in the presence of the Talent Manager, and asked to prevail upon his wife to surrender the business premises to the Respondent as per the repossession notice. The Petitioner claims to have been warned that his employment with the Respondent would be jeopardised if his wife did not give up the premises as asked.
 10. After discussing the matter with his wife, the Petitioner sent an email to the Respondent's Human Resource Manager on July 16, 2020, relaying the decision by his wife not to comply with the repossession notice and instead to pursue adjudication of the dispute in court. In his email, the Petitioner sought assurance on security of his job.
 11. The Petitioner claims to have been pressurised by the Human Resource Manager to have the court case withdrawn. He adds that he was threatened that if the case was not withdrawn, the Respondent would



- dismiss him alongside his brother, Edward Arori Abuki, who was also working at the Respondent Company.
12. On November 18, 2020, the Petitioner was issued with a show cause letter, which according to the Petitioner, was premised on the dispute between the Respondent and his wife.
 13. The Petitioner states that the allegation in the show cause letter was baseless and malicious as he was charged with violating Standing Instructions SI/a/19 on Allocation of Business Premises, notwithstanding that the applicable Standing Instructions at the time of allocation of the business premises was the Company's Standing Instructions (SI/A/19 of 2001) and not the revised Standing Instructions SI/1/19 revised in the year 2019, way after the Petitioner's wife had entered into the lease agreement with the Respondent, in February 2017.
 14. In the notice to show cause, the Respondent stated that it had evidence that the Petitioner was involved in his wife's business, based on an allegation that an application had been made to Kajiado County Government for a permit to operate food business during the Covid-19 pandemic.
 15. The 2nd charge against the Petitioner was violation of the Respondent's Code of Conduct on Conflict of Interest.
 16. The Petitioner's case is that his dismissal was premised on the unsuccessful attempts to persuade his wife to withdraw the case against the Respondent.

The Respondent's Response

17. The Respondent's response is contained in a replying affidavit sworn by its Human Resources Manager, Nicholas Mwanyalo on March 1, 2022.
18. Mwanyalo begins by stating that the Petition as framed does not raise any pertinent constitutional controversy between the parties.
19. He depones that the Petitioner has failed to state with a degree of precision the manner in which articles 2, 3, 10, 19, 20, 22, 23, 25, 27, 28, 41, 47, 48, 50, 165, 258, 259 and 260 of the *Constitution of Kenya* have been infringed by the Respondent.
20. Mwanyalo asserts that the relationship between the Respondent and the Petitioner at all times relevant to the Petition, was one of employer and employee and the matters pleaded do not amount to breach of fundamental rights and freedoms under the *Constitution*, to be pursued through a constitutional petition. He adds that the dispute herein can be adjudicated through the filing of an ordinary claim under the *Employment Act*.
21. Mwanyalo concedes that effective April 1, 2017, the Respondent permitted the Petitioner's spouse, Irene Moraa Abuki to operate the Swimming Pool Bar and Restaurant, as a tenant. The allocation of the business premises was done under the Allocation of Business Premises in Magadi (SI/1/19).
22. He further concedes that on June 23, 2020, the Respondent issued a sixty (60) days' notice to the Petitioner's spouse, Irene Moraa Abuki to repossess the Swimming Pool Bar and Restaurant. The notice was to expire in September 2020.
23. Mwanyalo accuses Moraa of violating various company and government guidelines relating to Covid-19 containment measures. He adds that Moraa snubbed the Respondent's attempts to resolve the matter amicably and instead opted to file Kajiado CMCC No 89 of 2020, which is still pending in court.



24. Mwanyalo states that he is aware that on November 18, 2020, the Respondent issued the Petitioner with a notice to show cause why disciplinary action should not be taken against him, for violation of Clause 4.7 SI/A/19 on Allocation of Business Premises as well as conflict of interest contrary to Clause 24 of the Respondent's Code of Conduct.
25. He further states that the Petitioner was granted an opportunity to respond to the allegations contained in the notice to show cause and on 18th December 2020, a disciplinary hearing was held where the Claimant was accompanied by his witness, Daniel Saiyore.
26. In support of the allegation on violation of Clause 4.7 SI/A/19, Mwanyalo depones that the Claimant directly participated in running of his wife's business, which adversely affected his work as an employee of the Respondent.
27. On the allegation of conflict of interest, Mwanyalo cites Clause 24 of the Respondent's Code of Conduct, 2015 which requires employees and executive directors to act in the interest of the Respondent and ensure that any business or personal association, including close personal relationships, do not create a conflict of interest with their roles and duties.
28. Mwanyalo states that on May 27, 2020, the Petitioner while employed by the Respondent, applied to the Kajiado County Government, for a permit to operate food business during the COVID-19 pandemic. He adds that in the said application, the Petitioner used his official email address bearing the Respondent's domain name.
29. Mwanyalo terms the Petitioner's assertion that the disciplinary action taken against him was actuated by malice as misplaced and baseless. He states that the Respondent had substantive reasons for terminating the Petitioner's employment and that the Petitioner was afforded adequate opportunity to be heard.

Determination

30. The first issue for determination is whether the Petition as framed raises any constitutional controversy.
31. In its submissions dated February 7, 2023, the Respondent cites a number of decisions in which courts have held that ordinary employment disputes ought not to be couched as constitutional petitions.
32. In *Josphat Ndirangu v Henkel Chemicals (EA) Limited* [2013] eKLR my brother Radido J held that:

“...a litigant should not avoid the provisions of the *Employment Act* regarding unfair termination or wrongful dismissal by going behind the statute and seeking to rely directly on Article 41 of the *Constitution* on the right to fair labour practices. The purpose of the *Constitution* is that the right to fair labour practices is given effect in various statutes of which the *Employment Act* and the *Labour Relations Act* are primary. The primary legislation should not be circumvented by seeking to rely directly on a constitutional provision. Both the *Employment Act* and the *Labour Relations Act* give effect to the constitutional rights.”
33. I do not need to say more. Looking at the parties' pleadings in this case, it seems to me that the issues in dispute arise from a straightforward employment matter which is well covered under the *Employment Act*. Although the Petitioner lists a number of constitutional provisions, he failed to provide a credible nexus between these provisions and his complaint now before the Court.
34. The danger of presenting an employment dispute as a petition is that the Court is denied the opportunity to interrogate rival statements of fact. If a party is confident about their position, they



should subject themselves to the rigours of full trial, including cross examination, and not hide behind lofty constitutional statements.

35. In light of the foregoing findings, this is the end of the road for this petition, which I proceed to strike out with the caveat that the petitioner is at liberty to pursue his claim against the respondent by way of an ordinary cause.
36. Each party will bear their own costs.
37. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF MARCH 2023

LINNET NDOLO

JUDGE

Appearance :

Mr. Omayio for the Petitioner

Mr. Bwire for the Respondent

