Muli v Kenya Water Institute & 2 others (Petition E225 of 2022)
[2023] KEELRC 942 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEELRC 942 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION E225 OF 2022

BOM MANANI, J

APRIL 27, 2023

IN THE MATTER OF ARTICLES 1, 2, 3, 10(2) (A) (B), 19, 20, 21, 22, 23, 27, 28, 35, 41, 47, 50 (1), 162(2) (A), 232, 258 & 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF VIOLATION AND/OR THREATENED VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 41, 47 AND 50(1) OF THE CONSTITUTION

AND

IN THE MATTER OF THE EMPLOYMENT ACT, 2007ANDIN THE MATTER OF THE KENYA WATER INSTITUTE ACT NO. 11 OF 2001

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO 4 OF 2015

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013ANDIN THE MATTER OF THE WATER ACT CAP 372

AND

IN THE MATTER OF KENYA WATER INSTITUTE (HUMAN RESOURCE POLICY AND PROCEDURE MANUAL)

BETWEEN

JORUM MUSYOKI MULI ..... PETITIONER

AND

KENYA WATER INSTITUTE ..... 1ST RESPONDENT

PRINCIPAL SECRETARY MINISTRY OF WATER & SANITATION & IRRIGATION ..... 2ND RESPONDENT

BRIGADIER (RTD) STEPHEN NJUNG'EKIHU ..... 3RD RESPONDENT

RULING

Background

1. The Petitioner was an employee of the 1st Respondent until December 19, 2022 when his contract of service was terminated. He has filed this Petition to challenge the lawfulness of the decision to terminate his contract.

2. In the Petition, the Petitioner raises a number of issues which he submits point to the unlawfulness of the decision to terminate his contract of service. These include the following:-

    a) That the 3rd Respondent irregularly instigated the disciplinary process against him. It is the Petitioner's contention that the mandate to commence disciplinary proceedings against him vest in the 1st Respondent's Human Resource Advisory Committee, not the 3rd Respondent.

    b) That the letter of termination issued to him did not disclose the reasons for termination of his contract of service.

    c) That the Respondents did not furnish him with a copy of the investigation report which recommended disciplinary action against him for alleged gross misconduct.

    d) That the 3rd Respondent was not cross examined by the 1st Respondent on the allegations made against the Petitioner before the decision to terminate the contract of service of the Petitioner was rendered.

    e) That the 3rd Respondent was conflicted in the process leading to the Petitioner's dismissal from employment in so far as he played the roles of accuser, prosecutor and adjudicator.

    f) The Petitioner did not get the opportunity to cross examine the 3rd Respondent and members of the 1st Respondent's Governing Council before the decision to terminate his employment contract was rendered.

    g) That the Respondents disregarded the procedure for processing the dismissal of an employee stipulated under the *Employment Act*.

    h) That the Respondents failed to hear the representations by the Petitioner before they terminated his contract of employment contrary to the requirements of the *Employment Act*.

    i) That as a result of the matters aforesaid, the Petitioner's rights under various articles of the *Constitution* to include articles 41 and 47 were violated.

3. The Petitioner has prayed for various reliefs most of which seek for declaratory orders.

Preliminary Objection

4. The Respondents have filed a preliminary objection to the competence of the Petition. The foundation of the preliminary point of law is that the court has no jurisdiction to handle this action as a Constitutional Petition as the dispute between the parties is founded on an employer-employee relation.

5. The preliminary objection that is raised in this cause is on all fours with the objection taken in a related matter: ELRC Petition No E226 of 2023. But for the fact that the two cases are not consolidated, the circumstances informing the point of law in the two matters are similar. Therefore, this ruling is a replication of the ruling in ELRC Petition E226 of 2023 in all material particulars.

Analysis

6. The question whether the Employment and Labour Relations Court has jurisdiction to handle constitutional issues arising from employer-employee disputes is, in my view, now settled. The court has this jurisdiction.

7. This position is self evident from the court's rules. Rule 7 (1) & (3) of the *Employment and Labour Relations Court (Procedure) Rules, 2016*provides as follows:-

    a) A party who wishes to institute a petition shall do so in accordance with the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2012*.

    b) Notwithstanding anything contained in this Rule, a party is at liberty to seek the enforcement of any constitutional rights and freedoms or any constitutional provision in a statement of claim or other suit filed before the Court.

8. That these rules contemplate the filing of Constitutional Petitions before the Employment and Labour Relations Court (ELRC) is not in doubt. The only requirement is that whatever constitutional issue that the ELRC is called upon to address must have arisen in the context of an employment relation. The mere fact that the dispute in question stems from an employment relation is no reason to suggest that it cannot raise a constitutional issue that may require resolution through a Constitutional Petition.

9. That this is the position has been restated in a number of court decisions. In the case of *Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR*, the three Judges of the Court of Appeal confirmed the fact that the ELRC has jurisdiction to entertain Constitutional Petitions arising from employment disputes so long as they raise a constitutional question related to the dispute for the court's resolution.

10. Okwengu JA expressed herself on the issue as follows:-

    ''In my view to hold that the Industrial Court has no jurisdiction to hear and determine a petition seeking redress of violations of fundamental rights arising from an employment relationship would defeat the intention and spirit of the *Constitution* in establishing special courts to deal with employment and labour disputes. Indeed such a stance would not only be inimical to justice, but would expressly contravene Article 20 of the *Constitution* that provides that the Bill of Rights "applies to all law and binds all state organs and persons", and enjoins a court to promote the spirit, purport and objects of the Bill of rights and adopt an interpretation that most favours the enforcement of a right or fundamental freedom.

    I would nonetheless reiterate what this court (differently constituted) stated in the Mugendi case ..... that the Industrial Court can determine Industrial and labour relation matters alongside claims of fundamental rights ancillary and incidental to those matters.''

11. G B M Kariuki JA stated as follows on the issue:-

''There was submission that the Industrial Court has no jurisdiction to deal with issues of Constitutional violations. But that argument does not hold good not least because the Industrial Court, though not entitled to handle Constitutional petitions that should otherwise go to the High Court Constitutional and Human Rights Division has power to determine constitutional issues arising in and intertwined with labour relations litigation before it. This question has been addressed by the High Court which has rightly held that constitutional issues arising in labour relations cases before the Industrial Court can be determined by the Industrial Court which has (under Article 162(2) of the *Constitution*) the status of the High Court notwithstanding that its powers under Article 162(2) of the *Constitution* relates to hearing and determining labour disputes.''

12. Kiage JA expressed himself on the subject as follows:-

''It is enough for the point to be made that the *Constitution* does not commit its application and enforcement to a narrow and rarefied forum. It would therefore be a misdirection for argument to be made that the superior courts contemplated by Article 162 must consider the *Constitution* and its application and interpretation, even when touching on matters fundamentally within the special competence of those courts, as anathema. The law, as I understand it, is that whereas those courts may not embark on a generalized handling of Bill of Rights disputes, they would definitely be entitled and are jurisdictionally empowered to address such constitutional issues as arise directly and in relation to the matters within their jurisdictional competence and specialization.''

13. The totality of the foregoing leaves no doubt in my mind that the ELRC has jurisdiction to entertain Constitutional Petitions arising from employment disputes to the extent that they raise a constitutional question for determination. In this context, I hold that the preliminary objection by the Respondents is without merit.

14. I note that the Respondents have placed heavy reliance on the Court of Appeal decision in *James Mukuha Gichane v National Hospital Insurance Fund & 3 others [2017] eKLR* in advancing their case on this issue. It is worth mentioning that this decision was made during and related to the old constitutional dispensation before labour rights were entrenched under article 41 of the *Constitution* of Kenya 2010. In the circumstances and to the extent that labour disputes were entirely governed by private law at the time, the position by the court was sound. However, this cannot be said to be the obtaining position under the current constitutional dispensation.

15. That said, I think that the more pertinent question in the cause is whether the court should provide the Petitioner with the constitutional remedies that he seeks notwithstanding that the issues raised by him are matters which can be resolved by reference to the various statutes on employment law in Kenya. Away from the question of jurisdiction as raised by the Respondents, this latter perspective of the dispute raises an entirely different constitutional issue: the application of the principle of constitutional avoidance.

16. By this principle, a court may decline to pronounce itself on a dispute that is before it from a constitutional viewpoint if the matter can be resolved by reference to some other regime of law. This is notwithstanding that the court is seized of jurisdiction to entertain the dispute.

17. This subject has been discussed in various court decisions. Indeed, some of the decisions are those relied on by the Respondents in support of their preliminary objection. Mativo J (as he then was) aptly raises the subject in the case of *KKB v SCM & 5 others* (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR). The learned Judge expressed himself on the issue as follows:-

''In summation, the doctrines of ripeness and constitutional avoidance shun to deal with a constitutional issue where there exists another legal course which can give the litigant the relief he

seeks. In other words, a constitutional issue is not ripe for determination until the determination of the constitutional issue is the only course that can give the litigant the remedy he seeks. Both constitutional avoidance and ripeness avert the determination of the constitutional issues until it becomes very necessary to the extent that it is the only course available to assist the litigant's cause."

18. As the learned Judge indicates, the desire to avoid giving constitutional clothing to every dispute that arises for resolution informs the philosophy behind the principle of constitutional avoidance. If the dispute can be resolved in some other way without resorting to the *Constitution*, parties are strongly advised to follow that pathway. Otherwise, we run the risk of trivializing the *Constitution*. It is in this context that the court in *Harrikson v Attorney General of Trinidad & Tobago (1980) AC 265* expressed itself as follows:-

> "The notion that whenever there is failure by an organ of government or public authority or public officer to comply with the law this entails contravention of some human right or fundamental freedom guaranteed to individuals by the chapter 1 of the *Constitution* is fallacious. The right to apply to the High Court under section 6 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 section 6 (1), the mere allegation that a human right 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 as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom."

19. This very question has been addressed by the Court of Appeal in *Sumayya Athmani Hassan v Paul Masinde Simidi& another [2019] eKLR*. In the matter, the court had these observations to make:-

> "It is evident that the petition was hybrid combining violations of various constitutional rights; employment rights under the *Employment Act* and breach of the Public Officers Ethics Act. However, the underlying complaint was the alleged unlawful interdiction and subsequent dismissal of the 1st respondent by the Corporation and appellant. The specific remedies sought were general damages, terminal benefits and issuance of certificate of service. In determining the petition, the ELRC relied wholly on the provisions of *Employment Act*.
>
> 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 therein are inadequate. The petition did not raise any question of the interpretation or application of *the Constitution*.
>
> We adopt and uphold the general principle in the persuasive authority in Barbara De Klerk (supra) that where legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the *Constitution* without challenging the legislation in question. That principle has been reinforced by the Supreme Court in Communications Commission case (supra).

In conclusion, we find that the alleged unlawful interdiction and termination of a contract of employment was not a constitutional issue and thus the petition did not disclose a cause of action anchored on the *Constitution*."

20. I reiterate that the issue raised above is one of constitutional avoidance as opposed to jurisdiction. That is why the objection by the Respondents, in so far as it is premised on absence of jurisdiction must fail. That the question of avoidance is not one of jurisdiction is made clear in the decision of *KKB v SCM & 5 others* (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) when the learned Judge observed as follows:-

"The 1st and 2nd Respondent's objection brings to fore two important and closely interrelated concepts. These are the doctrine of ripeness and the doctrine of avoidance..... These two concepts are completely different from the presence or absence of jurisdiction which is the power of the court to entertain a matter which is conferred by the *Constitution* or a statute."

21. I have considered the grievances in the Petition against the current regime on employment in Kenya. Prima facie, they fall within the purview and can be adequately addressed under the provisions of the *Employment Act*, 2007 and the *Fair Administrative Action Act*, 2015 both of which breathe life into the key articles of the *Constitution* that cover labour rights.

Determination

22. The Respondents have asked me to strike out both the Petition and application for conservatory orders. However, I reckon that striking out of pleadings is a draconian step. It is usually resorted to as a measure of last resort to close pleadings that are considered so hopeless as to be beyond redemption through amendments (see *SDV Transami (K) Limited v Steve Andrade [2022] eKLR*).

23. I will therefore be hesitant to strike out the current Petition. Although the court is entitled to decline pronouncing itself on the matter in its current form on account of the principles of constitutional avoidance and ripeness, it nevertheless has jurisdiction to hear it.

24. Whilst I will not strike out the Petition for want of jurisdiction as prayed by the Respondents, I hereby decline the invitation to hear the matter as currently presented. I decline the invite by the Petitioner to pronounce myself on the dispute as a Constitutional Petition in the face of the robust statutory framework on labour relations in Kenya. In my view, this framework, prima facie, provides the Petitioner with sufficient alternative avenues to litigate his claim.

25. As has been pointed out in some of the decisions that I have referred to, in order to invoke provisions of the *Constitution* in pursuit of a remedy in lieu of provisions of an ordinary statute that provides avenues for actualizing the remedy, a Petitioner ought to suggest, at least by his pleadings, that the statute is inadequate in some respect. I do not understand the pleadings by the Petitioner as suggesting that the current statutory framework on employment and labour in Kenya is incapable of sufficiently redressing his grievance in relation to the impugned dismissal. As such, this matter ought to have been filed as an ordinary Claim as opposed to a Constitutional Petition.

26. The Petitioner is at liberty to move the court as appropriate failing which this matter shall stand dismissed on account of the principle of avoidance upon the lapse of the 60th day from the date of this order.

27. There is no order as to costs.

DATED, SIGNED AND DELIVERED ON THE 27TH DAY OF APRIL, 2023

B O M MANANI

JUDGE

In the presence of:

..... for the Petitioner

.....for the Respondents

ORDER

In light of the directions issued on July 12, 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision 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.

B. O. M MANANI