



REPUBLIC OF KENYA



KENYA LAW
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Arendse & 182 others v Meta Platforms, Inc & 3 others; Kenya Human Rights Commission & 8 others (Interested Parties) (Constitutional Petition E052 of 2023) [2023] KEELRC 921 (KLR) (20 April 2023) (Ruling)

Neutral citation: [2023] KEELRC 921 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CONSTITUTIONAL PETITION E052 OF 2023

MN NDUMA, J

APRIL 20, 2023

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 2, 19, 20, 21, 22, 23, 24, 27, 28, 29, 33, 36, 41, 43, 47, 50, 54, 55, 159, 165, 258, 259 AND 260 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF RULE 7(1) OF THE EMPLOYMENT AND LABOUR RELATIONS COURT (PROCEDURE RULES), 2016

AND

IN THE MATTER OF CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES 2013

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF SECTIONS 2, 3, 5, 9, 10, 11, 12, 13, 14, 15, 17, 20, 21, 30, 34, 35, 36, 40, 41, 43, 44, 45 AND 49 OF THE EMPLOYMENT ACT

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE ILO TERMINATION OF EMPLOYMENT CONVENTION, 1982 AND RECOMMENDATION 166 THEREOF; TERMINATION OF EMPLOYMENT RECOMMENDATION, 1982 (NO. 166)

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF SECTIONS 3 AND 4 OF THE FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF GUIDING PRINCIPLES 11, 12, 13, 14, 17, 18, 19, 22, 23, 29 AND 31 OF THE GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS IMPLEMENTING THE UNITED NATIONS 'PROTECT, RESPECT AND REMEDY' FRAMEWORK



AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE INTERNATIONAL
CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF
THE CONVENTION AGAINST TORTURE AND OTHER CRUEL,
INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE MIGRATION
FOR EMPLOYMENT CONVENTION (REVISED), 1949 AND THE MIGRANT
WORKERS (SUPPLEMENTARY PROVISIONS) CONVENTION, 1975

BETWEEN

KIANA MONIQUE ARENDSE	1 ST PETITIONER
JAMES AGADA MARK	2 ND PETITIONER
MEAZA SHURA	3 RD PETITIONER
MARK AGABA	4 TH PETITIONER
FASICA BERHANE GEBREKIDAN	5 TH PETITIONER
CAMERON ROWAN CORNER	6 TH PETITIONER
ROBEL KHASAY GEBRU	7 TH PETITIONER
ABEL ABRHA ASGEDOM	8 TH PETITIONER
EPHREM KIRUBEL MIHRETEAB	9 TH PETITIONER
DAWIT BIRHANE BERHE	10 TH PETITIONER
TREVIN BROWNIE	11 TH PETITIONER
LUBEGA PACIFIC	12 TH PETITIONER
NAOD AMANUEL GEBREKIDAN	13 TH PETITIONER
TEAMIR DELLELEGN	14 TH PETITIONER
KAUNA IBRAHIM MALGWI	15 TH PETITIONER
TSIDENA ABADI ZEMO	16 TH PETITIONER
MESERET DINKU ABDO	17 TH PETITIONER
AYANA EPHREM GELETA	18 TH PETITIONER
ALEWIYA MOHAMMED MUSA	19 TH PETITIONER
TIKKY OLANG'O	20 TH PETITIONER
KHOTHAMANI MHLONGO	21 ST PETITIONER



YONA BEDASA	22 ND PETITIONER
THRAS GIDEY	23 RD PETITIONER
SAMRAWIT TEKESTE	24 TH PETITIONER
ZEGEYE DAWIT GEBREMARIAM	25 TH PETITIONER
JASON ILOVU	26 TH PETITIONER
ROSEBELLAH WAKHU	27 TH PETITIONER
CAROLINE NJERI MUCHANGI	28 TH PETITIONER
EVELYN NALUWU	29 TH PETITIONER
HASSAN ALKANO	30 TH PETITIONER
EDINAH LUMUMBA	31 ST PETITIONER
PALESA GLORIA KOMETSI	32 ND PETITIONER
MAHAT ABDULLAHI SHEIKH	33 RD PETITIONER
MAHLET YILMA	34 TH PETITIONER
CIELLA IRAMBONA	35 TH PETITIONER
MUSA ABUBAKAR	36 TH PETITIONER
ABDIKADIR GUYO	37 TH PETITIONER
JAMES IRUNGU	38 TH PETITIONER
HABEN HAILE YOHANES	39 TH PETITIONER
JUANITA JONES	40 TH PETITIONER
ODIRILE MOLEBOGE	41 ST PETITIONER
TESSLINE TONI KIEWIET	42 ND PETITIONER
ANTIAN JAY-DEAN MOOSA	43 RD PETITIONER
SAMUEL EBENIRO	44 TH PETITIONER
LIELINA ASSEFA	45 TH PETITIONER
MARION IMUYA MUHANDA	46 TH PETITIONER
ABDULLATEEF KEHINDE	47 TH PETITIONER
BELLA NININHAZWE	48 TH PETITIONER
MAGDALENE SILA	49 TH PETITIONER
SOPHIA DANIELS	50 TH PETITIONER
EPHRATA MAMO	51 ST PETITIONER
AMERTI BAYISA	52 ND PETITIONER
JEAN DE DIEU UWIDUHAYE	53 RD PETITIONER



TUYISHIMIRE MARIE IRENE	54 TH PETITIONER
SIBUSISO DUMA	55 TH PETITIONER
ARIANE HOGOZA	56 TH PETITIONER
FAYO HUSSEIN KADIR...	57 TH PETITIONER
NGARAMBE CHRYSOLOGUE	58 TH PETITIONER
UWAMAHORO STELLA CARINE	59 TH PETITIONER
ABDIKHES DAAR	60 TH PETITIONER
ESTHER MUKAMANA	61 ST PETITIONER
CYLIA SKOSANA	62 ND PETITIONER
MUGERWA HAMIDAH	63 RD PETITIONER
ISMAIL ALIYU	64 TH PETITIONER
LAWAL MOHAMMAD SHUAIBU	65 TH PETITIONER
SONIA MATETE KGOMO	66 TH PETITIONER
JODA BASHIR SUNDAY	67 TH PETITIONER
DAWIT BIRHANE BERHE	68 TH PETITIONER
DAVID NKURUNZIZA	69 TH PETITIONER
NATHAN NKUNZIMANA	70 TH PETITIONER
JOHNSON TWAGIRIMANA	71 ST PETITIONER
NASIRU AMINU MADAKI	72 ND PETITIONER
STEPHAN VAN DEN BERG	73 RD PETITIONER
NALEDI MKHIZE	74 TH PETITIONER
ALINOOR MOHAMED ABDULLAHI	75 TH PETITIONER
WILBERFORCE APUNGU	76 TH PETITIONER
NAFTALI ANDATI WAMBALO	77 TH PETITIONER
RAYWINE MUKONAMBI	78 TH PETITIONER
IRANYIBUTSE KOFFI	79 TH PETITIONER
MUSA ALIYU BAFFA	80 TH PETITIONER
DANIEL ELIAS YADETA	81 ST PETITIONER
MICHAEL MELAKU WALELIGN	82 ND PETITIONER
NEO NKWE	83 RD PETITIONER
BUSISIWE EGNECIOUS NKOSI	84 TH PETITIONER
PHETHILE BRIDGET DLAMINI	85 TH PETITIONER



KWENZEKILE NGIDI	86 TH PETITIONER
PRINCESS NELISIWE MADLEBE	87 TH PETITIONER
ANTONY AWUOR	88 TH PETITIONER
KIDIST FANTU BUZUNEH	89 TH PETITIONER
ASCHALEW SEIFU HUSEN	90 TH PETITIONER
ABDIHAMID BULLE	91 ST PETITIONER
NAKATE JANAT	92 ND PETITIONER
KAME TUYE BADASA	93 RD PETITIONER
NYANGARESI DANCAN	94 TH PETITIONER
UMAR KABIR	95 TH PETITIONER
HIJRA ABDALLAH	96 TH PETITIONER
HANAN ABDI	97 TH PETITIONER
BEATRICE ANI	98 TH PETITIONER
INNOCENTIA NEO MABASO	99 TH PETITIONER
SAMRAWIT MARKOS WELDESENBET	100 TH PETITIONER
MINASE SISAY	101 ST PETITIONER
ESTHER EMOSHOGWE MICHAEL	102 ND PETITIONER
LAWAL SUWIDI MOHAMMAD	103 RD PETITIONER
TUMWEBAZE PROSCOVIA	104 TH PETITIONER
KAME BADASA	105 TH PETITIONER
NAHOM TEKEST	106 TH PETITIONER
ABDIAZIZI HUSSEIN ADAN	107 TH PETITIONER
FREDRICK AMOS OKUMU	108 TH PETITIONER
ABDULLAHI GULIYA ADAN	109 TH PETITIONER
SHEWIT MULUGETA	110 TH PETITIONER
MOHAMED DAUD ABDI	111 TH PETITIONER
RIYAN ISMAEL IBRAHIM	112 TH PETITIONER
HALIMA JILLO	113 TH PETITIONER
NAJMA ILYAS HAJI	114 TH PETITIONER
GLADYS ATYANG	115 TH PETITIONER
TEDDY ODHIAMBO	116 TH PETITIONER
SAUSEPETER OJIAMBO	117 TH PETITIONER



LESEGO MOTLANTHE	118 TH PETITIONER
PASSY NAMYALO	119 TH PETITIONER
ADIAM GEBREZGABHER BEYIN	120 TH PETITIONER
TIRHAS HAILEKIROS HAILESILASSE	121 ST PETITIONER
BOTLHOKWA NONDALI DITSHEPO RANTA	122 ND PETITIONER
MOHAMUD AHMED HAJI	123 RD PETITIONER
HENRY NTEGE	124 TH PETITIONER
MOIPONE MMUSI	125 TH PETITIONER
ABDIAZIZ OSMAN ADAN	126 TH PETITIONER
SANDILE MKHABELA	127 TH PETITIONER
KELVIN MAGU NGILA	128 TH PETITIONER
HELLEN NAMUYANJA	129 TH PETITIONER
MERCY CHIMWANI	130 TH PETITIONER
ROSS KAGOSHE	131 ST PETITIONER
AMIR AHMEDMUZ ADEM	132 ND PETITIONER
SINIDU YOHANNES JOBA	133 RD PETITIONER
YASMIL DAUD ALI	134 TH PETITIONER
ADDNA HAJI	135 TH PETITIONER
LONWABO MTSHENGU	136 TH PETITIONER
HAMZA DIBA TUBI	137 TH PETITIONER
FELIX OTIENO MURUKA	138 TH PETITIONER
IBRAHIM ALIO GALGALLO	139 TH PETITIONER
LARSON ABEL DOMJUL	140 TH PETITIONER
BORU HUSSEIN JATTANI	141 ST PETITIONER
MOHAMED ABDIKADIR IBRAHIM	142 ND PETITIONER
HUSSEIN KORE WAKO	143 RD PETITIONER
MOHAMED GURACHA	144 TH PETITIONER
JATANI HUSSEIN JATANI	145 TH PETITIONER
MOLU ADAN GOLICHA	146 TH PETITIONER
FELIX MUNDE ONDIGO	147 TH PETITIONER
BONGIWE LAMANI	148 TH PETITIONER
BERISA TESFAYE	149 TH PETITIONER



SHARMAKE SAID	150 TH PETITIONER
CARYN PIETERSE	151 ST PETITIONER
SHUKRIA ALI TIFOW	152 ND PETITIONER
ASHA ABDULLAHI ABDIRAHIM	153 RD PETITIONER
OBSITU ALIYI OMER	154 TH PETITIONER
GEORGE KIPSANG	155 TH PETITIONER
KEANAN LESLEY JOUSTEN	156 TH PETITIONER
ELMI OSMAN	157 TH PETITIONER
ABDIRIZAK MUKTAR AHMED	158 TH PETITIONER
IBRAHIM ROBA QAMPARE	159 TH PETITIONER
MARIAM ADHAN HASSAN	160 TH PETITIONER
BIGOMBA LASTO	161 ST PETITIONER
KIBIRIGE IVAN GAAYI	162 ND PETITIONER
MAWERERE ERIC	163 RD PETITIONER
FRANK MUGISHA	164 TH PETITIONER
ENDALEW SHIBABAWA	165 TH PETITIONER
RETINA ASFAW TEGEGN	166 TH PETITIONER
EUNICE WANJIRU MWAURA	167 TH PETITIONER
AHMEDNOOR SALAT OSMAN	168 TH PETITIONER
MUSTAPHA MUKHTAR	169 TH PETITIONER
SANI MUHAMMAD FAISAL	170 TH PETITIONER
STEPHEN KOOME	171 ST PETITIONER
JOSHUA OTIENO OOKO	172 ND PETITIONER
SSENGOOBA ALLAN OSWALD	173 RD PETITIONER
ESTHER MAINGI	174 TH PETITIONER
MARVIN NKOJO	175 TH PETITIONER
ILIYASU ABBA AHMED	176 TH PETITIONER
MUHAMMAD ALIYU	177 TH PETITIONER
EMMANUEL SAMBO	178 TH PETITIONER
FIYORE NUGUS	179 TH PETITIONER
ABDI MOHAMED ALI	180 TH PETITIONER
ROBA DEREJE AMANTE	181 ST PETITIONER



MICHAEL NKOKO 182ND PETITIONER
AYUB HUSSEIN GISHO 183RD PETITIONER

AND

META PLATFORMS, INC 1ST RESPONDENT
META PLATFORMS IRELAND LIMITED 2ND RESPONDENT
SAMASOURCE KENYA EPZ LIMITED T/A SAMA 3RD RESPONDENT
MAJOREL KENYA LIMITED 4TH RESPONDENT

AND

KENYA HUMAN RIGHTS COMMISSION INTERESTED PARTY
KATIBA INSTITUTE INTERESTED PARTY
KITUO CHA SHERIA INTERESTED PARTY
KENYA NATIONAL HUMAN RIGHTS AND EQUALITY
COMMISSION INTERESTED PARTY
CENTRAL ORGANIZATION OF TRADE UNIONS KENYA INTERESTED
PARTY
THE ATTORNEY GENERAL INTERESTED PARTY
MINISTRY OF LABOUR, SOCIAL SECURITY AND SERVICES ... INTERESTED
PARTY
MINISTRY OF HEALTH INTERESTED PARTY
MINISTRY OF FOREIGN AFFAIRS INTERESTED PARTY

Jurisdiction of the Employment and Labour Relations Court in matters of alleged violation of human rights and fundamental freedoms by employers who were foreign companies.

Reported by Kakai Toili

***Jurisdiction** - jurisdiction of the Employment and Labour Relations Court (ELRC) - jurisdiction in matters of alleged violation of human rights and fundamental freedoms by employers against employees - whether the ELRC had jurisdiction in matters of alleged violation of human rights and fundamental freedoms by employers who were foreign companies - whether privity of contract was an essential element in establishing violations of human and fundamental freedoms by a person in control and authority over another - Constitution of Kenya, 2010, article 162(1) and (2).*

***Civil Practice and Procedure** - preliminary objections - nature of preliminary objections - what was the appropriate way in which a party ought to raise a preliminary objection?*

Brief facts

The petitioners were nationals of various countries engaged as Facebook Content Moderators. The petitioners averred that they were engaged by the 1st and 2nd respondents to work in Kenya and that the recruitment was done through the 3rd respondent. The petitioners alleged that the 1st, 2nd, and 3rd respondents had embarked on an unlawful and unfair termination of their employment for the sole reason that one of the moderators formerly engaged by the 1st and 2nd respondents through the 3rd respondent filed a constitutional petition challenging the gross violation of moderators' rights by the 1st, 2nd, and 3rd respondents. The petitioners thus



claimed that the 1st and 2nd respondents had orchestrated a sham redundancy to be undertaken by the 3rd respondent.

The petitioners alleged that their human rights and fundamental freedoms had been violated, continued to be violated, and were further threatened during the sham redundancy process. The 1st and 2nd respondents filed a notice of motion application seeking, among other orders, that the petition be struck out and/or dismissed as against them on, among other grounds, that the court lacked jurisdiction to entertain, hear, and determine the petition. The 1st and 2nd respondents' application was premised on various grounds, including that they were foreign corporations who were neither formally present, domiciled, nor trading in Kenya, over whom the court could not, as a matter of right or law, assume jurisdiction.

Issues

- i. Whether the Employment and Labour Relations Court had jurisdiction in matters of alleged violation of human rights and fundamental freedoms by employers against employees.
- ii. Whether privity of contract was an essential element in establishing violations of human and fundamental freedoms by a person in control and authority over another.
- iii. What was the nature of a preliminary objection?
- iv. What was the appropriate way in which a party ought to raise a preliminary objection?

Held

1. A preliminary objection raised a pure point of law, argued on the assumption that all the facts pleaded by the other side were correct. It could not be raised if any fact had to be ascertained. The preliminary objection raised by the 1st and 2nd respondents fell short of the mandatory requirements of a preliminary objection—it did not constitute a pure point of law argued on the assumption that all the facts pleaded by the other side were correct. There was a plethora of facts raised by the petitioners in the petition and the supporting affidavits, which were yet to be ascertained.
2. For a court to be said to be acting extraterritorially, the violations complained of by the petitioners must have been committed outside the jurisdiction of the court. That was not the case in the instant petition. The raft of alleged violations by the 1st, 2nd, and 3rd respondents was said to have been committed in Kenya and within a workspace provided by the 1st and 2nd respondents. Privity of contract was not an essential element in establishing violations of human rights and fundamental freedoms by a person in control and authority over another.
3. The 1st and 2nd respondents had been properly served with the court processes and had rightly been placed within the territorial jurisdiction of the court to enable them to defend the case brought against them by the petitioners, as they were already justly and effectively doing so through a duly appointed firm of advocates.
4. The jurisdiction of the court to hear and determine matters was founded under article 162(1) and (2) of the Constitution of Kenya, 2010. The jurisdiction of the court was in flux and a moving target. That had created uncertainty on what the jurisdiction of the court was, and it was about time the Supreme Court rendered itself authoritatively on the matter. Almost every other matter before the court started with a challenge on the jurisdiction of the court due to the lingering uncertainty. That led to uneconomical use of the court's time and to the case backlog.
5. The court had jurisdiction to determine the matter of alleged unlawful and unfair termination of employment on grounds of redundancy by the 1st, 2nd and 3rd respondents, and also the court had jurisdiction to enforce alleged violations of human rights and fundamental freedoms by the 1st, 2nd, 3rd, and 4th respondents against the petitioners as set out in the petition and the supporting documents.
6. The dispute arose from an employer–employee dispute. The court would consider the nature and extent of liability with regard to the alleged breaches and violations of the Constitution arising from or related to employment and labour relations in Kenya. It was immaterial whether the alleged violations occurred in a physical or virtual space within the jurisdiction of the court in Kenya.



7. The court distinguished its decision in Nairobi ELRC Petition No E071 of 2022 – *Daniel Motaung v Sama Source Kenya EPZ Limited t/a Sama and 2 others* where the court held that the petitioners in that case had not sought leave to serve summons on the 2nd and 3rd respondents in terms of order 5, rule 21 of the Civil Procedure Rules, and therefore the court found that it was not satisfied that it had assumed jurisdiction over the 2nd and 3rd respondents in that matter. The court, however, did not strike out the 2nd and 3rd respondents from the petition but allowed the petitioners to comply with order 5 rule 22 of the Civil Procedure Rules.
8. The alleged failure by the petitioners to disclose material facts was without merit. The disputed facts alluded to by the 1st and 2nd respondents shall be fully ventilated, considered, and determined upon hearing of the suit on the merits.
9. Whereas pure points of law may be raised in any manner and the court may discern them from pleadings and raise the same *suo moto*, it was appropriate for a party who wished to raise a preliminary objection to do so by a notice of preliminary objection or in a statement of defence where appropriate to avoid unnecessary arguments on how the points of law had been taken up by the objectors.

Preliminary objections dismissed.

Orders

- i. *Due to the nature of the matter and the interim orders in place, considering that the court had just commenced its leave, the matter was referred to the Principal Judge to allocate the matter to another judge within the Judicial Review and Labour Relation's Division to hear and determine the pending application and the petition on the merits on a priority basis.*
- ii. *The interim orders were extended pending the hearing and determination of the notice of motion dated March 17, 2023.*
- iii. *Costs in the cause.*

Citations

Cases

1. *Abdulabi, Bashir Haji v Adhan Mohamed Mooru & 3 others* Civil Appeal 300 of 2013; [2014] KECA 707 (KLR) - (Explained)
2. *Attorney General & 2 others v Okiya Omtatah Okoiti & 14 others* Civil Appeal 621 of 2019 & 74 of 2020; [2020] eKLR (Consolidated) - (Mentioned)
3. *Attorney General & another v Andrew Maina Githinji & another* Civil Appeal 21 of 2015; [2016] KECA 817 (KLR) - (Explained)
4. *Mambo, Rose Wangui & 2 others v Limuru Country Club & 17 others* Constitutional Petition 160 of 2013; [2014] KEHC 7683 (KLR) - (Explained)
5. *Miguna, Miguna v Lufthansa Group Operating as Lufthansa German Airlines & 6 others; Kenya National Commission on Human Rights & another; (Interested Parties)* Petition 47 of 2020; [2021] KEHC 1916 (KLR) - (Explained)
6. *Motaung v Samasource Kenya EPZ Limited t/a Sama & 2 others* Petition E071 of 2022; [2023] KEELRC 320 (KLR) - (Distinguished)
7. *Mugendi, Daniel N v Kenyatta University & 3 others* Civil Appeal 6 of 2012; [2013] KECA 41 (KLR) - (Mentioned)
8. *National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others* Civil Appeal 656 of 2022; [2023] KECA 80 (KLR) - (Mentioned)
9. *United States International University (USIU) v Attorney General & 2 others* Petition 170 of 2012; [2012] KEHC 5516 (KLR) - (Explained)

Regional Court

Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited [1969] EA 696 - Explained



Statutes

1. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 5; rules 21, 22A, 22B - (Interpreted)
2. Constitution of Kenya articles 9, 20, 22, 27, 28, 29, 33, 36, 41, 43, 47, 50, 54, 55, 162(1)(2) - (Interpreted)
3. Employment and Labour Relations Court Act (cap 8E) section 12 - (Interpreted)
4. National Social Security Fund Act (cap 258) In general - (Cited)

Advocates

Kaplan & Stratton Advocates for the 1st and 2nd respondents

Walker Kontos Advocates for the petitioners

RULING

1. The petition was filed by the 1st to 43rd petitioners on March 20, 2023. The petitioners have been joined by 183 other petitioners pursuant to an application for joinder dated April 11, 2023 which application was not opposed by the respondents and interested parties herein. The court granted the order for joinder accordingly on April 13, 2023.
2. The petitioners are nationals of various countries engaged as Facebook Content Moderators. The petitioners have averred in the petition that they were engaged by the 1st and 2nd respondents being Meta Platforms, Inc, and Meta Platforms Ireland Limited to work in Kenya. That the recruitment was done through the 3rd respondent, Sama Source Kenya EPZ Limited t/a Sama.
3. The petitioners allege that the 1st, 2nd and 3rd respondents have embarked on an unlawful and unfair termination of their employment as Facebook Content Moderators for the sole reason that one of the moderators formerly engaged and by the 1st and 2nd respondents through the 3rd respondent filed a constitutional petition in May, 2022 challenging the gross violation of moderators' rights by the 1st, 2nd and 3rd respondents.
4. That seemingly, in retaliation the 1st and 2nd and 3rd respondents have decided that they do not want to deal in any manner with any moderators who were engaged through the 3rd respondent as they are enlightened on their rights by association, and therefore a threat.
5. That the 1st and 2nd respondents have as a result orchestrated a sham redundancy to be undertaken by the 3rd respondent to get rid of 260 Facebook Content Moderators engaged through the 3rd respondent.
6. That the 1st and 2nd respondents thereafter partnered with the 4th respondent to engage moderators through the 4th respondent, on condition the 4th respondent would not engage any of the content moderators that had been engaged through the 3rd respondent. That this petition presents the clearest case of abuse of the redundancy process in Kenya.
7. The petitioners allege that their human rights and fundamental freedoms have been violated, continue being violated and are further threatened during the sham redundancy process.
8. The petitioners further detail the human rights violations they have suffered while working for the 1st 2nd and 3rd respondents and how the work they have done has affected their mental health and their general well-being. That in return the 1st, 2nd and 3rd respondents after exploiting them now want to dump them out and replace them with others.
9. That the petitioners are all currently based at the respondents' premises in Nairobi Kenya though they come from different countries.



10. That the petition is brought in terms of articles 9, 20, and 22 of the Constitution.
11. Grounds of petition
 - (a) That the redundancy is unlawful as it has no substantive justification and does not adhere to the principle of procedural fairness. That in conducting the redundancy, the 1st, 2nd and 3rd respondent's violated the moderators' rights under article 41, 47, 28 and 55 of the Constitution.
 - (b) That the refusal by the 1st, 2nd and 4th respondents to hire the content moderators engaged through the 3rd respondents amounts to discrimination and is a violation of article 27 of the Constitution. The conduct of the respondents amounts to discrimination against the Facebook Content Moderators engaged through the 3rd respondents; and
 - (c) That the 1st, 2nd and 3rd respondent have violated the right to fair labour practices of the petitioners and those of other moderators through the period they were engaged and
 - (d) The 1st, 2nd and 3rd respondent's failure to provide adequate psychosocial support to the moderators is a violation of their right to health and to reasonable working conditions.
12. The petitioners have pleaded that they are engaged on a complex employment relationship by the 1st, and 2nd respondents through the 3rd respondent.
13. That all the work known as Facebook Content Moderation belongs to the 1st and 2nd respondents. It is the 1st and 2nd respondents who are in charge of all factors of production including Content Moderation which takes place at the workplace and the digital work place (SRT) which are fully under the control of the 1st and 2nd respondents. The digital Workplace is fitted with Surveillance features which keep track of all the work done, the time spent on each assignment and movements of the Facebook Content Moderators. The amount of time spent at the digital workplace together with other metrics is computed and billed for each content moderator. Their performance is reflected on their payslip which shows there is a direct connection between their work and their pay.
14. The key tools of trade are the Facebook community standards which are wholly created and revised by the 1st and 2nd respondents. The work is queued directly from the 1st and 2nd respondents to the Facebook content moderators in the digital workplace and the 1st and 2nd respondents have set performance metrics which are used to assess the performance of each moderators for every part they review.
15. That the 1st and 2nd respondents' partners such as the 3rd and 4th respondent are mere conduits used to record for Facebook Content Moderators and is an attempt to shield the 1st and 2nd respondents from liability. (emphasis added).
16. That the Content Moderation Centre, Nairobi serves the larger Eastern and Southern African Region. That considering the variety of language spoken in these regions moderations are drawn from different countries to moderate posts that are in each local language. As a result, a lot of the moderators engaged through the 3rd respondent are foreigners on work permits. Some are refugees drawn from countries to which it is too dangerous to return at the moment.

Events Leading To The Suit.

17. The petitioners state that on January 9, 2023, an email was sent by Lilian Kiplang'at, the Program Director to all members of GPL8 (Facebook Content Moderators) informing them of an in-person Town-hall meeting to be held on January 10, 2023 at 10.am.



18. That on January 10, 2023 all the moderators attended the town-hall meeting where the 3rd respondent's top management including Lilian Kiplang'at, Clinton Odindo, Habel Kamau, Jennifer Kivuva and the Chief Executive Officer, Wendy Gonzalez were present.
19. That Lilian informed the moderators that the 1st and 2nd respondents did not want to renew their contracts with the 3rd respondent. That as a result, all the Facebook Content Moderators would be losing their jobs and they would be declared redundant. That their last working day would be February 28, 2022. [Emphasis added]
20. The announcement destabilized the moderators a lot, many of whom had migrated to Kenya for the job. Many of the moderators needed counselling following the announcement. The moderators were denied a session with the counsellors. That considering the kind of work the moderators handle, access to mental health support is a vital requirement.
21. An email was shortly sent to members of the GPL 8 Team by Lilian titled "Important and Confidential: Redundancy notice for CO Business." The notice indicated that the moderators' positions would be declared redundant with effect from February 28, 2023. The notice was for 30 days. The notice provided a calendar of events which included:-
 - (i) January 10, 2023, notification to the labour office.
 - (ii) Consultation and immigration support period.
 - (iii) 10th January, to February 9, 2023 – service package discussion.
 - (iv) February 28, 2023 – last day of work and during the period the wellness team would be available to give additional wellness support. That wellness support would continue for 12 months after the last working day.
22. The specific violations of the Constitution by the 1st, 2nd, 3rd and 4th respondents have been pleaded in greater detail in paragraphs 221 to 234 of the petition.
23. The petitioners prays for the following reliefs:-
 - (a) A declaration that the respondents jointly and severally violated the petitioners' constitutional rights and the constitutional rights of the Facebook Content Moderators engaged through the 3rd respondent as guaranteed under articles 27, 28, 29, 33, 36, 41, 43, 47, 50, 54 and 55 of the Constitution of Kenya, 2010.
 - (b) A declaration that the redundancy undertaken by the 1st, 2nd and 3rd respondents is unlawful as it is without justification and is procedurally unfair.
 - (c) A declaration that the termination of the moderators on account of redundancy amounts to unfair termination.
 - (d) A declaration that the termination letters issued to the moderators on account of redundancy are null and void.
 - (e) A declaration that the moderators engaged through the 3rd respondent were subjected to unfair remuneration in that the pay they were offered was inadequate and incommensurate to the work they were doing and the risk they were exposed to.
 - (f) A declaration that the Non-Disclosure Agreements the moderators signed are invalid for being unfair and for lack of consideration.



- (g) A declaration that the Non-Disparagement Agreements the moderators are being made to sign during the redundancy process are unlawful as they are unfair and lack consideration.
- (h) An order reinstating the moderators to the positions they were in.
- (i) An award of compensatory damages for unfair termination of employment equivalent to twelve months gross salary.
- (j) An order that the 1st, 2nd and 3rd respondents jointly and severally pay to each moderator engaged through the 3rd respondent an award for aggravated damages amounting to Kshs 10,000,000 per moderator with interest for unfair labour practices experienced while they were content moderators.
- (k) An order that the 1st, 2nd and 3rd respondents jointly and severally pay each moderator engaged through the 3rd respondent an award of damages amounting to Kshs 20,000,000 per moderator with interest for violation of their constitutional rights under articles 27, 28, 29, 33, 36, 41, 43, 47, 50, 54 and 55.
- (l) An order that the 1st, 2nd and 3rd respondents jointly and severally pay to each moderator engaged through the 3rd respondent, current or former, an award of damages amounting to Kshs 20,000,000 per moderator with interest for the damage caused to their mental health and general well-being as a result of the constant exposure to toxic content with little to no mitigation measures.
- (m) An order that the 1st, 2nd and 4th respondents jointly and severally pay to the moderators who they failed to recruit on account of them having been engaged through the 3rd respondent an award of damages amounting to Kshs 1,000,000 per moderator with interest for violating their right of freedom from discrimination.
- (n) An order that the respondents jointly and severally cater for the costs of lifelong treatment for each moderator, current or former engaged through the 3rd respondent for any mental health problems that they may have developed as a result of being Facebook Content Moderators.
- (o) An order that the moderators engaged through the 3rd respondent deserved a higher salary to the tune of Kshs 400,000 per month (gross) with interest and that the same be applied retrospectively to each moderator beginning with the date of their engagement.
- (p) An order that the 3rd respondent accounts for and pays back all the unlawful deductions made from each moderator's salaries and that all the moderators be provided with their payslips from the date of employment to the date of termination of employment or to date.
- (q) An order of permanent injunction restraining the respondents either by themselves, their servants, agents, employees, or anyone acting under their authority, direction, control, or instruction from, whether by words or actions, making any threat to or in any way whatsoever retaliating against any of the moderators for bringing this petition or giving evidence herein.
- (r) An order that the respondents each prominently exhibit in the 2nd respondent's premises, the 4th respondent's premises, and on the 1st and 2nd respondent's intranet workplace, a notice affirming that Facebook Content Moderators have the right to speak out about their working conditions and to form a union, and that the respondents will not interfere with these rights.
- (s) An order that the respondents jointly and severally implement at the 3rd and 4th respondents' premises in Nairobi, a psychological and mental health support system for the moderators



identical to that in the 1st and 2nd respondent's Headquarters at Menlo Park and Dublin for as long as the 1st and 2nd respondents continue partnering with the 3rd respondents for purposes of carrying out content moderation and all data annotation work.

- (t) An order awarding the costs of the petition together with interests to the petitioners.
24. The petition was accompanied by a notice of motion application on a certificate of urgency seeking various interim reliefs pending the hearing and determination of the application and the petition on the merits.
25. The court considered the application *ex parte* and granted an order in terms of prayers (a) (b) (c), (e), (i) and (k) of the notice of motion.
26. In terms of prayers (b) the court granted leave to the petitioners *ex parte* to effect service of the petition and of the application on the 1st and 2nd respondents at their principal offices in the United States and Ireland respectively in accordance with order 5, rule 22(A) (Internationally registered and recognized customer services) and order 5 rule 22(B) (Electronic Mail Services of the *Civil Procedure Rules*) and that such services be deemed adequate for the purpose of order 5.
27. The court notes that service was duly effected on the 1st and 2nd respondents who have since entered appearance in this matter through their appointed advocates.
28. The court further enjoined the Redundancy Notice issued to Facebook Content Moderators (GPL8 CO) on January 10, 2023 and by so doing restraining restrained the 1st, 2nd and 3rd respondent from terminating the contract of the Facebook Content Moderators pending the hearing and determination of the application.
29. The court further enjoined the 1st and 2nd respondents from replacing the Content Moderators engaged through the 3rd respondent pending the hearing and determination of the application.
30. The court further issued an interim prohibitory order restraining the 1st, 2nd and 4th respondents from refusing to recruit qualified Content Moderators on grounds that they were previously engaged through the 3rd respondent pending the hearing and determination of the application.

Response

31. In response to the petition and the Notice of Motion application aforesaid, the firm of Kaplan & Stratton Advocates for the 1st and 2nd respondents filed a notice of motion application dated March 24, 2023 seeking an order in the following terms:-
1. Spent
 2. That pending the hearing and determination of the application herein, this honourable court be pleased to stay the orders made on March 20, 2023.
 3. That the application herein be heard on priority to any other application and/or other proceedings in this petition, to include the petitioner's application dated March 17, 2023.
 4. That the petition herein be struck out and/or dismissed as against the 1st and 2nd respondents and the *ex-parte* orders made and issued as against the 1st and 2nd respondents on March 20, 2023 be set aside and/or discharged *ex debito justitiae* on the grounds:-
 - a. This honourable court lacks jurisdiction to entertain, hear and determine the petition herein as against the 1st and 2nd respondents.



- b. The petition is in any event, unsuitable as against the 1st and 2nd respondents as it was filed in violation of the mandatory provisions of the Constitution of Kenya, (2010) and the law.
 - c. The ex-parte orders issued by this court on March 20, 2023 as against the 1st and 2nd respondents are a nullity *ab initio*, as the said orders were made in excess of this court's jurisdiction.
 - d. The petitioners herein, at the ex parte stage of these proceedings, failed to make a full and fair disclosure of material facts within its knowledge germane to the dispute and have deliberately, negligently or recklessly concealed and obfuscated material facts at the hearing of the petitioner's application dated March 17, 2023.
5. Costs of this application and the petition be awarded to the 1st and 2nd respondents.
32. The application is premised on grounds set out on the face of the notice of motion the nub of which is that:-
1. The 1st and 2nd respondents are foreign corporations who are neither formally present, domiciled nor trading in Kenya over whom this honourable court cannot as a matter of right or law assume jurisdiction.
 2. The 1st and 2nd respondents are not in fact or law, and on the demonstration by the petitioners, the employers of the petitioners herein. The petitioners have deliberately dishonestly and unfairly concealed and obfuscated the material fact that they are only employed by the 3rd respondent and by virtue of written contracts of employment between the petitioners and the 3rd respondent.
 3. As there is no employer-employee relationship between the petitioners and the 1st and 2nd respondents, this court lacks jurisdiction over any purported dispute between the petitioners and the 1st and 2nd respondents.
 4. As required by law, the petitioners have failed to show sufficient grounds or good cause upon which this honourable court could have granted leave to serve the petition out of Kenya and in any event, the circumstances of this petition do not warrant an order for leave to serve the Petition out of Kenya. Any order for leave to serve the 1st and 2nd respondents was granted in excess of this honourable court's jurisdiction and should be set aside *ex debito justitiae*.
 5. In any event, and notwithstanding the grounds above, this court cannot assume jurisdiction over the 1st and 2nd respondents in the circumstances of this petition.
 6. The petition is bad in law, incompetent and a non-starter for want of jurisdiction as against the 1st and 2nd respondents. It is just and equitable in the circumstances that the orders sought in the application herein are granted.
33. The application is not supported by any affidavit. Upon hearing oral submissions by advocates for the parties, the court gave directions on the disposal of the preliminary objection set out in the application by the 1st and 2nd respondents dated March 23, 2023. The advocates for the 1st and 2nd respondents and the advocates for the petitioners filed written submissions with list of authorities. The 3rd and 4th respondents opted not to participate in the hearing and determination of the preliminary objection.
34. The advocates for the 1st and 2nd respondents and the advocates for the petitioners highlighted the submissions and list of authorities cited on April 13, 2023.



Determination

35. The court having considered the objection to the application and petition by the 1st and 2nd respondents and the submissions by the parties has identified the following issues for determination:-
- (a) Whether the court has jurisdiction to hear and determine the petition.
 - (b) Whether the 1st and 2nd respondents' notice of motion application can be considered as a notice of preliminary objection.
 - (c) Whether the 1st and 2nd respondents are proper parties in this case; and
 - (d) Whether the petitioners are guilty of non-disclosure of material facts.

Jurisdiction

36. The court will consider the issues delineated together. the 1st and 2nd respondents' object to the jurisdiction of this court to hear and determine the petition was summarized by the advocates for the 1st and 2nd respondents as follows:-
- i. That the 1st and 2nd respondents are foreign corporates who are not resident or trading in Kenya and this court as a matter of right or law cannot assume jurisdiction over the 1st and 2nd respondents.
37. The 1st and 2nd respondents submit further that the petitioners describe the 1st and 2nd respondents in paragraphs 4 and 5 of the petition as "a multinational public company with operations and customers all over the world with its principal offices at "1601 Willow Road, Menlo Park, California 94025" and the 2nd respondent is described as "a subsidiary of the 1st respondent and a limited liability company with the principal offices at 4 Grand Canal Square grand Canal Harbour Dublin, Ireland"
38. The respondents submit therefore it is apparent that the petitioners knew that the two entities were foreign companies without either a Legal or factual presence in Kenya. The respondents submit further that the petitioners sought leave, which leave was granted to effect service of the application and the petition out of Kenya. The petitioners were therefore well aware that the 1st and 2nd respondents had their residency and principal offices out of Kenya and in particular in the United States of America and Ireland respectively.
39. That the petitioners cannot in the same breath be heard to plead, as they did in the petition that they are being treated unfairly by the 1st and 2nd respondents in Kenya because of the earlier petition filed by their colleagues in Petition E071 of 2022, [Daniel Motaung vs Sama Source EPZ Limited trading as Sama](#) (as the 1st respondent) Meta Platforms, Inc. (as the 2nd respondent) and Meta Platforms Ireland (as the 3rd respondent).
40. The respondents submits also that the petitioners deliberately obfuscate and mischaracterize the hard truth that the petitioners herein are employed by Sama, the 3rd respondent and not by the 1st and 2nd respondents. That this is a deliberate non-disclosure of a material and relevant facts which should disentitle the applicants to the reliefs sought.
41. That the petitioners seek to introduce a legal theory unknown to the law, by pleading, that the petitioners are "Facebook Content Moderatos engaged through 'the 3rd respondent to work for the 1st and 2nd respondents" *inter alia*. That this is an attempt by the petitioners to bend over backwards to



avoid the truth, which is replete through the pleadings and documents on record and in particular in the letter of offer referred to at paragraph 21 of the affidavit of the 1st petitioner which states:-

“It gives me great pleasure to communicate our intent for you to serve as a Content Moderator at Sama Source Kenya.”

42. On the issue of jurisdiction, the respondents and petitioners rely on the case of *Mukisa Biscuits Manufacturing Company Limited vs West End Distributors Limited* (1969) EA in which it was famously held by Newbold J that a preliminary objection is one that raises a pure point of law argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained.
43. The Court of Appeal in the case of *Attorney General and Another vs Andrew Maina Gitinji and Another* [2016] affirms this position – Waki JA held that all the above three conditions must be met for a preliminary objection to be sustained.
44. From the pleadings of the petitioners, it is apparent that they were aware that the 1st and 2nd respondents are corporate bodies registered in the United States of America and Ireland respectively. However, the petitioners have maintained throughout the pleadings that the 1st and 2nd respondents have operations all over the world. That the 1st and 2nd respondents were the actual employers of the petitioners even though the recruitment and the contracts of employment were done by the 3rd respondent. The petitioners have pleaded that they work in the Virtual Platform provided and owned by the 1st and 2nd respondents and the 1st and 2nd respondents are in control of not only their place of work but also supervise and control their daily work. That the platform which provides their daily work environment – in which they allege continuous violation of their stated rights and fundamental freedoms is provided solely and controlled by the 1st and 2nd respondents [Emphasis added].
45. The 1st and 2nd respondents have not yet filed any replying affidavit to the petition even though they attempt to dispute these facts set out by the petitioners in the grounds of objection set out in the notice of motion dated March 24, 2023. The contestation of the facts of employment as set out in the petition by the petitioners have not been pleaded in a supporting affidavit to the notice of motion filed by the 1st and 2nd respondents.
46. It is apparently clear that the preliminary objection raised by the 1st and 2nd respondent in this respect – falls short of the mandatory requirements set out in the *Mukisa Biscuits* case (*supra*) – that it does not constitute a pure point of law argued on the assumption that all the facts pleaded by the other side are correct. There are a plethora of facts raised by the petitioners in the petition and the supporting affidavits which are yet to be ascertained. The Court of Appeal in the case of *Bashir Haji Abdulahi vs Adhan Mohamed Mooru & 3 others* [2014] eKLR made the following distinction between points of law and matters of fact – ‘Matter of fact’ is a matter involving a judicial inquiry into the truth of alleged facts; a ‘matter of law’; is a matter involving judicial inquiry into the applicable law.”
47. The question the court is called upon to determine upon hearing the case on the merits is whether or not the 1st and 2nd respondents are in fact and law the actual employers of the petitioners as alleged in the petition and whether the 1st and 2nd respondents are guilty of the violation of the rights and freedoms of the petitioners as set out in the petition in the capacity as employers and/or supervisors who are in control of the petitioners.
48. In *Miguna Miguna vs Lufthansa Group operating as German Airlines & 6 others – KNCHR and another* [2021] eKLR Korir J. held that for a court to be said to be acting extra territorially, the violations complained of by the petitioners must have been committed outside the jurisdiction of



the court. This is not the case in this petition. The raft of alleged violations by the 1st, 2nd, and 3rd respondents are said to have been committed in Kenya and within a work space provided by the 1st and 2nd respondents. Privity of contract is not an essential element in establishing violations of human and fundamental freedoms by a person in control and authority over another. [emphasis is added].

49. The court in this respect is persuaded by the three judge bench decision in *Rose Wangui Mambo & 2 others vs Limuru County Club & 17 others* [2014] eKLR where the court held as follows:-

50. “It is also worth mentioning that according to the rules, a petition cannot be defeated by reason of the misjoinder or non-joinder of parties. The court in such an instance is mandated to deal with the matter in dispute according to rule 5(b) of the rules, while rule 5(d) allows the court at any stage of the proceedings, (either upon or without the application of either party) to order that the name of any party improperly joined be struck out and that the name of any person who ought to have been joined or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter be added.

51. The 2nd to 9th respondents have invoked the doctrine of corporate legal entity to claim that they are wrongfully enjoined as respondents. Without appearing to trample on the age old doctrine of corporate legal personality which we do not find necessary to delve into, we think that the issue must be approached more from a practical perspective rather than a purely legalistic manner; and in a way that best advances the cause of justice with regard to all parties concerned.

52. From the definition of the term ‘respondents’ set out above, we understand the implication to be that any person can be joined as a respondent so long as there is an allegation that the person has infringed or threatens to infringe the petitioner’s fundamental rights. It is perhaps worth noting that at this point, we are not talking of determination of culpability or liability, as that we think is an issue for the court to eventually determine.”

50. It is the court’s considered finding that the 1st and 2nd respondents have been properly served with the court processes in this matter and have rightly been placed within the territorial jurisdiction of the court to enable them to defend the case brought against them by the petitioners as they are already justly and effectively doing through duly appointed firm of advocates.

51. The 3rd respondent who has been described by the petitioners as a conduit and partner through which the petitioners were recruited by the 1st, 2nd and 3rd respondents chose rightly not to challenge the jurisdiction of this court recognizing that what is before court are matters relating or arising out of employment and labour and/or arising from an employment relationship between the parties within the meaning of section 12(1) (a) of the *Employment and Labour Court Act, 2014*.

52. The jurisdiction of this court to hear and determine matters is founded under article 162(1) and (2) of the *Constitution* of Kenya, 2010 which provides:-

“(1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

(2) Parliament shall establish courts with the status of the High Court, to hear and determine disputes relating to:-

a. Employment and Labour Relations;” and
article 165(5) which provides:-

“(5) The High Court shall not have jurisdiction in respect of matters:-



- (a)
- (b) Falling within the jurisdiction of the court's contemplated in article 162 (2)

53. Section 12 of the [Employment and Labour Relations Court Act](#), No 18 of 2014 provides:-

“12(1) The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with article 162(2) of the [Constitution](#) and the provisions of this Act or any other written Law which extends jurisdiction to the court relating to employment and Labour Relations including :-

- a. Disputes relating or arising out of employment between an employer and/or employee.” [emphasis added]

54. Article 162(2) and sections 12(1)(a) aforesaid have been the subject of many decisions of this court; the High Court; and the Court of Appeal. To date this issue has not be settled.

55. The jurisdiction of this court can aptly be said to be in flux and a moving target. This has created uncertainty on what the jurisdiction of this court is and it is about time the Supreme Court rendered itself authoritatively on the matter. It need not be gain said, that almost every other matter before this court starts with a challenge on the jurisdiction of this court due to the lingering uncertainty. This is leading to uneconomical use of the court's time and to the case backlog.

56. The following Court of Appeal decisions on jurisdiction of Employment and Labour Relations Court are relevant to this matter.

1. [Professor Daniel Mugendi and Kenyatta University and 2 others](#) [2013] eKLR.
2. [The National Social Security Fund vs Kenya Tea Growers Association and 14 others](#) [2023] KCA A 80 KCR
3. [Attorney General and 2 others vs Okiya Omtatah Okoiti and 14 others](#) [2020] eKLR.

57. In the case of *Professor Daniel Mugendi (supra)* the Court of Appeal bench of Nambuye, Mwera and Kiage JJ cited with approval the decision of Majanja J in Petition No 170 of 2012 - [United States International University \(USIU\) vs The Attorney General and others](#) as follows:-

“The learned judge had in the proceedings before him been addressed on the aspect where it was alleged that fundamental rights relating to employment and labour (article 41 Constitution) had been violated, and whether the Industrial Court could entertain such claims. While adopting the position enunciated in the South African case of *Gcaba vs Minister of Safety and Security & others* CCT 64/08 (2009) ZACC 26, Majanja, J proceeded:

“44.....I would adopt the position of the Constitutional Court of South Africa in *Gcaba Vs Minister of Safety and Security (supra)*. The Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of article 162(3), section 12 of the Industrial Court Act, 2011 has set out matters within the exclusive domain of that court. Since the court is of the same status of the High Court, it must have the jurisdiction to enforce labour rights in article 41 and the jurisdiction to interpret the [Constitution](#) and fundamental rights and freedoms, is incidental to the exercise of jurisdiction over matters



within its exclusive domain. In any matter falling within the provisions of section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce, not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the *Constitution* within the matter before it.” [emphasis added]

58. The Court of Appeal concluded:-

“We have quoted in extenso the pertinent parts of the judgment above for the relevance attached to this appeal. In sum on this ground of jurisdiction, we find as we had stated earlier that the High Court had no jurisdiction to entertain the claim which essentially was based on breaches of contract of employment along with some unstated claims of breaches of rights, as the learned judge did find.”

59. The petitioners herein allege breach of the employment contract between them and the 1st, 2nd and 3rd respondents, violation of rights and fundamental freedoms by the 1st, 2nd and 3rd respondents and discrimination occasioned them by the 1st, 2nd and 4th respondents on ongoing recruitment of new staff on the petitioners.

60. The court finds that this court has jurisdiction to determine the matter of alleged unlawful and unfair termination of employment on grounds of redundancy by the 1st, 2nd and 3rd respondents and also the court has jurisdiction to enforce alleged violation of human rights and fundamental freedoms by the 1st, 2nd, 3rd and 4th respondents against the petitioners as set out in the petition and the supporting documents.

61. The National Social Security Fund decision (*supra*) relied upon by the respondents was delivered by a different bench of the Court of Appeal composed of Okwengu, Warsame and Mativo JJ. The Court of Appeal observed at paragraph 55 of the judgment that:-

“The issue under consideration in the petitions was the constitutional validity of a statute and or some specific provisions of the *NSSF Act, 2013*. The constitutional validity of the statute or the targeted provisions did not arise from an employer-employee dispute. [emphasis added]

62. This court while upholding the interpretation given to article 162(2) (a) read with section 12(1) (a) by the Court of Appeal in *Professor Mugendi* case (*supra*) distinguishes the Court of Appeal decision in the *NSSF* case (*supra*) in that the Court of Appeal in that case made a specific finding at paragraph 35 that:-

“

“(35) The constitutional validity of the statute or the targeted provisions did not arise from an employer-employee dispute.” [emphasis added]

This was the position taken by the Court of Appeal in *Omtatab* case (*supra*) as follows:-

“.....Decided cases are in agreement that constitutional issues can be determined by Employment and Labour Relations Court only if they arise from an employer-employee dispute.”

63. The present dispute arises from an employer – employee dispute. The court will consider the nature and extent of liability with regard to the alleged breaches and violations of the *Constitution* arising and



or related to employment and Labour relations in Kenya. It is in the court's considered finding that it is immaterial whether the alleged violations occur in a physical or virtual space within the jurisdiction of this court in Kenya. The court distinguishes the decision of this court in Nairobi ELRC Petition No E071 of 2022 – *Daniel Motaung and Sama Source Kenya EPZ Limited t/a Sama and 2 others* in that the judge held that the petitioners in that case had not sought leave to serve summons on the 2nd and 3rd respondents in terms of order 5, rule 21 of *Civil Procedure Rules* and therefore the court found that it was not satisfied that it had assumed jurisdiction over the 2nd and 3rd respondents in that matter. The court however did not strike out the 2nd and 3rd respondents from the petition but gave the petitioners opportunity to comply with order 5 rule 22 of the *Civil Procedure Rules*.

64. The court has also considered the alleged failure by the petitioners to disclose material facts and have found the said allegations to be without merit. the court need not emphasise that the dispute of facts alluded to by the 1st and 2nd respondents shall be fully ventilated, considered and determined upon hearing of the suit on the merits.
65. In the final analysis, this court finds that all the preliminary objections raised by the 1st and 2nd respondents, in a Notice of Motion not supported by any affidavit to be without merit.
66. Whereas pure points of law may be raised in any manner and the court may discern them from pleadings and raise same suo moto, the court considers it appropriate for a party who wishes to raise a preliminary objection to do so by a notice of preliminary objection or in a statement of defence where appropriate to avoid unnecessary arguments on the manner in which the points of law have been taken up by the objectors.
67. Accordingly, the preliminary objections raised are found to be without merit and are dismissed with costs in the cause.
68. Due to the nature of this matter and the interim orders in place, considering that this court has just commenced its leave, i refer this matter to the principal judge to allocate the matter to another judge within the Judicial Review and Labour Relation's Division to hear and determine the pending application and the petition on the merits on a priority basis. The interim orders are extended pending the hearing and determination of the notice of motion dated March 17, 2023.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 20TH DAY OF APRIL, 2023.

MATHEWS N NDUMA

JUDGE

Appearance

Kaplan & Stratton Advocates for the 1st and 2nd respondents

Walker Kontos Advocates for the petitioners

Ekale – Court Assistant

