



Masoud (for and on behalf of employees of KRA) v Kenya Revenue Authority & 2 others (Cause E088 of 2022) [2023] KEELRC 1207 (KLR) (18 May 2023) (Ruling)

Neutral citation: [2023] KEELRC 1207 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E088 OF 2022**

**M MBARŪ, J
MAY 18, 2023**

BETWEEN

MUNIR ABUBAKAR MASOUD (FOR AND ON BEHALF OF EMPLOYEES OF KRA) CLAIMANT

AND

KENYA REVENUE AUTHORITY 1ST RESPONDENT

JAMES MBURU GITHII 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. The 1st and 2nd respondents filed notice of Preliminary Objections on January 13, 2023 and on the grounds that;
 1. The claim dated November 18, 2022 does not meet the constitutional threshold set out in *Anarita Karimi Njeru v The Republic* (1979) eKLR and later restated in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR that a constitutional petition should set out with a degree of precision the claimant complaint, the provisions infringed and the manner in which they are alleged to be infringed by the 1st and 2nd respondents.
 2. The claim dated November 18, 2022 is incompetent and an abuse of the court process as the matter is *res judicata* in light of the case of Nairobi H C C H R Pet No E495 of 2022 Kenya Revenue Authority v Banking Insurance & Finance Union (K) and Court of Appeal Civil Appeal No 244 of 2010 (Civil Application No 21 of 2018) Banking Insurance and Finance Union v Kenya Revenue Authority.



3. The claimant lack locus standi as espoused in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR to institute the present claim. The court stated as follows - ...
 4. The 1st and 2nd respondents will be unable to comply with the orders sought by the claimant as compliance will be contrary to Article 24 of the Constitution of Kenya, 2010.
2. The claimant responded to the objections on the grounds that preliminary objections should be on pure point of law and not fact and in this regard the claimant in the Memorandum of Claim has clearly set out the provisions that have been infringed by the respondents as the basis of his complaint. There is no evidence of the claim being *res judicata* as alleged or any element of *sub judice*. The objections made are hypothetical, abstract and in abuse of court process. The respondents are anti trade union employers without respect to fundamental rights and freedoms pursuant to Articles 10, 36 and 41 of the Constitution as required in an open and democratic institution and the objections should be dismissed.

On February 23, 2023 the respondents filed a second Notice of Preliminary objections on the grounds that;

1. The court lacks jurisdiction to hear the claim dated November 18, 2022 pursuant to section 12(1)(a) to (j) of the Employment and Labour Relations Court, 2011.
 2. The claim dated November 18, 2022 is incompetent and an abuse of the court process in light of the case of Nairobi Court of Appeal Civil Appeal No 656 of 2022, The National Social Security Fund of Trustees v Kenya Tea Growers Association & 14 others.
3. Both parties attended and agreed to address the objections by way of written submissions.
- The respondents submitted that the claim does not comply with the principle in Anarita Karimi Njeru case that a constitutional petition must be pleaded with reasonable precision and in the case of Mumo Matemu the court held that a petitioner cannot come to court to seek facts and information he intends to use to prove the very case that he is arguing before the court. He must plead his case with some degree of precision and set out the manner in which the Constitution has been violated.
4. The claimant at paragraph 04.01 of his claim lists the constitutional provisions upon which the subject claim is premised on and has cited various articles of the Constitution. From the itemised provisions, Article 2, 3, 10, 19, 20, 21, 232 and 259 these are omnibus provisions the claimant has relied upon and does not raise any act of infringement directly relating to the cited provisions of the Constitution. The crux of the claim is the right of the respondent's employees to form, join and participate in a trade union and this is demonstrated from paragraphs 3 and 5 of the claim and supported by facts enumerated at paragraph 5. The substantive claim relates to Article 36 and 41 of the Constitution with regard to the right to association and fair labour relations respectively. Such provisions do not impose a duty upon the respondents a positive Acton which the respondent has failed to execute nor have the respondent applied such provisions to threaten or deny the claimant his rights.
 5. The respondents also submitted that the assertions made by the claimant that the 1st respondent's employees are unaware of the contents of Article 36 and 41 of the Constitution and the rights therefrom and the claim as couched fails to demonstrate to a reasonable degree of precision how the alleged omission on the part of the 1st respondent denies the employees their right of association and the right to form and participate in trade unions. In the absence of clear distinction of the nature of infringement by the 1st respondent and the nexus between the act or omission complained of the suit is defective and should be struck out.



In *David Gathu Thuo v Attorney General & another* [2021] eKLR the court dismissed the petition noting that although the petitioner had pleaded provisions of the *Constitution*, he had failed to demonstrate to the required standard how his individual rights and fundamental freedoms had been violated.

6. The respondents subtitled that the subject matter of the suit is *res judicata*. In the Statement of Claim, the compliant is that there is a right of the respondent's employees to form, join and participate in a trade union which matter was subject of litigation in *Banking Insurance & Finance Union (K) v Kenya Revenue Authority* [2008] eKLR; Misc Civ Appli 1683 of 2004 and the subsequent appeal in *Banking Insurance Finance Union (K) v Kenya Revenue Authority* [2018] eKLR Civil Appeal No.255 of 2010. The claimant at paragraph 01.03 of the Statement of Claim has admitted to being a participant in the activities of BIFU.

These cases are similar to the present one. The 1st respondent's employees raised the issue of unionisation suppression and in Civil Appeal No 255 of 2010 and the court held in favour of the employees that an order of mandamus to issue directed to the respondent herein being the Kenya Revenue Authority to comply with Section 49 of the Trade Disputes Act by effecting check off system.

7. The claimant is suing on behalf of the 1st respondent's employees in similar proceedings previously determined by a court of competent jurisdiction with finality and on this basis the court has no jurisdiction and the suit should be dismissed.

The claimant submitted that objections by the respondents are not based on pure points of law and a suit does not only require for the violation of fundamental rights but a simple threat of infringement of the rights is enough to precipitate a cause of action under Article 22 of the *Constitution*.

There is no proof that the suit is *res judicata* or *sub judice* and under Article 22(2) of *the Constitution* the claimant has a right to file suit as a person acting on his own behalf or acting as a member of a group or in the public interest. The claim is not hypothetical or abstract.

8. The claim herein is different from Nairobi Court of Appeal No 495 of 2022 and in the case of *NSSF v Kenya Tea Growers Association & 14 others* the court held the court had no jurisdiction to determine the constitutionality of a statute unless the dispute arises out of an employer-employee relationship. The suit herein does not relate to such matter but on the application of Articles 36 and 41 of the *Constitution* and the objections made should be dismissed with costs.

The issues in the objections by the respondents are;

Whether the claimant has met the constitutional threshold set out in *Anarita Karimi Njeru v The Republic*;

9. Whether the suit is *res judicata* and *sub judice* in view of Nairobi High Court Petition No. E495 of 2022 *Kenya Revenue Authority v Banking Insurance & Finance Union (K)* and Nairobi Court of Appeal Civil Appeal No.244 of 2010 (Civil Appeal No.21 of 2018) *Banking Insurance and Finance Union v Kenya Revenue Authority*.

Whether the claimant has *locus standi*; and Whether the 1st and 2nd respondents will be able to comply with orders sought as it will be contrary to Article 24 of the *Constitution*.

10. On November 21, 2022 the claimant filed his Memorandum of Claim on the basis that he was dismissed from the employment of the 1st respondent (KRA) on September 28, 1998 and while under employment he was involved in trade union activities and where he assisted to recruit KRA employees into the Kenya Union of Commercial, Food & Allied Workers (KUCFAW) in the year 1998 and later into BIFU in 1998 and thereafter made two attempts to register the Tax Collectors Union (TCU) in



the year 2002 and 2009 but in vain due to opposition by KRA. The acts of the KRA are said to be anti-unionisation and the claimant has filed this suit for and on behalf of employees of KRA and has standing as provided for by Article 22(2)(a) and (b) of the Constitution.

The claimant has filed a Memorandum of Claim and not a petition.

11. A claimant is allowed to file suit and urge constitutional claims in a Memorandum of Claim in terms of Rule 7(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016. The Rule envisages a party raising disputes and issues regarding the enforcement of any constitutional rights and freedoms or any constitutional provision through a Statement of Claim. Instead of invoking the constitutional petition route which requires adherence to principles set out in the case of Anarita Karimi Njeru cited above, a claimant before this court is well directed to move by a Memorandum of Claim as aptly captured by the Court of Appeal in the case of in Sumayya Atbmani 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 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.

12. Unless a party is seeking for a declaration of invalidity of the provisions of the law, it is needless to invoke the constitutional petition route. A Memorandum of Claim filed in compliance to Rule 7(3) of the Court Rules will suffice and which the claimant has well complied with and where his case is premised on the application of the various articles of the Constitution particularly the right to association and fair labour practices under Articles 36 and 41 of the Constitution, the claim is proper before this court.

With regard to the whether the suit is *res judicata* or *sub judice*, reliance is made to High Court Petition No E495 of 2022 Kenya Revenue Authority v Banking Insurance & Finance Union (K) and Nairobi Civil Appeal No 244 of 2010 (Civil Appeal No 21 of 2018) Banking Insurance and Finance Union v Kenya Revenue Authority.

13. The concept of sub judice is one that bars a Court from hearing a matter that is in one way or other before another Court of competent jurisdiction by way of a previously instituted suit as long as it is between the same parties canvassing it under the same title. In the alternative of the scenario immediately above, where one of the Courts determined the matter before it the one still pending would be *res judicata*

Section 6 of the Civil Procedure Act bars any court from engaging in matters *sub judice* before it. It provides as follows:

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed

14. Paragraph (2) of the Notice of Objections, the subject therein relates to High Court Petition No E495 of 2022 Kenya Revenue Authority v Banking Insurance & Finance Union (K) and Nairobi Civil Appeal No 244 of 2010 (Civil Appeal No 21 of 2018) Banking Insurance and Finance Union v Kenya



Revenue Authority but in the written submissions, the respondents have relied and cited the case of Banking Insurance & Finance Union (K) v Kenya Revenue Authority and the subsequent appeal in Banking Insurance Finance Union (K) v Kenya Revenue Authority (2018) Civil Appeal No 255 of 2010.

The first set of cases relied upon reveal a different set of facts.

The second set of cases and particularly in Court of Appeal in Banking Insurance Finance Union (K) v Kenya Revenue Authority [2018] eKLR, the appeal arose out of the judgment in HCC Misc. Application No. 1683 of 2004 where BIFU was seeking orders of mandamus to compel KRA to implement the check off system and deduction of union dues of its members who are employees of the KRA the respondent herein. The Court of Appeal allowed the Appeal.

15. The matter addressed on appeal and in the High Court both related to the employees' rights under the Trade Disputes Act, now repealed and particularly the right of BIFU which had recruited sufficient numbers of employees of the KRA into its membership and was hence entitled to trade union dues through the check off system and based on the check off forms placed with the KRA.

The claimant's case herein recognises this history and that there were separate attempts to register TCU but this is frustrated by the KRA to defeat the right to enjoy rights under Articles 36 and 41 of the [Constitution](#).

16. This then forms a different and separate claim from the one between BIFU and KRA. Without going into the merits and demerits of the claim herein, the facts addressed in Banking Insurance Finance Union (K) v Kenya Revenue Authority [2018] eKLR and the facts herein have different foundations and without going against the principles of *res judicata* and *sub judice*. A hearing of the claim will assist the court to fully appreciate the claim and the responses by the respondents herein.

On the question of *locus standi* the claimant has defined himself as acting for and on behalf of KRA employees and is seeking to address various threats to the infringement of their rights under the [Constitution](#) which is allowed in terms of Article 22 read together with Article 258 of the [Constitution](#).

17. The respondents have also challenged the jurisdiction of the court and applied the case of NSSF v Kenya Tea Growers Association & 14 other Civil Appeal No.656 of 2022 and as correctly submitted by the claimant and reiterated in Sumayya Athmani Hassan case cited above, a claimant before this court is allowed to move the court through a Memorandum of Claim and claim under the [Constitution](#) and to avoid invoking constitutional petition route which does not raise any matter with regard to the invalidity of a statute, the standing before this court is proper. A party is at liberty to seek the enforcement of any constitutional rights and freedoms or any constitutional provision in a Statement of Claim.

The claimant cannot be faulted for urging his claims against the respondents through a Memorandum of Claim which should be heard on the merits.

18. On whether the respondents will be unable to comply with the orders sought, if granted, in terms of Article 24 of the [Constitution](#), such objections in my humble view is only prospective without any objective validity. There is no response filed, the claimant had moved the court for the hearing of his claim and without the court hearing the same on the merits, the final orders to be determined cannot be gagged under the cloud that the respondent will be unable to comply with the orders sought as such will be contrary to Article 24 of the [Constitution](#). The outcome of the hearing cannot be presumed or pre-empted at this stage. Such would deny the claimant a fair chance to be heard of his case on the merits.



Accordingly, objections made are hereby found without merit and are dismissed with costs to the claimant. The respondents are given 14 days to comply with Rule 13 of the Employment and Labour Relations Court (Procedure) Rules, 2016.

DELIVERED IN OPEN COURT AT MOMBASA THIS 18TH DAY OF MAY, 2023.

M MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... **and**

