



**Akun & 5 others v African Line Terminal & Logistics Limited; Sajan & 2 others (Interested Parties) (Petition 002, 003, 004, 005, 006 & 007 of 2023 (Consolidated)) [2023] KEELRC 1406 (KLR) (8 June 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1406 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
PETITION 002, 003, 004, 005, 006 & 007 OF 2023 (CONSOLIDATED)**

**M MBARŪ, J**

**JUNE 8, 2023**

**BETWEEN**

**JULIAS ODHIAMBO AKUN ..... 1<sup>ST</sup> PETITIONER  
JOSEPH OMONDI ARAN ..... 2<sup>ND</sup> PETITIONER  
JAMES TUMAINI MBWIYAH ..... 3<sup>RD</sup> PETITIONER  
OMARI TSUM JANA ..... 4<sup>TH</sup> PETITIONER  
ALPHONCE CHIRO NGOMBO ..... 5<sup>TH</sup> PETITIONER  
MWENDWA MVITA MUTUA ..... 6<sup>TH</sup> PETITIONER**

**AND**

**AFRICAN LINE TERMINAL & LOGISTICS LIMITED ..... RESPONDENT**

**AND**

**PHILIP SAJAN ..... INTERESTED PARTY  
PARAMESHWARN VENKITACHALAM ..... INTERESTED PARTY  
JOSPHINE KAMAU ..... INTERESTED PARTY**

**RULING**

1. The respondent and the interested parties filed Notice of Preliminary Objections on the grounds that the suit should be dismissed with costs on the grounds that;
  1. The petition raises no *bona fides* constitutional issue.
  2. The petition goes counter to the principle of ‘constitutional avoidance’.



3. The petition does not demonstrate a violation of a constitutional right.
  4. The petitioner's claims can be addressed in an ordinary civil suit and thus this court lacks jurisdiction to entertain the petition.
  5. The issues raised in the petition are contentious that cannot be dealt with by a constitutional petition.
  6. The petition is in abuse of the court process.
2. The petitions herein are consolidated as they raise the same issues of facts and law being that the petitioners were employed by the respondent while the 1<sup>st</sup> interested party was the general manager, the 2<sup>nd</sup> interested was the finance manager and the 3<sup>rd</sup> interested party was the human resource manager of Sharaf Group of Companies that includes the respondent. The petition is also on the grounds that due to Covid-19 pandemic and commissioning of Inland Port in Naivasha, the respondent suffered unexpected financial losses in the year 2019 and 2020 and as a result, department heads were instructed to request employees of the respondent to volunteer for retrenchment but the respondent decided to force them into early retirement and through memo dated July 30, 2022 the petitioners were retired. This has led to violation of Articles 57 and 53 of the Constitution on grounds of age and denial of right to education for affected families and children and is contrary to fair labour practices contrary to Article 41 of the Constitution.
  3. The petitioners are seeking a declaration that the respondent and interested parties be found to be in violation of the various articles of the Constitution; that there is contravention of Section 10(5) of the Employment Act, 2007 and Section 7 of the Fair Administrative Action Act, 2015 and termination of employment was unconstitutional and unlawful for which compensation should be awarded.
  4. In principle, the doctrine of avoidance refers to the hesitance of the courts in adjudicating over employment and labour relations disputes where there are alternative statutory remedies or mechanisms exist for the resolution of such issues. Where a statute has provided for a remedy or the manner of lodging a claim, such statute should be applied accordingly and before taking the constitutional petition route.
  5. In Bernard Murage v Fineserve Africa Limited & 3 Others [2015] eKLR stated thus:
 

There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute....

I am bound to follow that principle of law since it flows from the other important principle that not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.
  6. Concern here is echoed in the in Wycliffe Ouma Omondi v Nine One One Group Limited & 2 Others [2020] eKLR where the court held that;
 

It is observed that more and more litigants are filing ordinary disputes as constitutional petitions. Their actions are not only wasting the courts' time but also deny those with genuine constitutional issues an opportunity to have their matters quickly resolved.



7. Suits, which should be well addressed as purely employment and labour relations claims are now couched as constitutional petitions without the petitioner bringing out which matters of the law are not in tandem with the constitution and therefore call for amendment, repeal or addressed as necessary.
8. In Sumayya Atkmani Hassan v Paul Masinde Simidi & another [2019] eKLR the Court of Appeal in addressing the question as to whether to file a constitutional petition or not held that;

The Article 41 rights are enacted in the Employment Act and Labour Relations Act. The two Acts and the rules made thereunder provide adequate remedy and orderly enforcement mechanisms. The 1<sup>st</sup> respondent filed a petition directly relying on the provisions of the Constitution for enforcement of contractual rights governed by the Employment Act without seeking a declaration of invalidity of the provisions of the Employment Act or alleging that the remedies provided therein are inadequate. The petition did not raise any question of the interpretation or application of the Constitution.

We adopt and uphold the general principle in the persuasive authority in *Barbara De Klerk* (supra) that where a 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

9. The rationale, in my humble view, is to be found under the provisions of Rule 7 of the Employment and Labour Relations Court (Procedure) Rules, 2016 which allow a claimant, under a Memorandum of Claim to address any claims regarding the enforcement of any constitutional rights and freedoms violations, if any. Inherently therefore, as a matter of practice and procedure, the constitutional questions advanced by the petitioners, can well have been raised in terms of Rule 7(3) of the Court Rules without the need to invoke the route of a constitutional petition.
10. This is aptly addressed in Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another [2016] eKLR and where the court held as follows;

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

...

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

11. In this regard, the objections by the respondent and interested parties taken into account are found with merit. There exists sufficient practice and procedure directions in terms of Rule 7(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016 to address the constitutional questions addressed in the instant petitions. These objections were raised early and before responses could be filed but the petitioners failed to take the cue and do the needful and shall therefore pay costs. The petitions herein consolidated are hereby struck out. The petitioners will meet the costs of the respondent and interested parties.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 8<sup>TH</sup> DAY OF JUNE, 2023.**



**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Rahma

..... and .....

