



REPUBLIC OF KENYA



Ndirangu & 11 others v Teachers Service Commission & another (Employment and Labour Relations Cause 829 of 2022) [2023] KEELRC 1847 (KLR) (27 July 2023) (Ruling)

Neutral citation: [2023] KEELRC 1847 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 829 OF 2022**

BOM MANANI, J

JULY 27, 2023

BETWEEN

MATHAI BONIFACE NDIRANGU 1ST PETITIONER
MIRUKA ONGORO 2ND PETITIONER
MWITHIGA DAVID 3RD PETITIONER
VIDESIO NYAGAH 4TH PETITIONER
PATRICK ATANDI 5TH PETITIONER
SETH OUMA 6TH PETITIONER
VIRGINIA WANGUI 7TH PETITIONER
FREDRICK KAGO 8TH PETITIONER
ELIAKIM ONSABWA 9TH PETITIONER
JULIUS KIMANI 10TH PETITIONER
PATRICIA KAMANDE 11TH PETITIONER
STEPHEN KURIA 12TH PETITIONER

AND

TEACHERS SERVICE COMMISSION 1ST RESPONDENT
**MINET KENYA INSURANCE BROKERS LIMITED (FORMERLY AON KENYA
INSURANCE BROKERS) 2ND RESPONDENT**



RULING

Background

1. The dispute before me relates to implementation of a medical scheme that the 2nd Respondent runs on behalf of the 1st Respondent for the benefit of the Petitioners. It is the Petitioners' case that the 1st Respondent has over time awarded the 2nd Respondent tenders to provide medical services to the Petitioners and other employees of the 1st Respondent without the input of the Petitioners. Yet, the Petitioners contend, the money that goes into financing of the medical scheme is raised through deductions to their salaries.
2. The Petitioners have cited a series of incidents which they assert are examples of the 2nd Respondent's failure to honour its obligations under the impugned medical scheme. Importantly, the Petitioners argue that for the current scheme, the Respondents did not take their views on board before concluding the tender process. Thus, the Petitioners pray, inter alia, that the resultant contract be cancelled until the 2nd Respondent addresses their grievances.

Objection to the Court's Jurisdiction

3. The 2nd Respondent has raised a preliminary objection regarding the competence of the Petitioners' action against it. According to this Respondent, there exists no employment relation between it (the 2nd Respondent) and the Petitioners. Therefore and in terms of section 12 of the [Employment and Labour Relations Act](#) (ELRC Act), the Employment and Labour Relations Court (ELRC) has no jurisdiction to entertain the perceived dispute between them. To emphasize this point, the 2nd Respondent contends that it (the 2nd Respondent) does not (in relation to the present action) fall in the category of the persons and institutions whom the Petitioners can sue before the ELRC as contemplated under section 12(2) of the [ELRC Act](#).
4. Section 12(2) of the [ELRC Act](#) provides as follows:-

"An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organization, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose."
5. The above provision appears to limit the actors before the ELRC to individuals and institutions that either have an employment relationship or are direct players in the employment and labour relations sector. These entities are identified as employees, employers, trade unions, employers' organizations, federations of trade unions and employers' unions, the Cabinet Secretary and other offices established by law and which are involved in employment and labour issues.
6. To be sure, reference to the term "Cabinet Secretary" in the aforesaid provision ought to be understood in the context of the meaning ascribed to the title under section 3 of the [Act](#). It means the Cabinet Secretary for the time being responsible for matters relating to employment and labour relations.
7. Although the Act indicates that in addition to the persons and institutions that are specifically mentioned under section 12(2) thereof, suit before the ELRC may be instituted by or against any office established under any written law, this provision cannot, in my view, be relied on to bring the 2nd Respondent on board these proceedings. The ejusdem generis canon of construction certainly excludes



the 2nd Respondent from the class of persons contemplated under the aforesaid provision of the ELRC Act. The 2nd Respondent is neither in an employment relationship with the Petitioners nor is it directly involved in matters relating to employment and labour relations with respect to the Petitioners.

8. It is true that the dispute between the Petitioners and the 2nd Respondent stems from the implementation of a fundamental clause on provision of medical services under the contracts of employment between the 1st Respondent and the Petitioners. However, the fact of the matter remains that the 2nd Respondent does not fall in the category of the actors contemplated under section 12(2) of the ELRC Act for purposes of the current Petition. Consequently, it is doubtful that this court can validly assume jurisdiction over the dispute between these two parties.
9. On its part, the 1st Respondent has filed a replying affidavit dated 14th December 2022. In the affidavit, the 1st Respondent challenges the Court's jurisdiction to entertain the dispute on account of inter alia, sections 151 and 167 of the Public Procurement and Asset Disposal Act (PPAD Act). It is this Respondent's position that the above provisions establish other institutional mechanisms for addressing the issues that have been raised by the Petitioners. As such, the court not only lacks the requisite expertise to address the administrative bottlenecks that the Petitioners are aggrieved about but also has no jurisdiction to entertain the matter in the first instance.
10. It is not in doubt that there exists an employment relation between the Petitioners and the 1st Respondent. As a consequence, the 1st Respondent has a statutory duty to facilitate provision of medical services to the Petitioners. As rightly indicated by the Petitioners, this statutory duty is complemented by the constitutional guarantee to medical care that is now entrenched under article 43 of the Constitution.
11. Therefore, under the Constitution and statute, the Petitioners are entitled to require the 1st Respondent to promote and protect their right to access quality medical care. Ideally, they are entitled to approach the court through a constitutional petition to seek that this entitlement be enforced.
12. However, it is not in doubt that the 1st Respondent is a public body. As such, the process of procurement for goods and services by this Respondent for and on behalf of the Petitioners must be undertaken in accordance with the provisions of the PPAD Act. This means that the contract for provision of medical services entered into between the 1st and 2nd Respondents and which is the subject of these proceedings is subject to the provisions of the PPAD Act. Section 4 (1) (e) of the Act suggests that management of procurement contracts is to be handled in accordance with the provisions of the Act.
13. Section 151 of the Act requires an accounting officer of a procuring entity to appoint a Contract Implementation Team to oversee implementation of complex and specialized procurement contracts entered into under the Act. The team is to comprise of members of the procurement function, the requisitioner, the relevant technical department and a consultant where applicable.
14. Section 2 of the Act defines "complex and specialized procurement contracts" to include procurement contracts where the terms and conditions of the agreement are different from standard commercial terms and conditions. These include contracts for infrastructural works performed under international agreements containing international terms and conditions.
15. The above definition does not exclude contracts for provision of medical services from what are described as "complex and specialized procurement contracts". In any event, the preliminary record before me suggests that implementation of the contract in dispute is a complex undertaking. With approximately 341,847 teachers (excluding their dependants) as beneficiaries under the scheme, the complement of beneficiaries of the scheme is quite large. Equally, the consortium of the approximately



- ten (10) service providers under the scheme is large. It is also noteworthy that the scheme has over 359 service points.
16. Undoubtedly, ensuring adequate controls and quality in the implementation of such a large scheme requires proper oversight. Having regard to the fact that one of the overall objectives of the *PPAD Act* is to facilitate management of procurement contracts generally, it is my view that disputes regarding management and implementation of the procurement contract between the Respondents on the one hand and the Petitioners on the other ought to be handled in line with the provisions of section 151 of the *Act* in the first instance.
 17. From the Petition before me, it is clear that the issues in dispute between the parties relate to how the 2nd Respondent has managed the implementation of provision of medical services to the Petitioners under the contract between the two Respondents. Therefore, it is a dispute about the quality of services that the 2nd Respondent has rendered under the aforesaid contract.
 18. Section 151 of the *PPAD Act* empowers the Contract Implementation Team to manage various administrative aspects of implementation of procurement contracts entered into under the Act. These include:-
 - a. Monitoring the performance of the contractor, to ensure that all delivery or performance obligations are met or appropriate action taken by the procuring entity in the event of obligations not being met.
 - b. Ensuring the quality of services or goods and the time frame within which they are to be delivered are observed.
 - c. Making recommendations for contract termination.
 - d. Ensuring that the contractor acts in accordance with the provisions of the contract.
 19. Undoubtedly, the above provision establishes the Contract Implementation Team as the forum to address various administrative matters that relate to the management and implementation of contracts entered into under the Act in the first instance. These include matters that touch on the quality of services delivered under these contracts.
 20. The foregoing being the case, the issue that comes to the fore is whether the Petitioners' grievance is ripe for litigation before court. The record does not suggest that the Petitioners utilized the contract implementation and management mechanism prescribed under section 151 of the *PPAD Act* to have the quality issues that they raise addressed before invoking the court's jurisdiction. Although the Petitioners contend that they have tried to have the issues addressed by the Respondents without success, no correspondence on the matter between the parties has been provided.
 21. The 1st Respondent's position is that this matter ought to have gone before the Contract Implementation Team established under section 151 of the *Act* in the first instance. Having regard to the overall purpose of the *PPAD Act* as set out under section 4 (1) (e) thereof, I am inclined to agree with the 1st Respondent's position that this action is premature since there is no evidence to demonstrate that there has been an attempt to resolve the issues relating to the implementation of the medical services contract as suggested under section 151 of the *Act*.
 22. In *Kiriwa Wa Ngugi & 19 others v Attorney General & 2 others* [2020] eKLR, the court observed that courts of law ought to decline invites to determine disputes that come before them prematurely.



Commenting on the same subject of ripeness Onguto J in *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others* [2016] eKLR expressed himself as follows:-

“The court ought not to determine issues which are not yet ready for determination or is only of academic interest having been overtaken by events. The court ought not to engage in premature adjudication of matters through either the doctrine of ripeness or of avoidance. It must not decide on what the future holds either.”

23. Finally, the Petitioners have submitted that since the matter was transferred to this court by the High Court, I should not strike it out in the event that I come to the conclusion that the ELRC has no jurisdiction to entertain it. Instead, I should return it to the High Court for hearing and disposal.
24. Yet, the authorities that counsel cites to advance her argument articulate a contrary view. The law is that if a matter is before a court which has no jurisdiction to handle it, such matter cannot be transferred to a court with jurisdiction as there is no competent suit that is capable of being transferred.
25. As matters stand, the ELRC has no jurisdiction to adjudicate on the dispute between the Petitioners and the 2nd Respondent. As a result, the court is incapable of transferring the suit between the two parties back to the High Court.

Determination

26. Having regard to the foregoing, I find as follows:-
 - a. That the Petitioners’ action against the 2nd Respondent falls outside the jurisdiction of this court on account of the court’s jurisdictional limits as prescribed under section 12 of the ELRC Act.
 - b. That although the Petitioners can litigate against the 1st Respondent in respect of the matters contained in the Petition, the two have not taken advantage of the administrative mechanisms provided under section 151 of the PPAD Act to address the administrative challenges that afflict the efficient implementation of the medical scheme in the first instance. Consequently and to the extent that this has not happened, the current Petition is not ripe for the court to entertain it.
 - c. As a result, the court finds that it is presently not seized of the requisite jurisdiction to entertain the Petition.
 - d. Accordingly, the Petition is struck out.
 - e. Having regard to the fact that the decision to transfer the action to the ELRC was at the instance of the High Court, I decline to burden the Petitioners with an order for costs against them.

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

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Petitioner

.....for the 1st Respondent

.....for the 2nd Respondent



ORDER

In light of the directions issued on 12th July 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

