



**Mwangi v Attorney General & 2 others (Petition E163 of 2022)
[2023] KEELRC 2538 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2538 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E163 OF 2022
BOM MANANI, J
OCTOBER 19, 2023**

BETWEEN

THUITA MWANGI PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION 3RD RESPONDENT

RULING

Background

1. At the time the cause of action that gave rise to this Petition arose, the Petitioner was the Permanent Secretary, Ministry of Foreign Affairs, Republic of Kenya. The facts of the case are that at the material time, the Government of Kenya opted to purchase property in Japan to house its Embassy. As Permanent Secretary, Ministry of Foreign Affairs, the Petitioner was substantively involved in the process.
2. Officials of the Government of Kenya identified property that was to be purchased. It does appear that subsequent to this process, the procedure of identifying and procuring the property was questioned by the Government. It is suggested that the process contravened the procurement laws of Kenya.
3. Arising from this development, investigations were launched into the transaction. Following the investigations, the Petitioner and other individuals were charged with various criminal offenses under the *Anti-Corruption and Economic Crimes Act*, 2003.
4. In line with the legal framework on anti-corruption prosecutions in Kenya, inquiry into the impugned transaction was undertaken by the 2nd Respondent. Thereafter, the 2nd Respondent made recommendations to the 3rd Respondent to prosecute the suspects including the Petitioner.



5. The record shows that after they were charged with various criminal offenses via Anti-Corruption Case No. 2 of 2013 before the Anti-Corruption Court, the Petitioner together with others moved the High Court via Constitutional Petitions Nos. 153 and 369 of 2013 in which they sought to bar the processing of the criminal charges. The two Petitions were eventually consolidated, heard and dismissed.
6. After dismissal of the Petitions, the Petitioner and the other accused persons were subjected to full trial before the Anti-Corruption Court. They were eventually cleared of the charges.
7. The Petitioner has now filed this action to challenge the legitimacy of the criminal trial. It is the Petitioner's case that the criminal trial was a travesty of justice. It was unwarranted.
8. The Petitioner accuses the Respondents of conniving to take him through the unmerited criminal process thereby violating his rights as more particularly set out in the Petition. In particular, the Petitioner blames the Respondents for his tribulations which resulted in his job loss.
9. Therefore, the Petitioner prays that the court grants him the following reliefs:-
 - a. A declaration that the Respondents breached the Petitioner's fundamental rights and freedoms.
 - b. Damages for the aforesaid breaches.
 - c. Payment of the Petitioner's unpaid salary together with other benefits from the date he was removed from office to 14th April 2023 when he expected to have retired.
 - d. Costs of the Petition.
 - e. Interest on the amounts to be awarded from the date of filing the Petition.
 - f. Any other relief that the court will deem fit to grant.

Preliminary Objection

10. The Respondents have raised an objection to the court's jurisdiction to adjudicate on the dispute. The objection is two pronged. First, it is contended that since there is no employer-employee relation between the Petitioner and the 2nd and 3rd Respondents, this matter does not fall within the jurisdiction of this court to adjudicate. Second, the Respondents argue that the matters that the Petitioner has raised through this Petition were the subject of litigation in Constitutional Petitions Nos. 153 and 369 of 2013 and that the High Court determined most of the issues on merit. Therefore, this Petition is res-judicata.

Analysis

11. I have looked at the decision in Constitutional Petitions Nos. 153 and 369 of 2013. It is true that some of the parties in the said Petitions are parties in the Petition before me. This is notwithstanding that Constitutional Petitions Nos. 153 and 369 of 2013 had more parties than the current Petition.
12. It is also true that the facts in Constitutional Petitions Nos. 153 and 369 of 2013 are substantially the same as the facts in the Petition before me. However, the main issue that the Petitioners invited the court to determine in Constitutional Petitions Nos. 153 and 369 of 2013 is materially distinct from the issue that this court is invited to determine in this Petition.
13. In Constitutional Petitions Nos. 153 and 369 of 2013, the High Court was called upon to determine the legitimacy of the criminal trial against the Petitioners. On the other hand, the issues that the court



is invited to address in this Petition are as set out in paragraph nine (9) of this ruling. The two sets of issues are evidently distinct.

14. I am alive to the fact that application of the doctrine of res-judicata covers matters which a party ought to have raised in a concluded suit but which he failed to raise. In this case, it is clear to me that the issues that formed the cause of action in Constitutional Petitions Nos. 153 and 369 of 2013 related to the Respondents' right to mount criminal charges against the Petitioner. In this case, the cause of action relates to the fact of violation of the Petitioner's rights as a result of what he indicates was a flawed criminal trial. Coming after the collapse of the criminal case, the issues that the Petitioner raises in this action could not have been raised in Constitutional Petitions Nos. 153 and 369 of 2013 which preceded the now collapsed criminal case. As such, the objection that is founded on the doctrine of res-judicata is without merit. It is declined. However, and as will become apparent from the next phase of this ruling, the question whether the Petition is res-judicata is of relevance only in respect of the action against the 1st Respondent.
15. Regarding jurisdiction, the objection is premised on the absence of an employment relation between the Petitioner and the 2nd and 3rd Respondents. As indicated earlier, it is these Respondents' position that they do not fall in the bracket of the actors contemplated under section 12 of the [Employment and Labour Relations Court Act](#) (ELRC Act) in relation to the Petitioner.
16. It is contended that for a party to mount a cause of action against another before the Employment and Labour Relations Court (ELRC), the grievance, whatever its nature, must have emanated from an employment relation. As the grievance by the Petitioner against the two Respondents has not emanated from an employment relationship between the Petitioner and these Respondents, the ELRC has no powers under section 12 of the ELRC Act to entertain the dispute.
17. It is perhaps opportune to mention here that although the 2nd Respondent did not quite raise this issue, it has nevertheless been drawn to the court's attention through the objection by the 1st Respondent. As the law demands, once a court is alerted of a challenge to its jurisdiction by whichever party, it has the singular duty of investigating the matter before it can proceed further. Importantly, the court may consider the question of jurisdiction even if it has not been raised by the parties once it becomes apparent that its jurisdiction to adjudicate on a matter may be in doubt ([John K. Malembi v Trufosa Cheredi Mudembei & 2 others](#) [2019] eKLR).
18. Quite evidently and without going into the merits of the dispute, the impugned decisions by the 2nd and 3rd Respondents in exercise of their constitutional and statutory powers impacted on the Petitioner's employment rights. It is because of the decision by the two to frame charges against the Petitioner that he was forced to step down from his position at the Ministry in compliance with section 62 of the [Anti-Corruption and Economic Crimes Act](#). It is perhaps because of this stepping aside and the protracted trial that the Petitioner's employment opportunity went up in flames.
19. Yet, these two Respondents are neither the Petitioner's employers nor do they fall in the category of institutions and persons against whom action may be brought before the ELRC in terms of section 12 of the ELRC Act, if the decisions on this matter are anything to go by. Similarly, the nature of the dispute and claim by the Petitioner against the two Respondents does not quite fall in the bracket of the disputes listed under section 12 of the ELRC Act.
20. Recent decisions by the appellate court suggest, and perhaps rightly so, that the phrase "including" under section 12 of ELRC Act may only be invoked to bring on board disputes that are ancillary or incidental to the matters that are contemplated under section 12(1) of the Act (see [National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others](#) (Civil Appeal 656 of 2022))



[2023] KECA 80 (KLR)). Yet, an extremely narrow interpretation of the ELRC's jurisdiction may yield unintended challenges. For instance, in a situation where a dispute transcends the jurisdiction of two courts, parties may be forced to compartmentalize their cases in order to file them before the appropriate court.

21. In this case for example, it is not in doubt that the Petitioner's contract of employment was impacted by the impugned actions by the 2nd and 3rd Respondents. Yet, because these two do not fit in the restricted meaning that has been assigned to section 12 of the ELRC Act, the Petitioner cannot include them in an action that seeks to protect his labour rights before the ELRC. To sustain such action against the two Respondents, the Petitioner has to consider moving the High Court for the appropriate relief.
22. Conversely, because the 1st Respondent is the legal representative of the Government of Kenya, the Petitioner's employer, the dispute between the two qualifies as an employer-employee dispute. As a result, the High Court will decline jurisdiction on such matter on this account. Only the ELRC will be jurisdictionally entitled to entertain the claim.
23. As such, the Petitioner finds himself with a mixed grill dispute which he can neither wholesomely place before the High Court nor the ELRC. He has to, if he elects, split the matter so that the one between him and the 1st Respondent goes before the ELRC and the one on alleged violation of constitutional rights by the 2nd and 3rd Respondent goes before the High Court.
24. Needless to state that such eventuality comes with the risk of the two courts pronouncing themselves differently on issues that arise from the same set of facts. Such is the challenge and dilemma that the vexed question of jurisdiction now presents.

Determination

25. The upshot is that I find that the action by the Petitioner against the 2nd and 3rd Respondents does not lie before the ELRC for want of jurisdiction. Therefore, the action as relates to the 2nd and 3rd Respondents is struck out with costs to them.
26. Since part of the grievances in the Petition touch on violation of the Petitioner's right to fair labour practice allegedly by the 1st Respondent's principal, the Petition is validly filed against the 1st Respondent in its capacity as the legal representative of the Government of Kenya which was at the material time, the Petitioner's employer. Therefore, the case between the Petitioner and the 1st Respondent is sustained.
27. The litigation in respect of Constitutional Petitions Nos. 153 and 369 of 2013 was targeted at barring the Anti-Corruption court from trying the Petitioner and other persons that had been charged before that court. On the other hand, the dispute before me relates to the right to be compensated for loss of employment and violation of the Petitioner's constitutional rights as a result of the prosecution that was undertaken before the Anti-Corruption court. Although the two cases arise from the same set of facts, they nevertheless present two distinct causes of action. Therefore, this Petition is not res-judicata. Accordingly, the objection founded on the doctrine of res-judicata is dismissed.
28. There is no order as to costs.

DATED, SIGNED AND DELIVERED ON THE 19TH DAY OF OCTOBER, 2023

B. O. M. MANANI

JUDGE

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

