



Khisa v Kenya Plantation and Agricultural Workers Union (Petition E25 of 2023) [2023] KEELRC 2943 (KLR) (17 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 2943 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E25 OF 2023
B ONGAYA, J
NOVEMBER 17, 2023**

BETWEEN

MESHACK KHISA PETITIONER

AND

**KENYA PLANTATION AND AGRICULTURAL WORKERS
UNION RESPONDENT**

RULING

1. The respondent has filed a notice of preliminary objection on a point of law application dated 24.03.2023 through Aduda & Company Advocates. The petitioner is in person.
2. The preliminary objection challenges the jurisdiction of the Honourable Court to hear and determine the matter, and was made upon the following grounds:
 - a. That the instant application has been filed in gross violation of the constitutional principle of avoidance.
 - b. That the instant petition does not raise any constitutional question(s) for the determination of this honourable court.
 - c. That the instant petition is a gross abuse of due process as there exists sufficient statutory remedies to invoke
 - d. That the instant petition is filed in gross abuse of due process as the same has purported to constitutionalize an ordinary employer-employee dispute.
 - e. That arising from above and as held by the supreme court of Kenya in the case of *Communication Commission of Kenya & 5 others versus Royal Media Services Ltd* Supreme Court of Kenya at Nairobi Petition no. 14 of 2014 this Honourable Court does not have



the jurisdiction to hear and determine this petition and therefore the petition ought to be dismissed with costs.

- f. That arising from the above and as was held by the court of appeal in the case of *Francis Gathugu Vs. Kenyatta University* Civil Appeal no. 279 of 2013 any willy nilly attempt at constitutionalizing every common dispute must be discovered, named and rebuffed.
 - g. That arising from the above and as was held in the case of the *Owners of motor vessel 'Iilian S' versus Caltex Oil (Kenya)*(1989) [1KLR], a court without jurisdiction cannot proceed with the proceedings.
 - h. Further to the above that jurisdiction is everything and without it a court cannot make one more step.
 - i. And finally, further to the above, a question as to the jurisdiction of the court must be heard and determined in priority to any other proceedings.
 - j. The consequent upon the above, the respondent will at the hearing of this preliminary objection of law urge the honourable court to dismiss this petition with costs.
3. The petitioner swore a replying affidavit on 28.04.2023 in response to the respondent's notice of preliminary objection, and stated thus:
- a. That the Honourable Court was moved through the notice of motion application dated 08.07.2021 (consolidated with the present petition) under all enabling provisions of the law including all the inherent powers of the Employment and Labour Relations Court under sections 1A,1B, 3A and 63(c) of the *Civil Procedure Act*, 2010, Order 51 rule 1 of the *Civil Procedure Rules* 2010 as read together with the *Employment & Labour Relations Court (Procedure) Rules*, 2016.
 - b. That the petition raises triable issues to the Honourable Court over the manner and style which the respondent repudiated or breached the petitioner's contract of employment, a matter that falls within the purview of the provisions of section 12 (1)(a) of the *employment & labour relations court act*, laws of Kenya.
 - c. That the petition is a formal application which falls within the purview of the provisions of section 12 (2) of the *Employment & Labour Relations Court Act*, as read together in the cited rules set out in rule 2 of the interpretation of legal notice no 146 of 2016 of the *Employment & Labour Relations Court (Procedure) Rules* 2016 where it is interpreted in the rules unless the context so requires.
 - d. That the petitioner has moved the Honourable Court in the present application, claim or complaint in the form of a petition which is a formal application made to the Court in accordance with the provisions of section 12(2) of the *Employment & Labour Relations Court Act* laws of Kenya seeking jurisdictional action against the respondent action for breach of his employment contract.
 - e. That the decision in *Communication Commission of Kenya & 5 others versus Royal Media Services Ltd* Supreme Court of Kenya at Nairobi Petition no. 14 of 2014 together with the cited case of *Francis Gathugu Vs. Kenyatta University* Civil Appeal no. 279 of 2013 are all distinguishable from the present case in that the principle of avoidance was applicable in cited case laws.



- f. That the cited authorities are inapplicable in the instant case and the right case law applicable to this matter is *United States International University Vs. Attorney General & 2 others* (2012) eKLR equally *Karisa Chengo & 2 others Vs. Republic* Civil Appeal No. 44, 45 & 76 of 2014 (2015) eKLR and as held in the case of *Owners of motor vessel 'Lilian S' v. Caltex Oil Kenya* (1989) 1KLR1.
 - g. That as a result of the authorities aforesaid, it is clear that the petition is sustainable against the respondent for breach of both the petitioner's contractual and constitutional right to fair hearing and fair administrative action contemplated under Article 50(1) and (2). Article 47 of the *constitution of Kenya* as read together with the provisions of Rule 8(g), (h), (i) and (ii) of the respondent union constitution which raises triable issues that require the Court to probe and analyse facts of the case against each and every breach of right and fundamental freedom raised in the petition thereafter make a finding on the basis of its merit.
 - h. That these are constitutional questions which the Court is seized with through the petition. The Court has jurisdictional authority to interpret and apply the constitutional issues raised in the present employment dispute and provide redress to violations of his constitutional rights in matters falling under its jurisdiction in line with the present case.
 - i. That the preliminary objection filed is not on a point of law but raises a procedural technicality, an objection on the form used by the petitioner to approach the Court on a dispute of right to fair hearing, fair trial and right to due process of the law as opposed to the principle objective that established this court to effect substantive justice by facilitating the just, expeditious, efficient and proportionate resolution of disputes in line with section 3 of the *Employment & Labour Relations Court Act*.
 - j. That under Article 159 of the *Constitution of Kenya* the Court is bound by mandatory terms to exercise its judicial authority without undue regard to procedural technicality such as the one raised in the preliminary objection filed by the respondent.
 - k. The preliminary objection does not meet the threshold of what a preliminary objection is as outlined in the case of *Mukisa Biscuits Co. Ltd Vs. West-end distributors ltd* (1966) EA 696 and also as set out in *Avatar Sing Bhamra & Another V. Oriental Commercial Bank*, Kisumu High Court Civil case No. 53 of 2004.
4. The parties filed their respective submissions. The court has considered the parties' respective positions and makes finding as follows.
 5. The only issue is whether the petition is trapped by the principle of constitutional avoidance. The answer lies largely in the pleadings. The petitioner has alleged violation of his rights and fundamental freedoms including Articles 41, 50(1) and 47 (1) of the *Constitution* as set out in paragraphs 36 to 45 of the petition. The petitioner prays for a declaration that his rights and fundamental freedoms were violated. How then can the Court decide the issues without taking evidence on the express alleged constitutional violations? It appears that as urged for the petitioner, the preliminary objection will collapse as whether rights and fundamental freedoms were violated is in dispute and is a matter which must go to full hearing and determined after taking evidence. The preliminary objection fails to pass the threshold and will fail.
 6. In conclusion the preliminary objection dated 24.03.2023 is hereby dismissed with costs in the cause and parties to fix the matter for further directions for expeditious determination of the petition.



**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
FRIDAY 17TH NOVEMBER, 2023.**

BYRAM ONGAYA

PRINCIPAL JUDGE

