



**Otieno v Muranga University of Technology & another; Universities Academic Staff Union (UASU), National Office & 2 others (Interested Parties) (Employment and Labour Relations Petition E174 of 2023) [2023] KEELRC 3403 (KLR) (21 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3403 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E174 OF 2023  
AN MWAURE, J  
DECEMBER 21, 2023**

**BETWEEN**

**DR TOBIAS IBRAHIM OKENO OTIENO ..... PETITIONER**

**AND**

**MURANGA UNIVERSITY OF TECHNOLOGY ..... 1<sup>ST</sup> RESPONDENT**

**EGERTON UNIVERSITY ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**UNIVERSITIES ACADEMIC STAFF UNION (UASU), NATIONAL OFFICE ..... INTERESTED PARTY**

**UNIVERSITIES ACADEMIC STAFF UNION (UASU), MURANGA UNIVERSITY OF TECHNOLOGY CHAPTER ..... INTERESTED PARTY**

**UNIVERSITIES ACADEMIC STAFF UNION (UASU), EGERTON UNIVERSITY ..... INTERESTED PARTY**

**RULING**

1. The 2<sup>nd</sup> Respondent filed a Notice of Preliminary Objection dated 27<sup>th</sup> September 2023, objecting to the Petitioner’s Petition dated 12<sup>th</sup> September 2023 on grounds that:
  1. The court lacks jurisdiction to step in, hear and determine the present Application and Petition and issue orders against the Respondent in light of the legal provision forestated hereunder.
  2. The cause of action challenged is based on a contract of employment between the Petitioner and the 2<sup>nd</sup> Respondent dated 1<sup>st</sup> December 2008 to 6<sup>th</sup> January 2023, therefore the Petitioner



ought to have filed an ordinary claim to ventilate his grievances as opposed to filing a constitutional petition.

3. The cause of action challenged is based on a contract of employment between the Petitioner and the 1<sup>st</sup> Respondent dated 4<sup>th</sup> September 2022 signed on 1<sup>st</sup> March 2023 therefore the Petitioner ought to have filed an ordinary claim to ventilate his grievances as opposed to filing a constitutional petition.
4. The Application together with the Petition offends Order 1 rule 3 of the [Civil Procedure Rules 2010](#).
5. This jurisprudence that has been adopted by this honourable court and other superior courts.
6. The Application and Petition as drawn is therefore defective, bad in law and should be struck out with costs

## 2nd Respondent's Case

2. The 2<sup>nd</sup> Respondent submitted that this court lacks requisite jurisdiction to hear and determine the allegations in form of a constitutional petition. It relied in the case of [Jackson Gilo v Computer Pride Limited](#) [2013] eKLR.
3. The 2<sup>nd</sup> Respondent submitted that the preliminary objection before this Honourable Court raises the question of lack of jurisdiction by this court to hear and determine matters relating to employment contract between employer and employee when coiled in form of a constitutional violations.
4. The 2<sup>nd</sup> Respondent submitted that the cause of action challenged by the Petitioner is based on a contract of employment between the Petitioner and 1<sup>st</sup> Respondent dated 4<sup>th</sup> September 2022 and alleged payment arrears between the Petitioner and the 2<sup>nd</sup> Respondent when the Petitioner worked for the 2<sup>nd</sup> Respondent before his resignation on 6<sup>th</sup> January 2023.
5. The 2<sup>nd</sup> Respondent relied in the Court of Appeal case of [James Mukuba Gichane v National Hospital Insurance Fund & 3 Others](#) [2017] eKLR which held:

“The circumstances of this appeal show that the appellant’s claim, based, under [the constitution](#) (now repealed) was misplaced. The alleged breach of fundamental constitutional right was not proved. The grievance of the appellant related to termination of employment and the only issue for determination was whether he was lawfully terminated. No matter how broadly the scope of fundamental rights is interpreted, it cannot encompass ordinary tortious and contractual rights between individuals that do not bear on human or fundamental rights. Thus, the rights of an employee vis a vis the employer in ordinary circumstances do not connote breach of fundamental rights. In this appeal, the relationship between the appellant and the 1st respondent being that of an employee and employer relationship, was pegged on contract.....

The amplitude of the appellant’s claims in the circumstances of this appeal does not extend beyond labour law. The allegations of breach of fundamental rights were contrived and bereft of evidence to support them. The high Court was spot on in its finding that the circumstances of the appellant’s claim, if true, hinged on termination of employment and belonged to a civil or labour court. We entirely agree.”

6. The 2<sup>nd</sup> Respondent submitted that the causes of actions against the 1<sup>st</sup> and 2<sup>nd</sup> Respondent do not arise from the same course of action and are not related. The Respondents are two separate legal entities



that can sue and be sued in their own capacities, the 2<sup>nd</sup> Respondent is not a party or privy to the contract between the 1<sup>st</sup> Respondent and Petitioner and vice versa. There is no relationship between the institutions.

### **Petitioner's Case**

7. The Petitioner submitted that the court is clothed with the jurisdiction to determine the question whether the Petitioner's constitutional rights and fundamental freedoms were denied, violated, infringed or threatened by the Respondents. This court is a specialised court with equal status as the High Court by dint of Article 162 (2) (a) and sitting as a constitutional court pursuant to Article 23(1) and (3) and Article 165 (3)(b) of *the Constitution*.
8. The Petitioner submitted that the cause of action arose in the cause of a contract of employment between the Petitioner and the 1<sup>st</sup> Respondent, at the instigation of the 2<sup>nd</sup> Respondent. And that the Petition is seeking redress for violation of constitutional rights and fundamental freedoms as envisaged under Articles 22(1), 23(1), 165(3)(b) and 258 of *the Constitution*.
9. The Petitioner submitted that the reliefs sought cannot be addressed through an ordinary suit as suggested by the 2<sup>nd</sup> Respondent; the presence of an alternative judicial avenue does not lock out the Petitioner from seeking appropriate remedies under the aforesaid constitutional provisions. He relied on the case of *Fred Munialo Maelo v Mathew Wamalwa Wafula & 2 Others* [2020] eKLR.
10. The Petitioner submitted that the 2<sup>nd</sup> Respondent's contention that the Petitioner ought to have filed an ordinary suit on the basis that the dispute arises from two contracts of employment is not a question of law but one of fact as it goes to the merit of the case.
11. The Petitioner submits that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are properly joined in the Petition as the reliefs sought arise out of his right to seek redress for the violations of his rights and fundamental freedoms occasioned by similar acts by the Respondents. Further, the objection offends the principles set in Mukisa case as it raises points of facts requiring this court to assess the same.
12. The Petitioner submits that Order 1 rule 3 of the *Civil Procedure Rules* do not apply to Constitutional petitions as they are within the province of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules* 2013.

### **Analysis and Determination**

13. The issue for determination before this court is whether the Notice of Preliminary Objection is merited.
14. The guiding principles on preliminary objection is laid down in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd*. (1969) EA 696, where the court held:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”



15. Further, in *Oraro v Mbaja* [2005] 1 KLR 141 Ojwang, J (as he then was) expressed himself as follows on preliminary objections:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.

.....

A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."

16. The preliminary objection herein raises issues that require this court to go into the merits of the Petition and Application for it to ascertain the objections cannot qualify in the purview of a preliminary objection.
17. It is trite law that a preliminary objection must be capable of terminating a suit in its entirety. If the court has to interrogate facts or exercise its discretion in determining the suit that would not qualify as a preliminary objection.
18. Clearly this preliminary objection does not raise pure points of law and so is found not to be merited. The same is dismissed and costs are in the cause.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 21ST DAY OF DECEMBER, 2023.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**



**JUDGE**

