



**Nayweni & 45 others v African Shipping Limited & 47 others;
International Transport Federation & 4 others (Interested Party) (Petition
E007 of 2022) [2023] KEELRC 3456 (KLR) (7 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3456 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
PETITION E007 OF 2022
M MBARŪ, J
DECEMBER 7, 2023**

BETWEEN

HILLARY IGWE NAYWENI & 45 OTHERS PETITIONER

AND

AFRICAN SHIPPING LIMITED & 47 OTHERS RESPONDENT

AND

**INTERNATIONAL TRANSPORT FEDERATION & 4 OTHERS .. INTERESTED
PARTY**

RULING

1. On 21 September 2023 the matter came up for ruling upon which, parties were directed to attend court on 9 October 2023 for taking hearing directions. The court directed parties to attend and address the issue as to whether this was a proper petition, to make oral submission on 30 October 2023 and file skeleton written submissions if necessary. On the allocated dates, the petitioner remained absent. The court directed the 42nd respondent to serve the petitioner for hearing on 20 November 2023 but the petitioner remained absent.
2. Counsel for the 1st, 3 to 7th, 9th, 11th to 14th, 16th to 18th, 20th to 31st, 33rd and 42nd respondents, represented Khagram Advocate submitted that the court has jurisdiction over claims where an employment relationship exists. The petitioners case is that they were employed by contractors to the respondents. Under paragraphs 1 to 5 of the petition, the 1st petitioner's case is that he was employed by an outsourced contractor and there is no employment relationship with the respondents denying this court jurisdiction under relationship outlined under Section 12 of the *Employment and Labour Relations Court Act*, 2011.



3. Khagram Advocate submitted that the respondents engage different members of the Kenya Ships Contractors Association as independent contractors. There is no privity of contract with the petitioners. Their employment is with the independent contractors. The reliefs and declarations sought cannot issue since such would impose an employment relationship upon the respondents yet it does not exist as held in the case of *Housing Finance Co. of Kenya Limited v Gilbert Kibe Njuguna* HCCC No.1601 of 1999. Without establishing any employment relationship with the respondents save to plead contracts with third parties, the petition should be struck out.
4. The 2nd and 10th respondents represented by Hannah Mtekele Advocate submitted that the petition herein does not satisfy the prerequisites of a constitutional petition and that the doctrine of constitutional avoidance is most applicable. The petition lacks specificity to be determined as it without contravening the very constitutional rights of a fair hearing to the respondents. The issue raised in the petition would ordinarily arise from an employment relationship best addressed through a Memorandum of Claim. In *Aliela Kenton College Trust & Another* Petition E084 of 2022 the court held that only when no other remedy lies can a party turn to the court for constitutional reparation. Constitutional avoidance is defined as a preference of deciding a case on any other basis other than one which involves a constitutional issue being resolved as held in *KKB v SCM & 5 others* Petition E014 of 2020.
5. The petition as drafted does not conform to the mandatory requirements under the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules*, 2013 nor does it meet the threshold in the case of *Anarita Karimi Njeru v Attorney General* [1979] eKLR. The petition does not disclose the facts upon which it relies on or what each respondent is alleged to have done. Instead there are general allegations that cannot be verified. The ambiguity of the petition goes into speculations and assumption which cannot stand as held in *Humphrey Mutegi Burini & 9 others v Chief of the Kenya Defence Forces & another* [2017] eKLR. The petition should be dismissed with costs.
6. The 19th respondent, represented by Cecilia Ndeti Advocate submitted that this is not a proper petition. Section 2 of the *Employment Act*, 2007 defines a contract of service as between an employer and employee as held in the case of *Stanley Mukei v National Oil Co.* There is no employment relationship with the petitioners and the petition is not proper and should be dismissed with costs.
7. The 44th respondent, represented by Amos Cheruiyot Advocate submitted that there is no employment relationship between the respondent and the petitioners which deny this court jurisdiction. Of the 47 petitioners, none disclose the employer but proceed to seek reliefs from third parties. It is not in the purview of the court to hear parties in the absence of jurisdiction. In *Public Service Commission v Cheruiyot & others* Civil Appeal No.119 and 113 of 2017, for want of an employment relationship, the court held the Employment and Labour Relations Court had no jurisdiction to hear the petitions and its judgment was a nullity.
8. The employment relationship has serious implications on the parties and the court must be fully satisfied that it actually exists. A claimant seeking in employment must prove such a relationship as held in *Kenya Union of Commercial Food and Allied Workers v Mwana Black Smith Limited* [2013] eKLR. This petition should be struck out.
There are no submissions by the petitioners.
9. The single issue for determination is whether this is a proper petition.



10. The petitioners filed this petition on 4 May 2022 on the grounds that the petitioners are employed or contracted by various members of the Kenya Ships Contractors Association, herein after named as the 42 respondents as Stevedores within the Port of Mombasa. ...
11. The petitioners also defined the 1st to 38th respondents as international shipping lines or agents plying the international waters and dock at the Port of Mombasa and are served by the petitioners when they dock.
12. The 39th respondent is defined as a company carrying out importation and handling of grain and fertilizers at the Port of Mombasa. The 4th respondent is a company carrying out importation and handling of cargo and goods business at the Port of Mombasa.
13. The 41st respondent is a manufacturer of cement, an importer of clinker and related chemical.
14. The 42nd respondent is an association of ships contractors' association providing human resources for the shipping companies and importers/exporters to perform services related to stevedoring.
15. The 43rd and 44th respondents are state corporations pursuant to [Kenya Ports Authority Act](#) and [Kenya Maritime Authority Act](#) respectively, with a duty to build, maintain, administer and manage all ports in Kenya and monitor, regulate and coordinate activities in the maritime industry respectively.
16. The 45th and 46th respondents are offices established pursuant to Article 152 of the Constitution.
17. The 47th respondent is the principal legal advisor to the government pursuant to Article 156 of the Constitution.
18. On this basis, the facts of the petition are that the petitioners as stevedores are contracted by members of the 43rd respondent and are currently working at the Port of Mombasa. ... the petitioners' services have been contracted by the respective members of the 43rd respondent and they are deployed to work in gangs of eight (8) or as individuals to offer services to the shipping lines, the 1st to 39th respondents, importers/exporters, the 40th to 42nd respondents and the 43rd respondent ...

Further, the petitioner's case is that;

... members of the 43rd respondent who have contracted their services have failed to cause accounts to be opened in their names with the National Hospital Insurance Funds (NHIF) and the National Social Security Fund (NSSF) and cause remittances to those accounts as required under ... the petitioners, some of them have been in the employment of the members of the 43rd respondent for a period in excess of 30 years. In the case of deponnee of the affidavit in support of the instant petition, he has stated that he has been a continuous employment GEOWAVE, which is a member of the 43rd respondent from 2016.

19. Under paragraph 30 of the petition, the petitioners have identified one of the members of the 43rd respondent as being GEOWAVE. As an employer, this entity is not enjoined herein as a respondent or interested party.
20. There is no other member of the 43rd respondent who is mentioned or noted in the entirety of these proceedings.
21. The primary jurisdiction of the court is to hear and determine employment and labour relations disputes and for connected purposes pursuant to Article 162(2)(a) of the [Constitution](#) read together with Section 3 and 12 of the [Employment and Labour Relations Court Act](#), 2011. In this regard, there



are the Employment and Labour Relations Court (Procedure) Rules, 2016 which guide parties on the procedural and practice requirements.

22. Under the constitutive legislation and Section 12 of the *Employment and Labour Relations Court Act*, 2011 the jurisdiction of the court hence encompasses and includes all disputes relating to, or arising out of, employment and labour relations. In the case of *County Government of Garissa & another v Idriss Aden Mukhtar & 2 others* [2020] eKLR the court gave emphasis that the *Employment Act*, 2007 (the Act) applies to all employees employed under a contract of service and provides for minimum terms and conditions of employment. An employee who is seeking to enforce his or her rights in employment, should apply the primary legislation setting out the rights and benefits which accrue in employment. Where there is a legal gap not covered under the law, only then should an employee invoke the constitutional route. See *Gabriel Mutava & 2 others v Managing Director, Kenya Ports Authority & another* [2016] eKLR.
23. Therefore, where there is a dispute relating to a matter within employment, the employee who is aggrieved is well covered under the *Employment Act*, 2007 and under the *Employment and Labour Relations Court (Procedure) Rules*, 2016 (Court Rules). A party is allowed to move the court through a Memorandum of Claim and seek for the enforcement of fundamental rights and freedoms as well as judicial review orders.

Rule 7(3) of the Court Rules provides that;

(3) Notwithstanding anything contained in this Rule, a party is at liberty to seek the enforcement of any constitutional rights and freedoms or any constitutional provision in a statement of claim or other suit filed before the Court.
24. As a matter of practice and procedure, the employment issues raised in the petition, if any, could have been well raised under a Memorandum of Claim. Constitutional avoidance in view of the provisions under the *Employment Act* and the Court Rules well apply in this case.
25. As a general principle, where it is possible to decide any case, employment and labour relations, criminal or civil, without reaching a constitutional issue, that is the course which should be followed. Both constitutional avoidance and ripeness avert the determination of constitutional issues until it becomes very necessary to the extent that it is the only course available to assist the litigant's cause as held in *Lugo v Director of Public Prosecutions* [2022] eKLR.
26. Other than that, the pleadings taken in the ordinary meaning, the petitioners were employed by members of the 43rd respondent. These members are then the employers in terms of Article 162(2) (a) of the *Constitution* and Section 12 of the *Employment and Labour Relations Act*, 2011. The issues raised with regard to statutory remittances to NSSF and NHIF for the petitioners are ordinarily matters of the employer to address. Upon moving the court, the subject employer(s) is required to attend and produce the work records in terms of Section 10(6) and (7) of the *Employment Act*, 2007. Such provisions would not apply to a party who is not in an employment relationship and for the court to move, crucial evidence and records would not be available.
27. Without an employment relationship between the parties, the petitioners having pleaded that their employment was/is with a given employer such as GEOWAVE, to move the court under a petition cannot sanitise the obvious lapse and want of jurisdiction. Filing a petition instead of a Memorandum of Claim cannot cure such matter.



In *KKB v SCM & 5 others* Petition 014 of 2020 the court held that;

The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved.

28. Where there exist alternative, sufficient and adequate avenues with rules of procedure and practice for parties to ventilate their grievance, such forums should be applied without invoking the constitutional petition route.
29. Accordingly, this is not a proper petition. Fundamentally, without any employment relationship between the parties herein, the court is without jurisdiction and must stop. The petitioner having been invited to address but remained absent shall meet costs due to the respondents.

DELIVERED IN OPEN COURT AT MOMBASA THIS 7TH DAY OF DECEMBER 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

