



Ogogoh v Maina & 3 others; Eleri & 2 others (Interested Parties) (Petition E018 of 2023) [2023] KEELRC 3471 (KLR) (7 December 2023) (Ruling)

Neutral citation: [2023] KEELRC 3471 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
PETITION E018 OF 2023
M MBARŪ, J
DECEMBER 7, 2023**

BETWEEN

JULIUS OGOGOH PETITIONER

AND

KENNEDY KURIA MAINA 1ST RESPONDENT

TERESIAH KEHEHU 2ND RESPONDENT

SOS CHILDREN'S HOME – MOMBASA 3RD RESPONDENT

DIRECTOR OF CHILDREN'S SERVICES 4TH RESPONDENT

AND

JOSPAH ERERI INTERESTED PARTY

ETHICS & ANTI-CORRUPTION COMMISSION INTERESTED PARTY

PUBLIC SERVICE COMMISSION INTERESTED PARTY

RULING

1. The ruling herein relates to Notice of Preliminary Objections by the 1st, 2nd and 4th respondents and the 3rd interested party respondents through the office of the Attorney General and on the grounds that;
 1. The dispute herein is sub judice pending before the Children's court at Tononoka in MCP & CCO E212 of 2022 and MCCHMISC E 076 of 2022 and hence the court lacks jurisdiction to hear the matter.
 2. The Employment and Labour Relations Court does not have the jurisdiction to hear the matter since it is only vested with powers to hear disputes between employers and employees and matters related to industrial disputes.



3. The Employment and Labour Relations Court does not have the jurisdiction to hear the cases on welfare of children as there is established specialised children's court to handle such disputes.
 4. The matter before court is a custody dispute couched in employment and employee terms and hence should not be heard before this court.
 5. The petitioner lacks standing to institute the petition on behalf of any parties before the children's court and has failed to demonstrate the nexus between the suit and any other similar matter necessitating public interest.
2. The respondents hence seek that the petition be dismissed with costs.
 3. Parties attended court and agreed to address the objections by oral submissions. Parties also filed their skeleton written submissions.
 4. The 1st, 2nd, 4th respondents and 3rd interested party submitted that the matter is sub judice in view of the pending matters before the Children's Court at Tononoka in MCP & CCO E212 of 2022 and MCCHMISC E076 of 2022 which deny this court jurisdiction. In the case of Daniel Kipkemoi Bett & another v Joseph Rono [2022] eKLR, the concept of sub judice was held to be that which bars a court from hearing a matter already before another competent court. To allow such a practice would lead to multiplicity of suit and conflict where the different courts may give different reliefs
 5. Section 6 of the *Civil Procedure Act* has addressed the same directing that no court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly or substantially in issue in a previously instituted suit. This was given emphasis in the case of Leopard Communications Ltd v Celtel Kenya Limited [2010] eKLR. The essence of the sub judice rule, is to bring litigations to a stop. The dispute herein is already before another court and the petitioner has deliberately failed to disclose these facts herein.
 6. The respondents also submitted that this court's jurisdiction does not extend to children matters, there is a specialised court with that jurisdiction and should be allowed to address the dispute under the *Children Act*, 2001. Where there exists a specialised court or division, that jurisdiction should be invoked first before a party can seek to have the matter addressed by another court as held in Penina Auma Olago & another v Director of Public Prosecutions & 2 others; Zachary Okoth Obado & 8 others (interested parties) [2021] eKLR. The mandate of this court is addressed under Article 162(2) (a) of the *Constitution* and under Section 12 of the *Employment and Labour Relations Court Act* and which does not include children matters.
 7. The doctrine of constitutional avoidance should allow parties to apply under the correct forum and not any court as held 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.
 8. The petitioner lacks standing before this court by virtue to Rule 4(2) of the *Constitution* of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the *Constitution*) Practice and Procedure Rules, 2013. The rules allow a party to act in his own interest or act on behalf of another who is unable to act on his own, act for the interests of a group or class of persons, act in the public interest or an association acting in the interest of one or more of its members. These criteria is lacking for the petitioner. His public interest is not defined. In the case of TWW v KJH & 2 others Petition E267 of 2021 the court held that public interest litigation is a weapon which has to be used with great



care and circumspection but should not be used as a veil of public interest on ugly private malice or vested interest. This is not a proper matter for this court and the objections should be allowed with costs.

9. The 3rd respondent supported the objections herein and also submitted that the reliefs sought in the petition are in their nature removed from the jurisdiction of this court which is limited to employment and labour relations as held in *Attorney General & 2 others v Okiya Omtata Okoiti & 14 others* [2020] eKLR. The petitioner has admitted that he is the executive director for Commission for Human Rights and does not claim any employment relationship with the respondents or the interested party hence removed from the jurisdiction of the court.
10. The petitioner in response submitted that the sub judice rule is not applicable herein in terms of Section 6 of the *Civil Procedure Act* as alleged. The issues in *Tononoka MCPO CCO E212 OF 2022 AND MCCHMISC OF 2022* are not the same as in this petition. To make a determination of where these matters are similar, the court requires call of evidence. Objections should be purely on points of law, once addressed on the given facts, the court can address the matter with finality which is not the case here. A comparison of what is before the lower court and this court would require strict proof. The objections herein are only meant to delay justice as held in *Margaret Wachu Karuri v John Waweru Ribiro* [2021] eKLR. The matters in issue are not similar, not under the same title and these are different court as held in *Republic v Paul Kihaa Kariuki, Attorney General & 2 others ex parte Law Society of Kenya* [2020] eKLR.
11. The issue herein is whether the 1st respondent is fit to hold public office as an employee in the public service and which matter is regulated under the jurisdiction of this court. The other question is whether the 1st respondent is compliant with the provisions of Article 232 of the *Constitution*. Matters before this court do not relate to custody of children but the violation of the *Constitution* by the 1st respondent while in his employment.
12. The petitioner has standing to file this petition which is filed under the provisions of Article 22 and 258 of the *Constitution* as held in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR and the objections herein should be dismissed with costs to allow the court hear the petition on the merits.
13. With regard to application of the sub judice rule herein, Section 6 of *Civil Procedure Act* defines the principle or the doctrine as follows;

No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim litigating under the same title, where such suit or proceeding is pending in the same court or any other court having jurisdiction in Kenya to grant the relief claimed
14. Hence, the rule prevents a court from proceeding with the trial of any suit in which the matter in issue is directly and substantially the same with the previously instituted suit between the same parties pending before same or another court with jurisdiction to determine it.
15. The 1st, 2nd, 4th respondents and 3rd interested parties case is that there exists *Children Court Tononoka MCP & COO E212 of 2022 and MCCHMISC E076 of 2022*. However, the pleadings thereof are not attached to the objections herein to allow the court to contradistinguish the parties, the nature of claims or the reliefs sought on the given facts. Save, the petitioner attached Orders obtained in *Tononoka MCCHMISC E076 of 2022* and the applicant therein is Elizabeth Wairimu, a party different from the petitioner.



16. What is apparent is that a matter filed at the Children's court should be regulated under such mandate and which is different from this court. To make a determination as to whether there exist any similarities herein on the given facts is not sufficient save to call evidence.
17. As a superior court of record, it would defeat justice for the court to decline jurisdiction on the basis that the matter herein is sub judice. That would not foster the ends of justice.
18. With regard to the question whether there exists an employment relationship between the parties herein so as to invoke the jurisdiction of the court, the petitioner is defined as a person acting in the public interest. The facts of the petition are that a minor who was placed under the care of the 1st and 2nd respondents was being taken advantage of through receipt of money for upkeep but would convert the same for personal use contrary to public officer code of conduct and in violation of the rights of the minor. The petitioner is therefore seeking for orders that these respondents be found to be in abuse of office and that they are unfit to hold public office, the 2nd interested party be ordered to investigate the matter and there be a refund of the monies received illegally from Camilla Zachariassen.
19. This court is clothed with jurisdiction to hear and determine constitutional petition as held in the case of United States International University (USIU) v Attorney General (2012) eKLR, that the court is competent to interpret the *Constitution* and enforce matters relating to breach of fundamental rights and freedoms in matters arising from disputes falling within the provisions of Section 12 of the Industrial Court Act, 2011. This position was upheld by the Court of Appeal in Judicial Service Commission v Gladys Boss Shollei (2014) eKLR.
20. However, it is not sufficient to cite various constitutional provisions and move the court. The assertions by the petitioner that the instant petition is filed in the public interest under the provisions of Article 22 and 258 of the *Constitution* is not apparent. Such matters are not outlined in his petition. Even in a case where he has applied such provisions, which is not the case here, where a matter is regulated under a statute such as the Children's Act, 2001 or the *Employment Act*, 2007 or any other legislation, the doctrine of constitutional avoidance applies.
21. In this case there are no averments that there is breach of any constitutional provisions that cannot be addressed under the provisions of the Employment and *Labour Relations Act*, 2011 or the *Employment Act*, 2007. That the procedural requirements therein that allow a party to move the court under the Employment and Labour Relations Court (Procedure) Rules are insufficient and hence, the only option is to move the court through a constitutional petition.
22. This resonates with the case of Harrikisson v Attorney General of Trinidad & Tobago (1980) AC 265, the Privy Council held that;
23. The right to apply to the High Court under of the *Constitution* for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court or being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.



- 24. In this case, the petitioner does not particularise the constitutional breaches committed by the respondents and the interested parties save to make allegations that they have duties and responsibilities to safeguard children rights.
- 25. The respondents are correct to the extent that the issues raised in the Petition could have been resolved without invoking the Constitutional route. Whether before this court or the children’s court. As a matter of practice and procedure, the constitutional questions advanced by the Petitioner, if any, could have been raised in terms of Rule 7(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016.
- 26. This is not a proper petition for the court. Further, the subject matter is far removed from an employment relationship to invoke the court jurisdiction. The interest of the petitioner is negated by the very description he has assigned himself.
- 27. Objections to this extend are with merit.

Without proper standing, the petition not proper, the same is hereby dismissed. The 1st, 2nd, 3rd, 4th respondents and 3rd interested party are awarded Kshs. 50,000 in costs to be shared equally.

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

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

