



**Oduor v Kalvinder Singh Bhullar t/a Bhullar & Company Advocates (Employment and Labour Relations Petition E172 of 2023) [2023] KEELRC 3196 (KLR) (1 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3196 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E172 OF 2023  
AN MWAURE, J  
DECEMBER 1, 2023**

**BETWEEN**

**WILKISTER ODUOR ..... PETITIONER**

**AND**

**KALVINDER SINGH BHULLAR T/A BHULLAR & COMPANY  
ADVOCATES ..... RESPONDENT**

**RULING**

1. The respondent filed a preliminary objection dated 15<sup>th</sup> September 2023 in opposition to the petition dated 25<sup>th</sup> August 2023 on grounds that:
  1. The dispute is of an employer/employee labour relationship in relation to the lapse of a probationary contract leading to non-confirmation of employment.
  2. The petition does not raise questions of contravention of constitutional and statutory provisions, violation of constitutional rights and constitutionality of acts of the Respondent.
  3. This Honourable Court lacks jurisdiction to hear and determine the Petition and the petition must be struck out for lack of jurisdiction.
2. The preliminary objection was canvassed by way of written submissions.

**Respondent's Submissions**

3. The Respondent submitted that the objection is based on pure points of law and is premised under article 162 of *the Constitution* which gives jurisdiction on employment and labour matters to the Employment and Labour Relations Court.
4. The Respondent submitted the petition raises employment and labour relations issues and the subject matter of the petition is unlawful termination of employment and lack of it will collapse the petition.



The law gives the Employment and Labour Relations Court jurisdiction to grant the reliefs sought and it has nothing to do with discrimination and violation of the Petitioner's constitutional rights.

5. The Respondent submitted the suit ought to have been pursued in the ordinary manner under statute. The principle of constitutional avoidance mitigates against the petition and it does not meet the threshold established in the Anarita Karimi case.

### **Petitioner's Submissions**

6. The Petitioner submitted that two options are available to institute a suit premised on unfair termination on account of discrimination on pregnancy, by way of a statement of claim or by a constitutional Petition and relied on *Yasmin Josephine Mokaya vs Kithure Kindiki t/a Kithure Kindiki & Associates* (2021) (KLR).
7. The Petitioner submitted that the decision to terminate her employment while she was on maternity leave was procedurally unfair and it was not justified as due process of the law was not followed.
8. The Petitioner submitted that she was appointed in writing vide the Contract of Employment executed by the parties and therefore, any extension of her probation period beyond the 3 months provided in the contract ought to have been in writing. As no such notice was issued to the Petitioner informing her of an extension to her probation period, the Petitioner was expected to resume her duties on 1<sup>st</sup> September, 2023 immediately after her maternity leave.

### **Analysis and Determination**

9. The first issue is whether the Respondent's Preliminary Objection is merited.
10. The Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969]EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:

....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. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

At page 701 paragraph B-C Sir Charles Newbold, P. added the following:

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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...."

11. In *Quick Enterprises Ltd Vs Kenya Railways Corporation*, Kisumu HCCC No.22 of 1999, the Court held that: -

"When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings."



12. Further, in *United Insurance Co Ltd Vs Scholastica A. Odera*, Kisumu HCCA No.6 of 2005, the court held: -

“A Preliminary Objection must be based on a point of law which is clear and beyond doubt and Preliminary Objection which is premised on facts which are disputed cannot be used to determine the whole matter as facts must be precise and clear to enable the court to say the facts are not contested or disputed.”

13. The Preliminary Objection does not raise pure points of law but raises issues that will require this court to go into the merits of the petition and call for evidence to ascertain the issues. Therefore, it cannot be disposed off as a preliminary objection as the facts are disputed and the same is not clear.

14. The second issue is whether this court has jurisdiction to hear and determine the petition. In *Charles Oyoo Kanyangi & 41 others vs Judicial Service Commission of Kenya* [2018] eKLR held as follows with regard to this court’s jurisdiction to hear and determine constitutional petitions:

“In that regard, ELRC has jurisdiction to hear disputes that, though touching on human rights and fundamental freedoms, arise from the nature of the relationship between the parties. In the case of *United States International University vs Attorney General* (supra), the Court stated;

“[41] Labour and employment rights are part of the Bill of Rights and are protected under Article 41 of *the Constitution* which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in Section 12 of the Industrial Court Act 2011 or to interpret *the Constitution*, would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court. This would give rise to forum shopping thereby undermining a stable and consistent application of employment and labour law.”

31. The Court went on to conclude;

“[44] ...The Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of Article 162(3), section 12 of the Industrial Court Act, 2011 has set out matters within the exclusive domain of that court. Since the court is of the status of the High Court, it must have the jurisdiction to interpret *the constitution* and fundamental rights in Article 41 and freedoms is incidental to the exercise of jurisdiction over matters within its conclusive domain. In any matter falling within the provisions of section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of *the Constitution* within a matter before it.”

15. Accordingly, the preliminary objection dated 15<sup>th</sup> September 2023 is unmerited for the reasons given herein having regard to the pleadings and the submissions.



16. In view of the foregoing, this court has jurisdiction to hear and determine constitutional petitions in respect to employer/ employee relationships. The parties are at liberty to proceed with the petition without any unnecessary delay.

17. Costs of the preliminary objection to be borne by the respondent.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 1<sup>ST</sup> DAY OF DECEMBER, 2023.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

