



**Obiero v Metal Crowns Limited (Petition 53 of 2019)
[2022] KEELRC 1685 (KLR) (25 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1685 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 53 OF 2019**

MA ONYANGO, J

MAY 25, 2022

(BEFORE HON. LADY JUSTICE MAUREEN ONYANGO)

**IN THE MATTER OF: ARTICLES 2, 3, 10, 19(1) & (2), 20(1) & (2), 22, 23, 27(1), 28, 29(A),
41(1), 48, 49(1), 50(2), 159, 258(1) AND 259(1) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLE 41 AND 50 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF: SECTION 41, 43, 45, 45(3) OF THE EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF: THE UNFAIR DISMISSAL/TERMINATION

AND

IN THE MATTER OF: WILLICE ODUOR OBIERO

BETWEEN

WILLICE ODUOR OBIERO PETITIONER

AND

METAL CROWNS LIMITED RESPONDENT

RULING

1. By a notice of preliminary objection dated 8th May 2019, the Respondent seeks the striking out of the petition here on the grounds that the Court’s jurisdiction has not been properly invoked as the matter ought to have been pursued by way of an ordinary claim.



2. It is the Respondent’s argument that the Petitioner’s claim is unlawful termination founded on the [Employment Act](#), that the matter as presented is an employment claim issue with no constitutional issue involved. That Constitutional petitions are reserved for weighty constitutional matters.
3. That claims for unlawful termination are adjudicated upon by way of filing an ordinary claim at the Employment and Labour Relations Court.
4. The Respondent submits that jurisprudence in our jurisdiction is that if a mechanism is prescribed for under statute for redressing a legal issue, that mechanism and/or procedure should be adhered to. The Respondent submits that this court has no jurisdiction to deal with the present petition.
5. That the emerging jurisdiction which has been settled by both the High Court and the Court of Appeal is that the remedies under the Bill of Rights of the Constitution should be reserved for appropriate and serious occasions. Additionally, not every matter will raise a constitutional issue worthy of attention by the constitutional division of the High Court.
6. The Respondent relies on the case of *The Owners of Motor Vessel “Lillian S” v Caltex Oil Kenya Limited* [1989] KLR 1653 (C.A) as quoted with approval in the decided case of [Malindi Law Society v Attorney General & 4 others](#) [2016] eKLR the Court of Appeal stated as follows:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a “court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

7. The Respondent further relies on the decision in [Grays Jepkemoi Kiplagat v Zakayo Chepkoga Cheruiyot](#) [2021] eKLR in which the Court held that a claim arising out of a private commercial contract and therefore cannot invite the invocation of violation of the constitutional provisions requiring enforcement by way of a constitutional petition.
8. The Respondent further submits that under Article 23 of the [Constitution of Kenya](#), the Employment and Labour Relations Court has no jurisdiction to grant the reliefs specified herein but rather such jurisdiction is reserved for the High Court. That Article 165 of the [Constitution](#) recognizes that the High Court is vested with jurisdiction to hear and determine matters of this nature as was appreciated in [Malindi Law Society v Attorney General & 4 others](#) (supra).
9. Citing Article 23 of the [Constitution](#), the Respondent submits that Article 23 provides that: -

23. Authority of courts to uphold and enforce the Bill of Rights

1. The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
2. Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
3. In any proceedings brought under Article 22, a court may grant appropriate relief, including—
 - a. a declaration of rights;
 - b. an injunction;



- c. a conservatory order;
 - d. a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
 - e. an order for compensation; and
 - f. an order for judicial review.
10. The Respondent further cites the case of *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR where the Court observed that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.
11. The Respondent also relies on the decision in *Bethwell Allan Omondi Okal v Telkom (K) Ltd (Founder) & 9 others* [2017] eKLR where the Court of Appeal observed:
- “The Appellant might want to argue that he has a constitutional right of access to justice, and we agree that he does, but the High Court and this Court have pronounced themselves many times to the effect that a party must first exhaust the other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the High court by way of constitutional petitions. See International Centre for Policy and Conflict & 4 others vs The Hon. Uhuru Kenyatta and others, Petition No. 552 of 2012, and Speaker of National Assembly vs Njenga Karume [2008] 1KLR 425.”
12. The Respondent submits that both the High Court and Employment and Labour Relations Court have concurrent and coordinate jurisdiction to determine violations of constitutional rights but the Employment and Labour Relations Court’s jurisdiction is invoked when the dispute relates to employment and labour relations. That it is evident that from the constitutional questions and issues raised in this petition this dispute ought to be handled by the Constitutional and Human Rights Court. That the High Court has a constitutional mandate to determine questions concerning the enforcement of fundamental rights and freedoms.
13. The Respondent further submits that it is the High Court which should hear and dispose of the matter because Article 165 is clear on the interpretation and enforcement jurisdiction of the High Court. The Respondent invites the court’s attention to the cases of *Centre for Rights Education and Awareness (CREAW) and others v The Attorney General* Nairobi Petition No. 16 of 2011 (Unreported) and *Dennis Mong’are Mugambi v Attorney General and Others* Nairobi Petition No. 146 of 2011 (Unreported) where the High Court affirmed its jurisdiction to hear and determine matters of enforcement of fundamental rights and freedoms.
14. The Respondent further relies on the case of *Law Society of Kenya v Federation of Kenya Employers* [2021] eKLR, Makau J. observed that;
- “Further upon consideration of the issues raised in the Petition, I find the Petition does not in my view relate to any issue touching on Article 41 of the Constitution nor Section 12 of the Employment and Labour Relations Act 2010. The Petition before this Court does not raise an employment and labour issue but raises issues related to gross violation of Petitioner’s rights and those of its members as well as the rights of the general public to quality services...”



15. The Respondent concludes that the present petition does not meet the legal threshold to warrant the grant of the orders sought.
16. For the Petitioner, it is submitted that under Article 165(2)(b) as read with Article 162(2)(a), the Employment and Labour Relations Court is bestowed with the power to determine whether a right or fundamental freedom has been denied, infringed, violated or is threatened. That the petition herein is remised both on unfair termination and on violation of constitutional rights. That the best mode to present the Claimant's case is therefore through a constitutional petition.
17. The Petitioner submits that his arbitrary arrest without a warrant and/or explanation, his harassment by denying him the right to counsel or without informing him of his rights as an accused person under Article 49 of the Constitution was discriminatory and demeaning of his dignity. That these are issues that cannot be claimed under the Employment Act.
18. The Petitioner relies on the decision in Mike Sonko Mbuvi Gideon Kioko v Clerk, Nairobi City County Assembly & 4 others [2020] eKLR where the Petitioner approached the Court through a petition and the Court held that it had jurisdiction to determine the case.
19. The Petitioner submits that Rule 7 of the Employment and Labour Relations Court (Procedure) Rules 2016 provides that 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.
20. A preliminary objection was defined in the case of Mukisa Biscuits Manufacturing Co. Ltd v West End Distribution Ltd [1969] E.A. 696 as an objection in the nature of what used to be a demurrer, which raised a pure position of law which is argued on the assumption that all the facts pleaded by the other side are correct. That it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of a judicial discretion.
21. In the instant suit, the Respondent has not filed any defence. It is not clear whether it agrees with the facts as pleaded by the Petitioner or not.
22. Secondly, the prayers by the Petitioner are not all anchored on the Employment Act. He has specifically pleaded that the petition is anchored on Articles 2, 3, 10, 19(1) and (2), 20(1) and (2), 27(1), 28, 29(a), 41(1)(a)(i), (c), 48, 50(2), 258(1), 259(1). In addition, he has relied on Sections 41, 43 and 45 of the Employment Act.
23. It would thus be premature for the Respondent to make a presumption about what the Petitioner claims without the benefit of the evidence in support of the prayers.
24. The Respondent has submitted that the Employment and Labour Relations Court and High Court have concurrent and coordinate jurisdiction to determine violations of constitutional rights but then it contradicts itself by asserting that the constitutional questions and issues raised in this petition ought to be handled by the Constitutional and Human Rights Court which has constitutional mandate, to determine questions concerning the enforcement of fundamental rights and freedoms, and that this Court has no jurisdiction to handle the instant petition.
25. This leaves the Court wondering whether the Respondent's position is that the petition herein is one that raises only employment issues and should be filed through an ordinary claim as stated in the preliminary objection or if the Respondent's position is that the petition raises constitutional issues which this Court has no jurisdiction to determine.
26. I find the preliminary objection without merit and accordingly dismiss it.



27. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 25TH DAY OF MAY 2022

MAUREEN ONYANGO

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 15th March 2020 and subsequent directions of 21st 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 Civil 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.

MAUREEN ONYANGO

JUDGE

