



Kariuki v New Palea Wholesalers Limited (Formerly Known as Paleah Store Limited) & another (Petition E137 of 2017) [2022] KEELRC 1451 (KLR) (30 June 2022) (Judgment)

Neutral citation: [2022] KEELRC 1451 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E137 OF 2017**

MN NDUMA, J

JUNE 30, 2022

IN THE MATTER OF ARTICLE 1,2,3(1), 10, 19, 20, 21, 22, 23, 27(1) (2) & (3), 28, 41(1), 47(1) & (2), 48, 50(1), 165(3) (B) & 258(1), OF THE CONSTITUTION OF KENYA (2010) AND IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27(1), (2) & (3), 28, 41*1), 47(1) AND 50(1) OF THE CONSTITUTION OF KENYA, 2010. AND IN THE MATTER OF RULE 4, 10, 11 AND 20 OF THE CONSTITUTION OF KENYA SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES, 2013 AND IN THE MATTER OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACT AND IN THE MATTER OF SECTIONS 41, 44, 45, 49 & 51 OF EMPLOYMENT ACT

BETWEEN

MICHAEL GACU KARIUKI PETITIONER

AND

NEW PALEA WHOLESALLERS LIMITED (FORMERLY KNOWN AS PALEAH STORE LIMITED) 1ST RESPONDENT

PATRICK NJIRU KURIA 2ND RESPONDENT

JUDGMENT

1. The petition was filed on September 7, 2021 by the petitioner seeking the following reliefs: -
 - a. A declaration be and is hereby issued that the termination of employment of the petitioner on grounds of gross misconduct was unprocedural, unlawful, unjustified and/or unfair.
 - b. An order directing the Respondent to pay the petitioner arrears of his salary for the month of May amounting to Kshs 120,000.



- c. An order directing the Respondent to pay severance pay on account of work done for 8 years calculated as follows;
3,333/= per day x 15 days = 49,995/= annually x 8 years = Kshs 399,960.
 - d. Three months' pay in lieu of notice Kshs 100,000/= x 3 = Kshs 300,000/=.
 - e. 12 months' salary for the unlawful termination from employment as provided for under Section 49 of the Employment Act for unfair termination- 12 x 100,000 = 1,200,000.
 - f. Payment of statutory deduction not remitted amounting Kshs. 1680,880.
 - g. General damages and breach of the Petitioner's right to fair labour practices
 - g. Certificate of Service.
 - h. Costs of this suit.
 - i. Interests thereon.
 - j. Any other relief the Court deems fit to grant.
2. The petition is founded on facts set out in paragraphs 5 to 18 of the petition the nub of which is that the petitioner was employed by the respondents as a General Manager of the conglomerate transport business in April, 2013 at a starting salary of Kshs 70,000.
 3. In February, 2017, the petitioner was arrested by police on allegation that he was involved in theft of the company's motor vehicle Registration No. KCF 022F. The petitioner sent a demand letter to the respondents and filed Civil Suit No. 1025 of 2017 against the respondents for false accusation and demanded damages thereof.
 4. The petitioner wrote a letter of resignation to the respondents on grounds that the work environment was not conducive and his work relationship with the Respondents had terribly deteriorated.
 5. The respondents implored the petitioner to return to work which the claimant accepted and negotiated a salary of Kshs 100,000 per month and an allowance of Kshs 12,000.
 6. That on May 28, 2021, the respondents called the petitioner on phone at around 8.30 am and directed that the petitioner vacate the work place failing which he would mobilise the drivers and mechanics to chase him out of the premises forcefully.
 7. The petitioner fearing for his life left the premises hurriedly leaving some of his belongings behind to avoid getting hurt by a mob that had gathered.
 8. That as part of his work, the claimant risked his life attending to various motor accidents in various parts of the country even in deep of the night with no extra pay.
 9. 9. That he worked for 8 years. That sometimes in 2016, the petitioner while attending to the company's bus registration No. KBB 164W, at Survey along Thika Road, slipped and fell at the door steps and broke two ribs which necessitated him to be hospitalized at Guru Nanak Hospital where she spent Kshs 350,000 for hospital bills. That the company did not pay the bills nor reimburse the claimant the money.
 10. That for the period of 8 years, the petitioner did not have National Social Security Fund and National Hospital Insurance Fund dues deducted from his salary remitted. That the petitioner did not go on



leave for the whole period and he worked during holidays and weekends severally without overtime paid.

11. That on 15th June, 2021, the respondent through the Human Resource department addressed a show cause letter to the petitioner upon the forceful eviction from the premises.
12. That the respondent has caused the petitioner great mental anguish and emotional distress because no explanation has been given to him for the termination of his employment even though he had served the company diligently and caused the company to grow in leaps and bounds. That the company had 11 buses when he joined and the fleet had grown to 45 trucks and 160 buses totaling to about 280 units.
13. That this growth is attributable to his leadership and management.

Legal Foundation

14. The petitioner has in the petition outlined various provisions of *the Constitution* in paragraphs 19 to 24 as the anchor of the petition.
15. The petitioner then set out the cause of action in paragraphs 25, 26 and 27 that the petitioner violated the petitioner's right to a fair hearing and fair Labour practices contrary to provisions of article 41(1) of *the Constitution* and that by dismissing the petitioner giving fictitious reasons, the respondent acted contrary to Article 47 of *the Constitution* on fair administrative action.
16. That the purported dismissal was in outright breach of section 4 of the *Fair Administrative Action Act* and section 41 and 45 of the *Employment Act*.
17. The petitioner in his final prayers did not seek any declarations and or judicial review orders in respect of any provision of *the Constitution* which was allegedly violated by the respondents.
18. The petition is supported by a verifying affidavit and a supporting affidavit of the petitioner setting out the facts leading to the filing of the petition. Statement of the claimant and list of documents are attached thereto.

Replying Affidavit

19. The 2nd respondent filed a replying affidavit sworn to on October 7, 2021 in which he first raises a preliminary objection to wit; that the petition herein is sub judice, in that it raises same matters raised in Cause No. MCELRC 1114 of 2021 - Michael Gacu Kariuki -vs- Patrick Njiru Kuria T/A New Paleah Wholesalers Limited
(Formerly known as Paleah Stores Limited). The plaint dated 16th June, 2021 is attached and marked 'PKN-I.'
20. The respondent deposes that the petitioner was employed by the 1st respondent as a manager and his duties included being the general overseer of the business, supervising the mechanics and employees and vehicle organisation at the yard.
21. That it is not true that the petitioner was chased away from work and that it is not true that the petitioner was treated in inhumane manner.
22. That the petitioner failed to report to work as required, prompting the respondent to write him a letter giving him a chance to be heard and to explain if he had any justifiable reasons as to why he had not reported to work and neither communicated to anyone as to why he failed to do so. The notice to show cause dated June 14, 2021 is annexed to the affidavit.



23. That the petitioner did not respond to show cause letter but instead filed cause No. Mcelrc114 of 2021 aforesaid.
24. That the petitioner was dismissed from work as a consequence thereof.
That he did not exhaust internal processes before approaching Court.
25. That it was his own folly not to report to work and the respondent had a justifiable reason to dismiss him.
26. That the petitioner failed to perform his duties as required and treated his fellow employees in a manner that was demeaning, uncalled for, despicable and uncouth which led to disgruntlement among employees under him leading to a go slow.
27. The employees of the 1st respondent signed a petition rejecting the petitioner as their general manager which petition is annexed, hereto and marked 'PNK- 3.'
28. The respondent admits having received demand letter dated February 10, 2017 before this suit was commenced. That the petitioner thereafter on March 6, 2017 submitted a notice of resignation of his employment and in his letter, he stated that he was happy working for the company.
29. The letter is annexed and marked 'PKN -6' but he withdrew the latter case, and negotiated for his reinstatement which happened. That Civil Suit No. 1025 of 2017 was not filed after the dismissal of the petitioner, but was filed on different allegations, namely malicious arrest and prosecution regarding an incident that occurred at work.
30. That the assertions by the petitioner that he was never granted leave by the 1st respondent are untrue since as the General Manager, he was required to authorize requests for leave for the rest of the employees. That the petitioner was entitled to leave and at no point did the respondents preclude the petitioner from being granted leave.
31. That it is not true that National Hospital Insurance Fund and National

Social Security Fund dues for the petitioner were not remitted.

32. That the claims by the petitioner can easily be resolved in an employment cause and not through a constitutional petition.
33. That not every case can be resolved by invoking the bill of rights in a constitutional petition and this petition falls short of the imperatives that must be pleaded with specificity and proved on a preponderance of evidence as was set out in the case of Anarita Karimi Njeru -vs- Republic (1979) eKLR.
34. That the present petition falls short of these imperatives and no constitutional remedies dealt with in a constitutional, judicial review petition have been pleaded in the final prayers of the petition herein. That the petition is devoid of any merit, it is an abuse of Court process and it be struck out accordingly.
35. The parties filed written submissions and the issues for determination are as follows: -
 - a. Whether this suit should be struck out for falling foul to the sub judice rule.
 - b. Whether the petition has been wrongly filed in a pure employment dispute that ought to have been brought by way of a statement of claim in terms of Employment and Labour Relations Court (procedure) rules 2016 and the enabling statutes.
 - c. Whether the petitioner is entitled to the remedies sought.



Determination

36. The court has carefully considered the Statement of claim filed by the claimant in Cause No. MCELRC 114 of 2021 against the respondent Patrick Njiru Kariuki T/A New Paleah Wholesalers Limited and is satisfied that the issues for determination raised in that suit before the magistrate Court are the same issues raised for determination in the present suit. The parties in both suits are the same and the reliefs sought are similar in material respects. However, given the salary the claimant alleges he was earning from the respondent in the sum of Kshs 100,000 at the time he alleges his employment was terminated by the respondent, the Chief magistrate's Court has no jurisdiction to hear and determine the matter in cause No. Mcelrc114 of 2021. The Court cannot therefore ask the claimant in the present suit to elect which cause of action he wishes to proceed with since the magistrate Court has to down its tools in the matter before it considering the facts pleaded on the face of the statement of claim.
37. The court finds that there is no impediment in proceeding to determine the present suit before it since it is properly filed in the court with jurisdiction to hear and determine it.
38. With regard to the question whether the petitioner herein wrongly filed a petition in a matter which ought to have been properly filed by way of a statement of claim, the court is well guided by the Court of Appeal decision in the case of [Daniel N. Mugendi -vs- Kenyatta University & 3 others](#) [2013] eKLR where the Court stated: -
- “- Citing the case of Alphonse Mwangemi Munga & 2 Others -vs- Africa Safari club Limited [2008] eKLR, the learned judge was persuaded that [the Constitution](#) had to be read together with other laws made by Parliament. It should not be so construed as to be disruptive of other laws in the administration of justice and that accordingly parties should make use of the normal procedures under the various laws to pursue their remedies instead of all of them moving to the Constitutional Court and making constitutional issues of what is not. With all the foregoing, the learned judge concluded that the claim placed before her by the appellant was based on employment – a matter that should have instead be taken to the Industrial Court which had constitutional and statutory jurisdiction over such matters and not the High Court in the form of a Constitutional reference.”
39. In the present matter, this Court has jurisdiction to deal with both a constitutional reference arising from employment and labour relations matters by dint of article 162(2) of [the Constitution](#) read with section 12 of the [Employment and Labour Relations Court Act](#), 2014 and a cause filed by way of a statement of claim.
40. However, the specific issue to be determined is whether it is a suited matter under article 22 of [the Constitution](#) which provision provides:-
- “(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed, or is threatened.”
41. Under article 23 is provided remedies that the Court may provided pursuant to a constitutional petition brought in terms of article 22(1) as follows: -
- (3) in any proceedings brought under Article 22, a Court may grant appropriate relief, including-
- a. declarations of rights
 - b. an injunction;



- c. 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 of judicial review.
42. The remedies sought by the petitioner in this matter as against the respondent, are remedies specifically provided for under Part VI – termination and dismissal of the *Employment Act*, 2007 and not remedies that are suited in a Constitutional judicial review petition. The raft of remedies therefore set out in this petition in paragraphs (e) to (K) herein before set out in the judgment is a best indicator that this suit ought not to have been brought by way of a constitutional petition and is indeed an abuse of court process especially given that the claimant was aware and had filed a civil cause in the lower court on the same cause of action.
43. Secondly, guided by the decision of the Court of Appeal in *Anarita Karimi Njeru -vs- Republic* [1979] eKLR where the Court stated as follows: -
- “We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.
44. The pleadings in this petition do not even begin to set out a sound basis for filing a constitutional matter on an employment matter wholly based on an employment contract between the petitioner and the 1st respondent. The petitioner does not disclose at all in relation to the specific reliefs sought in this matter how any right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened so as to find a Constitutional petition as the suitable option as opposed to a claim under the relevant statute, being the *Employment Act*, 2007 read with *Employment and Labour Relations Court Act*, 2014.
45. It has been reiterated time and over again that the provisions of article 159(2) (d) that “justice shall be administered without undue regard to procedural technicality.” ought not to provide carte blanche for misuse of constitutional petitions and by so doing diminish their sacred worth in protecting the rights and fundamental freedoms in the Bill of Rights.
46. This mis-use is particularly foul when used to jump the cue over litigants who have followed proper procedure as provided in the enabling statutes and the rules of the court by filing claims before this court which provide and remain the most appropriate method of filing suits solely based on an employer and employee contract.
47. This short cut is in many ways self-defeating as in this case, where the specifics of the actual dispute between the parties have not been specifically and with precision disclosed in the petition to enable the court arrive at a just determination of the dispute.
48. The disconnect between the pleadings in the petition and the remedies sought is glaring and the petition is found to be an abuse of Court process and struck out accordingly.



49. The cause of action having arisen in the year 2021, the matter is not yet statute barred especially in view of the other matter pending before the magistrate court which may still be lawfully transferred to a court with jurisdiction to hear and determine it upon application by the claimant therein.

50. In the final analysis, the petition is struck out as an abuse of court process with no order as to costs.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 30TH DAY OF JUNE, 2022.

MATHEWS N. NDUMA

JUDGE

Appearances

Mr. Omari for the petitioner

Mr. Khaemba for Respondent

Ekale – Court Assistant

