



**Nubian Rights Forum v National Hospital Insurance Fund & another
(Petition E024 of 2022) [2022] KEELRC 1382 (KLR) (29 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1382 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E024 OF 2022
NZIOKI WA MAKAU, J
JUNE 29, 2022**

**IN THE MATTER OF: THREATENED INFRINGEMENT
AND CONTRAVENTION OF FUNDAMENTAL**

**RIGHTS AND FREEDOMS UNDER ARTICLES 2, 10 (1), 10 (2), 19,
22, 41,47, 48, 73(2) & 201 OF THE CONSTITUTION OF KENYA,2010**

AND

**IN THE MATTER OF: ALLEGED VIOLATION OF
RIGHTS AND FREEDOMS UNDER ARTICLES 1(1),
2(1), & (2), 3(1), 10(1) & (2), 27, 73(2), & 201 OF THE CONSTITUTION OF KENYA,
2010**

BETWEEN

NUBIAN RIGHTS FORUM PETITIONER

AND

NATIONAL HOSPITAL INSURANCE FUND 1ST RESPONDENT

PETER KAMUNYO 2ND RESPONDENT

RULING

1. The 1st and 2nd respondents filed a notice of preliminary objection dated February 21, 2022 seeking that the petitioner's application and petition dated February 8, 2022 and the entire proceedings as filed before this court be dismissed with costs. The preliminary objection is premised on the ground that this honourable court lacks the jurisdiction to hear and determine the Petition which as filed violates the provisions of section 12 of the *Employment and Labour Relations Court Act*, 2011. Further, that the petition is amorphous, incompetent, fatally defective, and ought to be struck out for non-disclosure of any cause of action.



2. The 1st and 2nd Respondents/ Applicants submit that their preliminary objection is purely on a point of law and capable of disposing the entire suit and that it thus properly meets the threshold of a preliminary objection as espoused in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. They further submit that in determining a preliminary objection, the court will also consider that the preliminary objection must stem from the pleadings while raising a pure point of law as asserted in *Avtar Singh Bhamra & another v Oriental Commercial Bank*, Kisumu HCCC No. 53 of 2004 (unreported) cited with authority in *John Njuguna Kimunya v Teresiah Wachuka Kimunya & another* [2016] eKLR. It is their submission that this Court has original and appellate jurisdiction to hear and determine the disputes enumerated in section 12(1) of the *Employment and Labour Relations Court Act*. They submit that however, the petitioner herein is a human rights organization whose disputes with an employer the Employment and Labour Relations Court has no jurisdiction over unless such organization is suing as an employee or employer. They submit that the substratum of the Petition relates to alleged violation of rights of employees of the 1st Respondent but the Petitioner is not the employer, employee, trade union, employer's organization, federation, Registrar of Trade Unions or the Cabinet Secretary in this instant. They submit that the petitioner thus lacks the locus standi to even institute the suit before this court and that this court is not clothed with the jurisdiction to entertain this matter. On this issue of jurisdiction, the respondents rely on a plethora of authorities including the Supreme Court case of *Samuel Kamau Macharia v Kenya Commercial Bank & 2 others* [2012] eKLR wherein the court held that a court of law can only exercise jurisdiction as conferred by *the Constitution* or any other written law and cannot arrogate to itself jurisdiction exceeding that conferred upon it by law.
3. They further submit that even where a petition raises constitutional law questions, the same cannot be entertained by this court unless properly instituted by a proper party and the dispute is as contemplated under the *Employment and Labour Relations Court Act*. They rely on the case of *Public Service Commission & 4 others v Cheruiyot & 32 others* [2022] eKLR where the Court of Appeal laid down the interpretation of Section 12 of the *Employment and Labour Relations Court Act* as hereinabove submitted by them. Notably, that for the court to entertain a petition premised on the breach of a party's fundamental rights under *the Constitution*, the alleged breach must be ancillary and incidental to the matters contemplated under section 12 of the Act. It is the respondents/applicants' submission that the alleged constitutional breaches in the Petition are neither ancillary nor incidental to the disputes contemplated under the Act as there exists no relationship between them and the Petitioner herein. Furthermore, the issues in the Petition do not fall under the doctrine of public interest litigation as alleged by the Petitioner and are private in nature falling under private employment contract as asserted in *Humphrey Makokha Nyongesa & Another v Communications Authority of Kenya & 2 others* [2018] eKLR.
4. The respondents/applicants submit that the suit herein is a nullity and that this court having lacked jurisdiction in the matter, automatically lacks powers to transfer the same to a court of competent jurisdiction. That this was the holding in the case of *Joseph Muthee Kamau & another v David Mwangi Gichure & another* [2013] eKLR and reiterated by the Supreme Court in the case of *Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others* [2019] eKLR that a suit filed before a court without jurisdiction could not be transferred to another court. The applicants urge this court to apply the rationale adopted in *Phoenix of East Africa Assurance Company Limited v M. Thiga t/a Newspaper Service* [2019] eKLR wherein the court noted that a suit filed devoid of jurisdiction is dead on arrival and cannot be remedied.
5. The petitioner submits that the Employment and Labour Relations Court has the constitutional mandate to hear and determine all employment and labour relations disputes as under article 162(2)



- (a) of *the Constitution* of Kenya. That this mandate is defined in various cases including: *Daniel N Mugendi v Kenyatta University & 3 others* [2013] eKLR; *USIU v Attorney General [2012] eKLR*; and *Ali Jarso Wako & another v Ministry of Interior & Coordination of National Government & 5 others; Public Service Commission & 5 Others (Interested Parties)* [2020] eKLR. It submits that the matters raised in the petition relate to issues concerning the recruitment and employment of public servants and that accordingly, any constitutional issues raised in the petition are related and/or incidental to employment and labour relations.
6. As to whether it has locus standi to institute these proceedings, the petitioner submits that the petition herein is anchored under various constitutional provisions including articles 22 and 158 of *the Constitution* of Kenya which allows it to file a petition to vindicate the rule of law. The petitioner submits that in determining the petitioner's locus, this court should be persuaded by the case of *Priscilla Nyokabi Kanyua v Attorney General & Interim Independent Electoral Commission* [2010] eKLR. It further submits that it is trite law that what gives a person locus standi is a minimal personal interest even though it is clear that such person would not be more affected than any other member of the population. The Petitioner submits that the court has equally recognised that organizations have rights similar to that of an individual private member of the public and that in human rights cases, public interest litigation cannot bar the jurisdiction of the court or let justice bleed at the altar of technicality. The Petitioner submits that the court has vast powers to do justice without technical restrictions and that procedures and reliefs have to be moulded according to the facts and circumstances of each case and situation. The petitioner submits that if an authority expected to protect *the Constitution* drags its feet, any person acting in good faith may approach the court to seek judicial intervention to protect the sanctity of *the Constitution* and that the Anglo-Saxon jurisprudence that an action can only be brought by a person to whom legal injury is caused must be departed from.
 7. It is the petitioner's submission that it has defined itself as premised and fully operating in Kenya and that it has filed the petition on behalf of the employees and the entire Kenyan public. The Petitioner submits that the matter addressed in the petition give it proper standing before this court as held in *Okiya Omtatah Okioti & Another v Anne Waiguru, Cabinet Secretary, Devolution and Planning & others* [2014] eKLR. The petitioner submits that the respondents' preliminary objection herein is sensational, frivolous, vexatious, misconceived, made in bad faith and therefore suitable for dismissal with costs to the petitioner.
 8. The jurisdictional challenge by the respondents is to the effect that the court has no jurisdiction to entertain this petition as the petitioner is not an employee, Trade Union or employer's federation. It is submitted that The Employment and *Labour Relations Act* is confined to a class of the following: employer, employee, trade union, employer's organization, federation, Registrar of Trade Unions or the Cabinet Secretary. That argument flies in the face of articles 41 and 47 of *the Constitution* which give anchor to parties such as the petitioner to raise constitutional issues in relation to employment matters before this Court. The substratum of the petition relates to alleged violation of rights of employees of the 1st respondent. that is within the core mandate of this court and not any other court. Instructive and perhaps something the respondents are not aware of is the body of jurisprudence some of which is cited by the petitioner in response to the preliminary objection. One which the respondents can refer to in order to better understand the remit of a public interest litigation before this Court is the case of *Okiya Omtatah Okioti & Another v Anne Waiguru, Cabinet Secretary, Devolution and Planning & Others* (supra). The Petitioner is not articulating the Petition for itself and any attempt to interpret the *Employment and Labour Relations Court Act* so as to fetter the rights inherent in a case such as this is clearly a misstep and without basis. The petitioner has the requisite locus standi to institute the petition before this court. The preliminary objection raised by the respondents has no basis and is accordingly dismissed with costs to the petitioner.



It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JUNE 2022

NZIOKI WA MAKAU

JUDGE

