



Itolondo v Vice Chancellor of Kenyatta University (Miscellaneous Application E069 of 2022) [2022] KEELRC 1254 (KLR) (8 July 2022) (Ruling)

Neutral citation: [2022] KEELRC 1254 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E069 OF 2022**

SC RUTTO, J

JULY 8, 2022

IN THE MATTER OF: ARTICLES 3, 10, 21, 22, 23, 47, 48, 50, 159, 162, 165, 232 AND 258 OF THE CONSTITUTION OF KENYA, 2010.

IN THE MATTER OF: THE ALLEGED VIOLATION OF ARTICLES 3, 10 21, 22, 35, 47, AND 232 OF THE CONSTITUTION OF KENYA, 2010.

IN THE MATTER OF: THE ALLEGED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS IN ARTICLES 35 AND 47 OF THE CONSTITUTION OF KENYA, 2010.

IN THE MATTER OF: THE ALLEGED VIOLATION OF SECTIONS 3, 4, 5, 7, 9, 11, 14 AND 22 OF THE ACCESS OF INFORMATION ACT OF 2016 AND SECTIONS 4, 5, 6, 7 AND 11 OF THE FAIR ADMINISTRATIVE ACTION ACT OF 2015.

IN THE MATTER OF: FAILURE TO PROVIDE THE REPORT OF REFORMS AND RESTRUCTURING OF KENYATTA UNIVERSITY.

IN THE MATTER OF: FAILURE TO ENSURE TRANSPARENCY, ACTIVE INVOLVEMENT BY KENYATTA UNIVERSITY STAFF AND THE GENERAL PUBLIC IN THE REFORMS AND RESTRUCTURING OF KENYATTA UNIVERSITY.

BETWEEN

WILFRIDA A. ITOLONDO APPLICANT

AND

VICE CHANCELLOR OF KENYATTA UNIVERSITY RESPONDENT

RULING

1. The Applicant moved the Court through a Motion Application which is dated 12th May, 2022, seeking an order to prohibit the Respondent from implementing a report on the Reform and Restructuring of Kenyatta University until the Applicant and staff of Kenyatta University and the general public have been provided with the report. The Applicant further sought orders to compel the Respondent to



issue her with the report on Reform and Restructuring of Kenyatta University and to circulate it to its staff as the immediate key stakeholders and the general public.

2. The Application was certified urgent on 16th May, 2022 and it came up for interpartes hearing on 24th May, 2022.
3. The Respondent through its counsel, Mr. Regeru appearing alongside Mr. Thuo, informed Court that it had filed Grounds Objection in response to the Application and that the same raised a jurisdictional question.
4. The Applicant confirmed that she had received the Respondent's Grounds of Objection that morning. In the circumstances, the Court granted the Applicant time to respond to the Grounds of Objection and further issued directions on timelines to be complied with, in respect of submissions on the Grounds of Objection.
5. Since the Grounds of Objection raised a jurisdictional question, the Court deemed it prudent to determine the same at the outset.
6. The Grounds of Objection raised 16 grounds. Nonetheless, in its submissions in support of the Objection, the Respondent singled out the following two grounds: -
 - a. That the court has no jurisdiction to hear and determine the dispute as the predominant issue is not an employer employee dispute.
 - b. That the prayers sought in the Application cannot be granted in a Miscellaneous Application and ought to await the full hearing of a properly instituted suit.

Submissions

7. On the issue of jurisdiction, the Respondent submitted that jurisdiction flows from the law and the recipient court is to apply the same with any limitations embodied therein. That further, a Court cannot arrogate to itself jurisdiction through a craft of interpretation or by way of endeavours to discern or interpret the intentions of Parliament where the wording of the legislation is clear and there is no ambiguity. To this end, the Respondent invited the Court to consider the determinations in Phoenix of E.A Assurance Company Limited vs S.M Thiga t/a Newspaper Service (2019) eKLR and Xxcel Africa Limited t/a Mathare United Football Club (MUFC) vs Kenyan Premier League Limited (KPL) & another (2017) eKLR.
8. It was further submitted on behalf of the Respondent that for this Court to entertain a dispute, the same must relate to employment and labour relations and that the Miscellaneous Application herein has nothing to do with employment and labour relations. That further, the Application has been brought under Articles 2, 3, 10, 21, 2, 23, 35, 47, 50, 159, 165, 232 and 258 of *the Constitution* and the same do not deal with employment and labour relations. That suits on the said Articles should be instituted in the High Court as opposed to this Court.
9. The Respondent further argued that the Application is not based on Article 41 of *the Constitution*, which is the only Article of *the Constitution* whose interpretation is squarely within the jurisdiction of the Court.
10. It was the Respondent's further submission that the prayers sought are substantive, hence ought not to be sought through a Miscellaneous Application. The case of *Rockland Kenya Limited vs Commissioner General of the Kenya Revenue Authority & another* (020) eKLR was cited in support of this argument.
11. In conclusion, the Respondent urged the Court to strike out the Miscellaneous Application with costs.



12. On her part, the Applicant submitted that the Court has jurisdiction to hear and determine the dispute as it touches on employer-employee relations. That she is a senior lecturer at Kenyatta University where the Respondent is the Chief Executive Officer. On this issue, The Applicant invited the Court to consider the determination in the case of *Wilfrida Arnondah Itolondo vs Attorney General & 5 others* (2019) eKLR in which the Court departed from the narrow view on the question of jurisdiction. That in that matter, she was not an employee of the 3rd to 6th Respondents, but nonetheless since the matter touched on appointments, it was transferred from the High Court to the Employment and Labour Relations Court.
13. On whether the orders sought can be granted in a Miscellaneous Application, the Applicant submitted that the same was in respect of documentation and procedural technicalities. That further Article 159 (2) (d) of *the Constitution* provides that justice shall be administered without undue regard to procedural technicalities. That in view of Article 22 (3) (b) and 159 (2) (d) of *the Constitution*, as read together Sections 11 (3) and (4) of Legal Notice No. 117 of 2013, she could just have moved the Court orally or through a letter without going through formal documentation. To this end, she urged the Court not to dismiss the Miscellaneous Application because of procedural technicalities. To buttress her argument, the Applicant cited the case of *Okiya Okioti Omtata vs Communications Authority of Kenya & 8 others* (2018) eKLR and *D.T Dobie & Company Kenya Limited vs Joseph Mbaria Muchina & another* (1980) eKLR.

Analysis and determination

14. I have considered the Application, the Grounds of Objection, as well as the opposing submissions and two issues stand out for determination: -
 - i. Whether the Court has jurisdiction to hear and determine the dispute?
 - ii. Whether the prayers sought can be granted in a Miscellaneous Application?

The question of Jurisdiction

15. This Court's jurisdiction is founded on the provisions of Article 162 (2) (a) of *the Constitution*. Further, and to further give effect to the aforesaid constitutional provision, Section 12(1) and (2) of the *Employment and Labour Relations Court Act* provides that the Employment and Labour Relations Court shall have jurisdiction to determine disputes relating to employment and labour relations including:-
 - (a) disputes relating to or arising out of employment between an employer and an employee;
 - (b) disputes between an employer and a trade union;
 - (c) disputes between an employers' organisation and a trade unions organisation;
 - (d) disputes between trade unions;
 - (e) disputes between employer organizations;
 - (f) disputes between an employers' organisation and a trade union;
 - (g) disputes between a trade union and a member thereof;
 - (h) disputes between an employer's organisation or a federation and a member thereof;
 - (i) disputes concerning the registration and election of trade union officials; and



- (j) disputes relating to the registration and enforcement of collective agreements.
16. The question now is whether the matter herein falls within this Court’s jurisdiction as outlined above.
17. The Applicant has introduced herself as a senior lecturer at Kenyatta University. She states that she has brought the Application on her own behalf, on behalf of the staff of Kenyatta University as key stakeholders and the general public.
18. The Applicant seeks to access a report by the name “Reform and Restructuring of Kenyatta University”. The Applicant states that the Respondent has failed to avail the said report upon request by herself and the staff members of Kenyatta University.
19. Not much has been revealed by the Applicant about the nature of the said report. Be that as it may, what is evident is that the Applicant has moved the Court in her capacity as an employee of Kenyatta University where the Respondent is the academic and administrative head.
20. In the body of the Application, the Applicant referred to a meeting held on 1st April, 2022 where the Respondent briefed staff about the purpose of the meeting giving the following highlights: -
- “i. The university has been undergoing financial challenges that have necessitated reforms and restructuring of the university.
 - ii. The financial challenges have been caused majorly by a decrease in the self-sponsored students.
 - iii. The respondent had appointed a committee in August 2021 chaired by Prof. John Okumu that had come up with a report on reforms and restructuring of the university.
 - iv. The other names of the Prof. Okumu led committee were only disclosed at that meeting.
 - v. The report had been presented to the university senate for approval. on Wednesday 29th March, 2022 at a senate meeting held at safari park.
 - vi. That no staff will be laid off.”

Underlined for Emphasis

21. That thereafter, a Prof. Okumu presented a summary of the report on the Reforms and Restructuring of Kenyatta University.
22. It is notable that the Respondent through its counsel on record, denied the existence of the report and stated that stakeholder consultations were still ongoing. However, it did not dispute the meeting of 1st April, 2022 and the foregoing highlights as presented by the Applicant.
23. From the “highlights” of the meeting of 1st April, 2022, and specifically the last bullet which provides that “no staff will be laid off”, it is apparent that the restructuring process be it at whatever stage, potentially has an impact on the labour force at Kenyatta University. This is because it alludes to retention of employees following the restructuring process.
24. I have found it imperative to set out the background of the matter as above, so as to give the context of the dispute, which appears to be in an employment setting.
25. Therefore, it is apparent that the Applicant is seeking access to the report, in her capacity as an employee of Kenyatta University, which is headed by the Respondent and who may presumably have custody of the said report by virtue of his capacity.



26. The Respondent has submitted that this Court lacks jurisdiction to entertain the Application as it relates to the right to access to information under Article 35 of the Constitution. With due respect, I disagree with this position.
27. This Court is vested with jurisdiction to determine constitutional violations beyond Article 41 of the Constitution provided they are employment and labour related. In the instant case, the right to access information has been made in an employment context and as stated above, if the report indeed exists, will impact on the labour force Kenyatta University. This includes the Applicant and the other staff at the university.
28. On this score, I will align myself to the holding by the Court of Appeal in the case of Daniel NMugendi vs Kenyatta University & 3 others [2013] eKLR where the learned Judges reckoned that: -

“The learned judge had in the proceedings before him been addressed on the aspect where it was alleged that fundamental rights relating to employment and labour (Article 41 Constitution) had been violated, and whether the Industrial Court could entertain such claims. While adopting the position enunciated in the South African case of *Gcaba vs Minister of Safety and Security & Others* CCT 64/08 (2009) ZACC 26, Majanja, J proceeded:

“44. ...I would adopt the position of the Constitutional Court of South Africa in *Gcaba Vs Minister of Safety and Security* (Supra). 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 same status of the High Court, it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret the Constitution and fundamental rights and freedoms, is incidental to the exercise of jurisdiction over matters within its exclusive 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 the matter before it.”

We have quoted in extenso the pertinent parts of the judgment above for the relevance attached to this appeal. In sum on this ground of jurisdiction, we find as we had stated earlier that the High Court had no jurisdiction to entertain the claim which essentially was based on breaches of contract of employment along with some unstated claims of breaches of rights, as the learned judge did find.”

Underlined for emphasis

29. Accordingly, since the dispute has its basis in an employment setting, it is my view that this Court is vested with the primary jurisdiction to determine the dispute, hence it can determine any ancillary matters arising therefrom, including access to information.
30. Having settled the issue of jurisdiction, I now move to determine whether the orders sought at this instance can be granted through a Miscellaneous Application.

Whether the orders sought can be granted in a Miscellaneous Application?

31. The Respondent contends that the orders sought by the Applicant cannot be granted through a Miscellaneous Application as they are substantive in nature.



32. From looking at the Miscellaneous Application, it is notable that the same purely raises constitutional issues, key among them being Article 35 of *the Constitution* which relates to access to information.
33. Enforcement of the Bill of Rights under *the Constitution*, 2010 is guided by *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, commonly referred to as The Mutunga Rules.
34. In this regard, Rule 4(1) of the said Mutunga Rules, is couched as follows:-
- “Where any right or fundamental freedom provided for in *the Constitution* is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.”
35. Rule 10 (1) provides that an application under Rule 4 shall be made by way of a Petition as set out in Form A in the Schedule with such alterations as may be necessary. The said Form A to the Schedule provides the format of the Petition as follows: -
- “IN THE HIGH COURT OF KENYA AT
- PETITION NO. OF 20
- IN THE MATTER OF ARTICLE 22(1)
- IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLE (insert article)
- BETWEEN
- A.B. (insert names of parties) PETITIONER
- AND
- C.D. (insert names of parties) RESPONDENT”
36. The foregoing notwithstanding, Rule 10(3) qualifies the provisions of Rule 10(1) as it provides that: -
- “Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.”
37. My construction of the aforementioned provision is that the provisions of Rule 10(1) is not cast on stone and a party may elect to move the Court through whatever means albeit informal. That is to mean that there are no hard and fast rules as regards the manner a party alleging a constitutional violation may move the Court.
38. It would seem that the Applicant herein opted to move the Court through a Miscellaneous Application which has cited the constitutional provisions that have been allegedly violated.
39. Over and above, Article 22 (3) (b) of *the Constitution* requires that any “formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation”.



40. More importantly, Article 159 (2) (d) of *the Constitution* provides that: -

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles...justice shall be administered without undue regard to procedural technicalities.”

41. To this end, the suit though brought by way of a Miscellaneous Application as opposed to a Petition, passes the test under Rule 10 (3) of the Mutunga Rules.

42. My position is fortified by the determination of J.A Makau J (as he then was), in the case of Miscellaneous Application E010 of 2020 *Karen Hospital vs Michael Omusula (Being sued as next of Kin, Representative and Husband/Spouse of Jackyline Nelimamutaki)* [2021] eKLR where the learned Judge observed that: -

“[28]. In view of the nature of patients fundamental rights herein and the nature of the application, pending before me, I find that though Constitutional Petition is required to be instituted by way of a Petition, the Mutunga Rules, are drawn in such a matter that allows accommodation of an application that is not brought to Court by way of a Petition and the Court is under an obligation to accept even an oral application, a letter or any other informal documentation, which discloses a denial, violation, infringement or threat to a right or fundamental freedom. I therefore find, that further, to demand that the Applicant should have commenced these proceedings by way of a plaint, Petition or originating summons and not by miscellaneous application, is not supported by the Mutunga Rules governing Constitutional Petitions and applications. I find the Applicant Miscellaneous application is not fatal as the Applicant’s Miscellaneous application deals with Constitutional violation as already noted herein above.”

43. I have also considered the determination in the case of *Rockland Kenya Limited vs Commissioner General of the Kenya Revenue Authority & another* [2020] eKLR which was cited by the Respondent in support of its position, and I note that the same was in respect to a normal civil claim unlike the instant matter which purely raises constitutional issues.

44. Aside from the foregoing, the Court appreciates and bears in mind that the Applicant being a pro se litigant, may be handicapped and challenged in maneuvering through Court Procedures and other intricacies of the law.

45. Accordingly, and despite the suit having been initiated by way of a Miscellaneous Application, the same finds refuge in Rule 10(3) of the Mutunga Rules and can be accommodated, hence I am inclined to save the same rather than terminate it prematurely.

Orders

46. Accordingly, I find the Grounds of Objection to be without merit and I dismiss the same with no order as to costs.

47. Having dismissed the Grounds of Objection, the Respondent is hereby granted leave to file a substantive response to the Application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JULY 2022.

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STELLA RUTTO



JUDGE

Appearance;

For the Applicant In person

For the Respondent Mr. Regeru appearing alongside Mr. Thuo

Court Assistant Barille Sora

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 had 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.

STELLA RUTTO

JUDGE

