Mugure v Ministry of Defence & another (Petition E011 of 2021) [2022] KEELRC 3898 (KLR) (16 September 2022) (Ruling)

Neutral citation: [2022] KEELRC 3898 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI

PETITION E011 OF 2021

DKN MARETE, J

SEPTEMBER 16, 2022

BETWEEN

MAJ (RTD) PETER MWAURA MUGURE ..... PETITIONER

AND

MINISTRY OF DEFENCE ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

RULING

1. This is an application by way of a preliminary objection dated March 10, 2022. It is based on the grounds;
    1. The petition violates the doctrine of exhaustion of administrative remedies.
    2. The petition contravenes the trite law enunciated in the *locus classicus* case of *Anarita Karimi Njeru v Republic* (1979) eKLR.
    3. This honourable court lacks the jurisdiction to entertain the suit.
2. The 1st respondent /objector's case is that the petitioner has not exhausted the administrative remedies available to him before filling this matter in court. It is her case that in as much as the petitioner alleges that administrative action meted out on him was not fair, he ought to have exhausted the administrative remedies available to him under the *Kenya Defence Forces Act* and the *Fair Administrative Action Act*. This is the appropriate procedure for parties to take before coming to court.
3. On this the 1st respondent/objector seeks to rely on the authority of *Larry Odira Seko v Senate, Pan Africa Christian University & 2 others* (2022) eKLR was guided by the finding of the Court of Appeal

Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others (2015) eKLR to the effect that;

> "It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. courts ought to be for a of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts..."

4. Her further case is that it is not disputed that the petitioner did not exhaust the administrative remedies available to him. Secondly, a peruse of the alleged appeal against termination of commission as presented to this court reveals that the issues raised are outside the ambit of the Defence Council as established under the *Constitution* and defined under the *Kenya Defence Forces Act , 2012*.

5. The 1st respondent/objector also banks and relies on the authority of *Charles Onchari Ogoti v Safaricom Limited & Another* (2020) eKLR, where the High Court in adopting the Supreme Court decision held thus;

> "...I would respectfully agree that although the general principle is that as found by the Supreme Court in *Independent Electoral and Boundaries Commission v Jane Cheperenger & 2 Others* (2015) eKLR, that preliminary objection procedure should be invoked (as with Mukisa Biscuits' case) where facts are not disputed, it may "it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement (and) it is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits." This public interest cause of effective use of judicial resources may call for the use of preliminary objection procedure of in limine determination of disputed facts where facts are capable of quick resolution and may be established by consideration of the materials before the court without calling for further evidence...This would also the case where on a question of res judicata or sub-judice, only the respective pleadings and or judgment need be considered."

6. In the case of *Anarita Karimi Njeru v Republic* (1979) eKLR, the court observed thus;

> "...we would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *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..."

Further,

7. In the authority of *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* (2020) eKLR, the court held thus;

> "(Counsel) argued that the instant suit is brought under article 22 of the *Constitution* and that it raises constitutional issues. This argument is attractive because arguments invoking the *Constitution* are bound to evoke emotions because it is the Supreme law of the land. However, attractive as it is, this argument collapses not on one but on three fronts. First, a constitutional question is an issue whose resolution requires the interpretation of a

constitution rather than that of a statute. When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider constitutional rights or values."

8. The petitioner/applicant in opposition to the preliminary objection seeks to rely on the authority of *Akusala Borniface and another v Law Society of Kenya* [2021] eKLR, where the court observed thus;

> " The validity of any preliminary objection is gauged against the requirement that it must raise pure points of law capable of disposing the dispute at once. It is, therefore, mandatory for a court to ascertain that a preliminary objection is not caught up within the realm of factual issues that would necessitate the calling of evidence."

9. He further seeks to buttress his position by relying on the authority of *Mukhisa Biscuits Manufacturing Company Ltd v West End Distributors Limited (1969) EA 696* where the court observed as follows;

> " ... so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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.
>
> ... A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued 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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop."

10. Again, he supplements his case by relying on the authority of *Oraro v Mbaja* which states as follows;

> " I think the principle is abundantly clear. A preliminary objection, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed."

11. The petitioner/respondent further submits that he has not violated the doctrine of exhaustion in that the respondent/applicant posits and submits that the issues raised here are outside the ambit and scope of the Defence Council yet faults the petitioner for failing to exhaust available administrative remedies. This is double speak. It is blowing hot and cold and should not be sustained in the circumstances. It is not feasible in support of the objection.

12. Thepetitioner/respondent further submits that this is a quest for judicial review remedies under the doctrine of exhaustion might be a threat to this attempt. This is, however, nullified and voided on the ground that an authority who curtails, obstructs and deliberately frustrates their own internal review mechanisms stands estopped from pleading the defence of exhaustion.

13. Further, thepetitioner/respondent seeks to rely on the authority of *Okiya Omtatah Okoit v Commissioner General, Kenya Revenue Authority & 2 others* [2018] eKLR where the court observed as follows:

> "This approach is same one suggested by the Court of Appeal in *R v National Environmental Management Authority* [2011] eKLR where the court explained that: The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it."

Again,

> "In a similar claim of employee not having brought complaint under internal grievance mechanism where the said employee raised Constitutional issues, the Court of Appeal in Civil Appeal No 93 of 2020 *Justice Lucy Njoki Waithaka v The Tribunal Appointed to investigate the conduct of the Hon Lady Justice Lucy Njoki Waithaka and others* [2021] eKLR. In this case, the ELRC court declined jurisdiction and held that the Tribunal was the conclusive forum to vindicate the petitioner as may be found by the tribunal other than the court to make a finding on the grounds raised by the (appellant). The Court of Appeal considered whether the learnt judge erred to decline jurisdiction by stating the tribunal was the right forum notwithstanding the appellant had raised complaints of her constitutional violations. The Court of Appeal found that the learnt judge/wrongly abducted jurisdiction granted under article 165 (5) (b) of the *Constitution* on violation of constitutional rights. The Court of Appeal found that there are no exceptional reasons for court to decline jurisdiction that is expressed by the *Constitution*. The court should strive to hear and determine the disputes actually before them as opposed to driving away parties from the judgment seat unheard.
>
> The court upholds the said decision of Court of Appeal. The court finds the KDF internal grievance mechanisms are specific and narrow flowing from section 303 of the KDF Act and that it is not upon the Chief of KDF to hear and make any determination on the alleged violation of constitutional rights. The Applicant has relied on Authority of *Republic v The principal Magistrates Court at Lamu & Another* [2016] eKLR to buttress the alternative remedy exhaustion. In the Court of Appeal case (supra) the court states that whereas it is correct principle that a party should not onvoke court process where there exists another sufficient and adequate avenue or forum for the effective resolution of disputes, the tribunal does not qualify as such alternative, effective forum for such sound of complaints for reasons given which was only the court had jurisdiction to determine questions of constitutional rights violations. This court takes the similar position and finds that the issues raised by the claimant on violation of constitutional rights in the procedure of dismissal from service are competently before court under article 162(2)(a) as read together with article section 165 (5) (b) of the *Constitution* and the *Employment and Labour Relations Court Act , 2011* . Under the claim the court has powers to grant order sought if found to have merit."

14. In the penultimate, the petitioner/respondent relies on the authority of *Kennedy Nunda Okoth v Chief of Kenya Defence Forces & 2 others* [2022] eKLR where the court concluded that the doctrine of exhaustion does not apply in handling of constitutional violations of parties. The court held thus;

> "19. The respondents objected to the jurisdiction of the court on the ground that the Petitioner had not exhausted the dispute resolution avenues outlined in section 303(3)(c) of the *Kenya Defence Forces Act* as read with the *Armed Forces (Summary Jurisdiction) Regulations, 1969* (now repealed).
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> 20. The section provides:
>
> 303. Establishment of internal grievance mechanism.
>
> (1) The Defence Council shall establish an internal grievance mechanism which shall be under the office of the Chief of the Kenya Defence Forces to address any complaint brought by or against a member of the Defence Forces.
>
> (2) The Defence Council shall, within ninety days of the commencement of this Act make rules of procedure with respect to internal grievance mechanism established under subsection (1).
>
> (3) The rules of procedure made under subsection (2) shall be in accordance with article 47 of the *Constitution* and shall make provisions with respect to investigation and determination of any complaint by or against a member of the Defence Forces and without prejudice to the generality of the foregoing, the rules of procedure shall make provisions with respect to—
>
> (a) the procedure to be observed in lodging a complaint;
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> (b) manner in which the complaint is to be investigated; and
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> (c) manner in which appeals are to be made where a member of the Defence Forces has not obtained a satisfactory redress.
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> 21. The court has keenly examined the aforecited proviso and come to the view that it does not apply to disciplinary proceedings such as faced the Petitioner.
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> 22. The court is of that view because under Part VIII of the *Kenya Defence Forces Act*, and more so section 159 of the Act, the guidelines for summary trials are set out in detail, and these include recourse to other authorities as contemplated by written law (including courts)."

15. The petitioner/respondent further submits, and this is on record that the objector is not amenable to an out of court settlement of the issues in dispute. This has been demonstrated throughout these proceedings and are therefore estopped from relying on defence of exhaustion of remedies.

16. At the onset, it is noted that the objectors have not indicated the particulars of violations of the doctrine of exhaustion. This is not demonstrated or at all, on the face of the preliminary objection or their written submissions in support of the application.

17. The contradiction of the authority of *Anarita Karimi Njeru v Republic*, [1979] eKLR is also not outrightly explained.

18. The respondent/petitioner brings out a case of constitutional petition in which he seeks judicial review remedies. He further opposes the preliminary objection by a submission that in a situation like we are faced with, where a party is bound and open to abuse of his available administrative process, the doctrine of exhaustion is not available to them.

19. Again the petitioner/respondent comes out with authorities that oust the defence of exhaustion in cases of constitutional violation like we now have. This court has on various occasions implored upon the parties to negotiate and reconcile on the issues at hand. All this time the respondent/objector has rebuffed such attempts. A case of allegiance to alternative remedies is not displayed in the circumstances. The objector's sincerity in resolving the matter by any other process is not demonstrated or even apparent.

20. This is an issue of violation of the constitutional rights of a citizen. It is primal in attention and adjudication. This court takes unfettered jurisdiction and interest in the subject. This cannot be wished away on the basis of a plea of the doctrine of exhaustion. It remains a no defence.

21. The conduct of the objector in these proceedings as pleaded by the petitioner/respondent is telling. The petitioner is not likely to enjoy an open hearing in a tribunal before the 1st respondent/objector. There is no indication of open endedness.

22. I am therefore inclined to dismiss the preliminary objection with cost to the petitioner/respondent.

DATED AND DELIVERED AT NYERI THIS 16TH DAY OF SEPTEMBER 2022.

D.K. NJAGI MARETE

JUDGE

Appearances

Mr. Tororei instructed by State Law Office for the Respondents/Objectors

Mr. Gori instructed by Gori, Ombongi & Company Advocates for the Petitioner/Respondent.