



Benjamin v Ministry of Labour & another; Federation of Kenyan Employers & 4 others (Interested Parties) (Petition E001 of 2022) [2022] KEELRC 3887 (KLR) (2 September 2022) (Ruling)

Neutral citation: [2022] KEELRC 3887 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E001 OF 2022
SC RUTTO, J
SEPTEMBER 2, 2022

IN THE MATTER OF ON UNEQUAL DURATION MATERNITY AND P'ERNITY LEAVES
AND
IN THE MATTER OF SECTION 5 AND 29 OF EMPLOYMENT ACT 2007 (REV.2012)
AND
IN THE MATTER OF CHILDREN ACT, 2001
AND
IN THE MATTER OF VIOLATION OF THE RIGHT TO NON- DISCRIMINATION
AND
IN THE MATTER OF CONTRAVENTION OF ARTICLES 10, 27,
28 AND 41, 43, 53 OF THE CONSTITUTION OF KENYA (2010)

BETWEEN

MAGARE GIKENYI J BENJAMIN PETITIONER

AND

MINISTRY OF LABOUR 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

AND

FEDERATION OF KENYAN EMPLOYERS (FKE) INTERESTED PARTY

CENTRAL ORGANISATION OF TRADE UNIONS (COTU) INTERESTED PARTY

TRADE UNIONS CONGRESS OF KENYA (TUC-KE) INTERESTED PARTY

NATIONAL ASSEMBLY (NA) INTERESTED PARTY



RULING

1. Before me for determination is the respondents' Notice of Preliminary Objection dated March 8, 2022, brought on grounds that: -
 1. The petitioner is a stranger, busy body and lacks locus standi to file and prosecute this petition against the respondents and he has no sufficient interest in law to commence these proceedings since under section 12(2) of the Employment and Labour Relations Act, the petitioner is neither an employee, an employer, a trade union, an employer's organisation, a federation, the registrar of trade unions, the cabinet secretary nor any office established under any written law for such purpose.
 2. This Honourable court lacks jurisdiction to hear and determine this matter since the petition does not disclose a cause of action or dispute within the meaning of section 12(1) of the [Employment and Labour Relations Court Act](#).
 3. The issues raised in the petition are matters reserved for the High Court under Article 165 of the [Constitution](#) and as such the Employment and Labour Relations Court does not have jurisdiction to handle the matter.
 - a. By virtue of the foregoing, the petitioner is forum shopping and the Court should guard against abuse of its process.
 - b. The petition is grossly incompetent, incurably defective, vexatious and an abuse of the court process and ought to be struck out in limine.
2. The petitioner filed his Replying Affidavit in response to the Preliminary Objection through which he avers that: -
 - i. The purported preliminary objection is not a demurrer and as such cannot amount to a preliminary objection and is a waste of precious judicial time.
 - ii. A preliminary objection must relate to matters which are not contested and are pure points of law which do not rely on any facts from the respondents. Postulations by the respondents or their points of departure cannot be used as points of law.
 - iii. Consequently, whether the petition discloses a cause of action or dispute is a matter the Court is to decide on the evidence before it and thus not a matter of law but an issue of fact and/or contestation of facts.
 - iv. Article 22 of the [constitution](#) (2010) gives a wide ranging *loci standi* to file any matter in court.
 - v. The respondents and interested parties are properly enjoined. The Ministry of Labour (1st respondent) makes employment policies while the 2nd respondent (Attorney General) represents county and national government, parastatals and agencies in court for civil and quasi-judicial matters. While the interested parties protect interests of their members (FKE, COTU, TUK) in matters labour. The 4th and 5th interested parties legislate of laws including labour laws. Hence these parties (respondents and interested parties) are properly enjoined.



- vi. The issue of workers' leaves like maternal leave, paternal leave, sick leave etc deal with labour issues which is the jurisdiction of this Honourable Court.
- vii. Article 162(2) mandates this Court to deal with employment and labour relationship issues.

Submissions

3. The respondents submitted that the petitioner does not fall within any of the categories stated in section 12(2) of the *Employment and Labour Relations Court Act* and there is no employer-employee relationship between the petitioner and the respondents. That there is therefore no legal basis on which this Petition should be lodged at the Employment and Labour Relations Court. To support this position, reliance was placed on the case of *Public Service Commission & 4 others vs Eric Cheruiyot & 32 others* (Civil Appeal Nos 119 &139 of 2017) (2022) KECA 15 KLR. Consequently, the respondents urged this Court to find that the petitioner has no *locus standi* to file and prosecute the petition against the respondents.
4. It was the respondents' further submission that the matters touching on the constitutionality of an Act lies in the purview of the High Court as provided under Article 165(5) (d) of the *Constitution*. Citing the case of *Republic vs Karisa Chengo & 2 others* (2017) eKLR, the respondents submitted that this matter is not in the ambit of this Court's jurisdiction. The respondents further invited the Court to consider the decisions in *Owners of the Motor Vessel "Lilian S" vs Caltex Oil (Kenya) Ltd* [1989] eKLR, *Public Service Commission & 4 others vs Cheruiyot & 32 others* (Civil Appeal Nos 119 &139 of 2017) (2022) KECA 15 KLR.
5. It was further submitted that the petitioner has not specifically demonstrated how his constitutional rights were violated. That the jurisdiction of the Court should be invoked by the petitioner pleading breach of a specific right under the bill of rights and particularizing the details and the manner in which such rights have been infringed. The case of *Anarita Karimi Njeru vs Republic* of Kenya (1976-80) 1 KLR 1272 and *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR, was cited by the respondents to fortify this argument.
6. On his part, the petitioner submitted that the Preliminary Objection is not a demurrer and as such, cannot amount to a Preliminary Objection. That a Preliminary Objection must relate to matters which are not contested and are pure points of law. As to what constitutes a question of law, the petitioner invited the Court to consider the determination in the case of *Mohammed Abdi Mahamed vs Ahmed Abdulabi Mohammed & 3 others* (2018) eKLR. The case of *Mukisa Biscuit Manufacturing Company Limited vs West End Distributors* (1969) EA 696, was cited in support of this argument, with the petitioner further submitting that none of the three grounds raised by the respondents amount to preliminary points of law.
7. On the question of *locus standi*, the petitioner submitted that anyone can move to Court for declaratory and fundamental orders if he/she has reasonable belief that his/her right or/and rights of others have been violated or threatened to be violated. The case of *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR was cited by the petitioner to buttress this argument. The petitioner further argued that there is no requirement for one to be an employee to raise constitutional matters.
8. It was the petitioner's further submission, that the Petition is concerned with Section 29 of the *Employment Act*, which he avers, discriminates on leave days hence this Court is a competent court with the requisite jurisdiction to deal with alleged discrimination of employees based on the sex of



the employee on labour issues at a place of work. That it is not the High Court which deals with discrimination in a place of work.

9. The petitioner further submitted that the question as to whether the Petition discloses a cause of action or dispute is a matter to be decided by the Court after hearing the evidence from all parties.
10. Placing reliance on the case of the *Attorney General & 2 Others vs Okiya Omtata Okiiti & 14 Others* (2020) eKLR, the petitioner submitted that the Court has the requisite jurisdiction to determine the dispute.

Analysis and Determination

11. The petitioner has contended that the Preliminary Objection by the respondents does not meet the threshold as to what constitutes a Preliminary Objection. Notably, the respondents did not address this issue in their submissions.
12. What constitutes a Preliminary Objection was determined in the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696 thus: -

“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point, 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 had to be ascertained or if what is sought is the exercise of judicial discretion.”

13. Drawing from the above authority, a Preliminary Objection ought to satisfy the following elements: -
 - a. It should raise a pure point of law;
 - b. It is argued on the assumption that all the facts pleaded by the other side are correct; and
 - c. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
14. Essentially, a Preliminary Objection can only be raised on a pure point of law and must not be blurred with factual issues that can be disputed. Such was the determination by the Supreme Court in *Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 Others*, Application No 50 of 2014, [2015] eKLR, where it was held as follows: -

“Thus, a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are *prima facie* presented in the pleadings on record.”

15. The first ground of Preliminary Objection is on locus standi and which is raised on the basis that the petitioner is neither an employee, an employer, a trade union, an employer’s organisation, a federation, the registrar of trade unions, the cabinet secretary nor any office established under any written law for such purpose.
16. Essentially, this issue touches on the capacity of the petitioner to bring the instant Petition. The issues touching on the capacity of the petitioner in terms of section 12 (2) of the *Employment and Labour*



Relations Court Act, is a question of fact that can only be determined upon examination of facts before the Court. Evidently, and going by the petitioner's Replying Affidavit, this is a contested fact.

17. Further, the Preliminary Objection states that the Petition does not disclose a cause of action or dispute within the meaning of section 12 (1) of the Employment and Labour Relations Court Act. This is an issue that can only be determined upon the Court examining the facts of the case alongside the evidentiary material on record.
18. In the circumstances, the Court cannot make a conclusive finding from the face of the Preliminary Objection as to whether the Petition has disclosed a cause of action. If anything, a finding on this issue is tantamount to exercise of judicial discretion thus the Preliminary Objection further falls short of the legal threshold.
19. What this means is that the Preliminary Objection as couched, is not confined to issues of law and seeks the exercise of the Court's discretion. Simply put, the instant Preliminary Objection does not meet the legal threshold of a Preliminary Objection.
20. Having found as such, I will have stopped there but I find it necessary to address the question of jurisdiction which has been raised in the Preliminary Objection in regards to this matter.
21. As per the Preliminary Objection, the issues raised in the Petition are matters reserved for the High Court under Article 165 of the Constitution hence this Court does not have jurisdiction to handle the Petition.
22. The gist of the Petition is the constitutionality of Section 29 of Employment Act, 2007, which makes provision for maternity leave in respect of female employees. Maternity leave is a right granted to female employees to take time off work, following child birth. This is therefore one of the rights granted to employees under the Employment Act. As such, it is a right that accrues within an employment relationship. Thus, does this Court have jurisdiction to determine this issue?
23. In the case of Daniel N Mugendi vs Kenyatta University & 3 others [2013] eKLR, the learned Judges of the Court of Appeal 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

24. In following with the above decision and given the fact that the dispute has its basis within the context of an employment relationship, 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 the constitutionality of a provision concerning employee rights.
25. I have also had the opportunity to consider the decision in the case of Public Service Commission & 4 others vs Cheruiyot & 20 others (Civil Appeal 119 & 139 of 2017 (Consolidated) [2022] KECA 15 (KLR), which was cited by the respondents in support of their arguments.
26. It is notable that the issue for determination in that case was in respect of the constitutionality of section 43(5) and (6) of the Elections Act. The same had no bearing on employee rights under the Employment Act as in the present Petition.
27. Indeed, in my view, the drafters of the Employment and Labour Relations Court Act, did not intend to limit the Court’s jurisdiction to matters arising within an employment relationship or put in another way, where there is an employer-employee contract. I believe that it is for this reason that the rider “....and for connected purposes” was incorporated into the preamble of the Act.
28. To this end, it is my finding that the issue in dispute herein is in respect of matters related to employment and labour relations hence this Court has jurisdiction to determine the same.
29. For the reasons set out above, the Preliminary Objection is overruled with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF SEPTEMBER 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Petitioner In person

For the Respondents Ms Kinyua

For the Interested Parties No appearance

Court assistant Abdimalik Hussein

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

