



Ngugi & 2 others v Attorney General (Sued on behalf of President, Head of Public Service, Cabinet Secretary, Ministry of Education and Secretary to the Cabinet) (Petition E123 of 2022) [2022] KEELRC 12920 (KLR) (14 October 2022) (Ruling)

Neutral citation: [2022] KEELRC 12920 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E123 OF 2022
SC RUTTO, J
OCTOBER 14, 2022
IN THE MATTER OF: ARTICLE 22(1) OF THE CONSTITUTION
OF KENYA
IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS UNDER
ARTICLES 1, 2, 10, 19 (1) AND (3), 20 (1), 21
(1), 27 (1), 41, 47, 62 (4), 73 (2) (B), 131 (2) (A)
AND (E), 153 (1) AND (4) (A) AND 232 (1)
AND (2) OF THE CONSTITUTION OF
KENYA

BETWEEN

FAITH NGUGI 1ST PETITIONER

KEN MUTUA 2ND PETITIONER

MOSES NGIGI 3RD PETITIONER

AND

ATTORNEY GENERAL RESPONDENT

SUED ON BEHALF OF PRESIDENT, HEAD OF PUBLIC SERVICE, CABINET SECRETARY, MINISTRY OF EDUCATION AND SECRETARY TO THE CABINET



RULING

1. The respondent has raised a preliminary objection dated July 22, 2022, which is premised on the following grounds: -
 1. The petitioners lack *locus standi* to commence these proceedings as has been clearly set out by the Court of Appeal in Civil Appeal No 119 of 2017, Public Service Commission and 2 others v Eric Cheruiyot & others and in that regard the court lacks the jurisdiction to hear and determine the issues raised herein.
 2. The honourable court lacks jurisdiction to hear and grant the orders sought both in the application and petition as:
 - a. The Kenyatta University council members are not employees of the university and do not fall in the category of employees where this honorable court has jurisdiction hence the orders challenging the alleged disbandment of the council cannot issue in the circumstances.
 - b. The orders seeking to challenge and quash the said cabinet decisions on alleged annexation, alienation and expropriation of property land reference number 11026/2 purely lie in the jurisdiction of the Environment and Land Court established (sic) 162 Constitution and this court cannot hear and determine this matter.
 - c. The alleged directives and decisions of the head of public service cannot be challenged in this court by virtue of provisions of article 162 of the Constitution and *inter alia* section 12 of the Employment and Labour Relations Court Act as there is no employer employee relationship.
 - d. The matter herein is purely premised on the doctrine of privity of contract and the petitioners and the person on whose behalf the respondent has been sued have not such relationship with each other hence the proceedings cannot stand.

Submissions

2. The preliminary objection was canvassed by way of oral submissions. Ms Mbilo submitting on behalf of the respondent, argued that the petitioners have not demonstrated their interest in the matter and the fact that the vice chancellor and the Kenyatta University Council lack the capacity to appear in court under article 22 to represent themselves. In this regard, Ms Mbilo referred to article 258 of the Constitution as being the standard guide for locus standi. She further placed reliance on the case of Public Service Commission & 4 others v Cheruiyot & 20 others (Civil Appeal 119 & 139 of 2017 (consolidated) [2022] KECA 15 (KLR)). Ms Mbilo further buttressed her submissions on the provisions of article 162 (2) of the Constitution and section 12 of the Employment and Labour Relations Court Act (ELRC Act) which spells out the parties who can approach this court.



3. As regards jurisdiction, Ms Mbilo submitted that since the orders being sought by the petitioners are in respect of the disbandment of the university council, this court lacked jurisdiction. That in this regard, the council members are not employees of the Kenyatta University and any issue in regard to its disbandment did not fall within the jurisdiction of this court. It was her further submission that the vice chancellor of Kenyatta University, being an employee of the university, had not commenced proceedings to challenge his suspension, hence the petitioners lack locus to commence the instant proceedings as there is no privity of contract.
4. Ms Mbilo further submitted that the petition seeks to quash annexation and appropriation of land. That this is an environment and land issue, hence pursuant to article 162 of the Constitution, this court lacks jurisdiction. That in addition, the directions and decision of the head of public service cannot be challenged in this court by virtue of article 162 of the Constitution and section 12 of the ELRC Act as there is no employer employee relationship. To this end, counsel urged the court to strike out the petition.
5. Mr Havi submitting on behalf of the petitioners, stated that the test for determination of a preliminary objection is as set out in *Mukisa Biscuit Manufacturing Co Ltd v West end Distributors Ltd* (1969) EA 696. That the issues raised in the preliminary objection must be on a pure point of law and the objection must be one that will finally dispose off the action. That as such, the question as to whether there is an employment relationship between the parties is a question of fact.
6. As regards the issue of *locus standi*, Mr Havi submitted that under article 22 and 258 of the Constitution, anybody can approach the court in the event a right has been violated or is under threat of violation. That the person who moves the court need not be the person who has suffered infringement. That the petitioners in this case, being staff of Kenyatta University have *locus standi*, and a challenge in that regard cannot be sustained.
7. Counsel further argued that indeed, the respondent has admitted that the petitioners and the vice chancellor is an employee of Kenyatta University. That as such, this was an employment dispute that was properly before this court.
8. That as regards the validity of the actions of the head of public service and Prof Kiamba, the same was a secondary question to the employment dispute. To buttress his arguments, counsel made reference to the case of *David Ndii v the Attorney General* (citation not provided) where the court examined the three aspects of what suffices to be a preliminary objection. He submitted that the court also considered, the question of jurisdiction and justiciability and openness of a petition and held that where there is a scintilla of evidence leading to a question of fact, the court should not entertain the preliminary objection. That the justiciability of a petition is not a question of a preliminary objection. Counsel urged the court to dismiss the preliminary objection.
9. In a quick rejoinder, Ms Mbilo submitted that the preliminary objection passes the test in the *Mukisa Biscuit Case* as it raises a pure point of law. That the petitioners are neither members of the council nor the vice chancellor of Kenyatta University. That since the parties have been clearly described in the petition and the respondents are not employers, the objection therefore raises a pure point of law. She further argued that the petitioners do not meet the test under article 22 and 258 of the Constitution hence lack *locus standi* to bring the instant suit. To this end, counsel placed reliance on the case of the *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* [2015] eKLR.



Analysis And Determination

10. I find it imperative to first start by describing what a proper preliminary objection is. This is now a settled issue of law hence I will not reinvent the wheel. A preliminary objection was described in the celebrated case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696 as follows: -

“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”.

11. As per Sir Charles Nebbold, JA: -

“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. The improper raising of points by way of preliminary objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

12. Therefore, for a preliminary objection to pass the test, it ought to raise a pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or where the court is called upon to exercise judicial discretion.

13. Related to the same issue, the court in the case of *Avtar Singh Bhamra & another v Oriental Commercial Bank*, Kisumu HCCC No 53 of 2004, determined that: -

“A preliminary objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

14. As to the distinction between a question of law and fact, I wish to draw guidance from the expression of Mativo J (as he then was) in the case of *JN & 5 others v Board of Management, St G School Nairobi & another* [2017] eKLR, where the learned judge held that: -

“14. In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts.

15. In law, a question of fact, also known as a point of fact, is a question that must be answered by reference to facts and evidence as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant legal principles. The answer to a question of fact (a "finding of fact") usually depends on particular circumstances or factual situations.”

15. Drawing from the decision of Mativo J, an employment relationship is a question of fact or rather, is an issue that can only be answered by reference to facts and evidence. Further, it is notable that the



respondent has not filed a response hence there is no averment as regards the relationship between the parties. The facts cannot therefore be said to be settled.

16. The preliminary objection is premised on the capacity of the petitioners to bring the instant petition on account that there is no employment relationship subsisting between the parties. No doubt, this is a factual issue. A preliminary objection should be based on a pure point of law and should not be marred with issues of fact as the case herein.
17. The net effect of my consideration is that the respondent's preliminary objection has not met the legal threshold of a preliminary objection.
18. In view of the reasons set out above, the respondent's preliminary objection dated July 22, 2022 is overruled with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF OCTOBER 2022.

STELLA RUTTO

JUDGE

Appearance:

For the Petitioners Mr. Havi

For the Respondent Ms. Mbilo

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

