



**Rachuonyo v Jaramogi Oginga Odinga University of Science and Technology  
(Petition E035 of 2022) [2022] KEELRC 13278 (KLR) (23 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13278 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
PETITION E035 OF 2022**

**S RADIDO, J**

**NOVEMBER 23, 2022**

**IN THE MATTER OF ARTICLES 20(1) AND (2), 27(1), 41(1), 47(1), 50(1) AND (2)  
(B), (C) AND (K) AND 159(2))(D) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF SECTIONS 44(4), 45(3)(B) AND 46(G) OF THE  
EMPLOYMENT ACT, 2007 AND IN THE MATTER OF RULES 2, 7(2), 18, 19 AND  
24 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND  
FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF UNFAIR TERMINATION OF EMPLOYMENT CONTRACT**

**BETWEEN**

**GEORGE ONYANGO RACHUONYO ..... CLAIMANT**

**AND**

**JARAMOGI OGINGA ODINGA UNIVERSITY OF SCIENCE AND  
TECHNOLOGY ..... RESPONDENT**

**RULING**

1. George Onyango Rachuonyo (the applicant) lodged a Petition with the Court on 29 August 2022, alleging unfair termination of employment. At the same time, the applicant filed a Motion under a certificate of urgency seeking interim conservatory orders.
2. Upon service, the Jaramogi University of Science and Technology (the Respondent) filed Grounds of Opposition and a Notice of Preliminary Objection contending that:
  - (1) The Court lacks jurisdiction to hear and determine the Petitioners' Petition as the cause of action in the Petition is not anchored in the *Constitution of Kenya, 2010*.



- (2) The Petition did not adhere to the principle of avoidance also known as constitutional avoidance which entails that a court will not determine a constitutional issue when a matter may properly be decided on another basis.
  - (3) The remedies sought in the Petition are provided for in the [Employment Act](#) and [Labour Relations Act](#) that provides an avenue for redress in the event of violation.
  - (4) That the Petition is fatally defective in form and substance as remedies sought by the Petitioner against the Respondent cannot be granted by virtue of a Petition.
  - (5) That the cause of action and remedies sought in the Petition cannot be heard and determined by this Honourable Court as per the judgment of the Supreme Court in [Communications Commission of Kenya & Ors v Royal Media Services Ltd & 5 Ors](#) [2014] eKLR.
3. The applicant filed a replying affidavit to the Preliminary Objection, a replying affidavit to the Grounds of Opposition, submissions on the Grounds of Opposition and submissions on the Preliminary Objection on 5 October 2022.
  4. The Respondent, after that, filed its submissions on 13 October 2022 (should have been filed/served before 6 October 2022).
  5. In support of the Preliminary Objection, the Respondent argued that the applicant was alleging unfair termination of employment and that the remedies sought by the applicant were all provided for in the statute, which had codified the right to fair labour practices (case law was cited including [Sumayya Athmani Hassan v Paul Masinde Simidi & Ar](#) [2019] eKLR).
  6. In the [Simidi](#) case, the Court of Appeal held:
 

"unlawful interdiction and termination of employment of a contract of employment was not a constitutional issue, and thus the Petition did not disclose a cause of action anchored in [the Constitution](#). Accordingly, the Petition being incompetent, the Court acted in excess of jurisdiction and erred in law in determining the Petition."
  7. In his submissions, the applicant asserted that the Preliminary Objection did not raise pure points of law as contemplated in [Anthony Miano & Ors v Attorney General & Ors](#) (2021) eKLR.
  8. The High Court stated in the decision that:
 

"Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence."
  9. The applicant further contended that the objection was casually drafted and did not cite any constitutional provision breached requiring moving the Court through a Petition.
  10. The Court has considered the Petition, Motion, Affidavits, Notice of Preliminary Objection, and submissions and come to the view that the Objection should be upheld for the following reasons.
  11. One, the cause of action presented by the applicant arises from an employment contract and the remedies sought are sound in employment law as embodied in the [Employment Act, 2007](#).



12. In this respect, this Court finds and endorses the words *In Re Application by Bahadur* [1986] LRC 9(CONST) that:

The Constitution is not a general Substitute for the normal procedure for “ invoking Judicial control of administrative action where infringements of rights can find a claim under substantive law. The proper course is to bring the claim under that law and not under the Constitution. (Harrikson v Attorney-General of Trinidad & Tobago [1979], 3 WLR 62 applied).

13. Two, the dispute advanced by the applicant would require the interrogation of evidence during a viva voce hearing to enable the Court do justice to the parties. In other words, adjudication by way of pleadings and submissions would impede rather than advance the cause of justice.
14. Three, the applicant has not demonstrated that there were any disputed facts which the Court should look into or interrogate while addressing the Preliminary Objection.
15. Lastly, upholding the Preliminary Objection will not prevent the applicant from accessing justice as he could still approach the Court in the normal way as contemplated by Rule 7(3) of the *Employment and Labour Relations Court (Procedure) Rules, 2016*.

### **Conclusion and Orders**

16. The Court finds the Petition an abuse of the court process, and it is struck out with costs to the Respondent.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 23<sup>RD</sup> DAY OF NOVEMBER 2022.**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

### **Appearances:**

For applicant Odhiambo & Odhiambo Advocates

For Respondent Jeptanui Katwa, Advocate, Legal Department, Jaramogi University of Science and Technology

Court Assistant Chrispo Aura

