



Universities’ Academic Staff Union (UASU) (Kenyatta University Chapter) v Kenyatta University & another (Petition E023 of 2021) [2022] KEELRC 13109 (KLR) (3 November 2022) (Ruling)

Neutral citation: [2022] KEELRC 13109 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E023 OF 2021
MA ONYANGO, J
NOVEMBER 3, 2022**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS UNDER ARTICLES 2, 3, 10, 19, 20, 21, 22, 23,
24, 27, 36(1), 37, 41, 47 AND 50 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF EMPLOYMENT ACT (NO. 17 OF 2007)

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT (NO. 4 OF 2015)

BETWEEN

**UNIVERSITIES’ ACADEMIC STAFF UNION (UASU) (KENYATTA
UNIVERSITY CHAPTER) PETITIONER**

AND

KENYATTA UNIVERSITY 1ST RESPONDENT

COMMISSION FOR UNIVERSITY EDUCATION 2ND RESPONDENT

RULING

1. By notice of preliminary objection dated March 4, 2021 the 1st Respondent seeks the dismissal of the entire Petition with costs to the 1st Respondent on the grounds THAT:-
 - (i) The Court has no jurisdiction to hear and determine this Petition in which the predominant issue is the propriety or otherwise of the 1st Respondent’s decision to relocate its school of Agriculture and Enterprise Development (SAED) from one of the 1st Respondent’s campus to another.



- (ii) The Petitioner has no capacity to sue in the manner it has purported to do so.
2. In its submissions in support of the preliminary objection the 1st Respondent avers that this Court lacks the requisite jurisdiction to entertain the petition as filed by dint of the provisions of Section 12 of the *Employment and Labour Relations Court Act* given that the dispute between the parties is not an employment and/or Labour relations dispute. To buttress this argument the 1st Respondent relied on the cases of *Phoenix of EA Assurance Company Limited v S M Thiga T/A Newspaper Services [2019] eKLR*, *Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited [1989] KLR 1* and *Excel Africa Limited T/A Mathare United Football Club (MUFC) v Kenya Premier League (KPL) & Another [2017] eKLR* where the Courts held that if a Court lacks jurisdiction it cannot proceed to hear the matter.
 3. It is further submitted that the core reason for the petition is to stop the planned relocation of the 1st Respondent's School of Agriculture and Enterprise Development (SAED) from the Main Campus in Nairobi to Kitui which does not fall under the ambit of what can be handled by this Court
 4. The 1st Respondent further submitted that the Petition herein is filed in the wrong court as prayers 1, 2, 3, 4, 5, 7 and 8 therein are not labour related and that the only relief sought with a labour connotation is prayer 9 whose success is dependant on the grant of the other reliefs sought.
 5. The Applicant submits that the only recourse available to this Court is to dismiss the Petition as this Court cannot order the transfer of this petition given that it is not a court of competent jurisdiction. To buttress this argument the Applicant relied on the supreme Court decision in the case of *Albert Chairemba Mumba & 7 Others v Maurice Munyao & 148 Others [2019] eKLR* where the Court while citing the case of *Kagenyi v Musiramo & Another [1968] EALR 43* held that an order to transfer a suit from one court to another cannot be made unless the suit is in the first instance filed in a Court with competent jurisdiction.
 6. On the issue of capacity to sue the Applicant submitted that the Petitioner is not a registered trade union and has further not exhibited any certificate of registration as proof of its registration. It is further argued that the Petitioner is in fact a chapter or a branch of a trade union and thus lacks capacity to sue and be sued. For emphasis the Applicant cited the case of *Kenya National Chamber of Commerce and Industry – KNCCI (Murang'a Chapter) & 2 Others v Del Monte Kenya Limited & 3 Others; County Government of Kiambu (Interested Party) [2020] eKLR*.
 7. The Applicant further argued that the Petitioner has not disclosed the persons on whose behalf it has filed the instant Petition and therefore cannot be allowed to litigate on behalf of unnamed persons. For emphasis the Applicant cited the case of *Dock Workers Union v Kenya Ports Authority [2015] eKLR*.
 8. In conclusion the 1st Respondent urged the Court to be guided by the cited authorities and similarly uphold the Preliminary Objection dated March 4, 2021 is merited and to dismiss the Petition in its entirety with costs to the 1st Respondent.

2nd Respondent's Submissions

9. The 2nd Respondent in its submission contended that the 1st Respondent's Preliminary Objection is merited and urged this Court to allow it to avoid a lengthy trial process that would waste judicial time.
10. The 2nd Respondent also submitted that this Court lacks Jurisdiction to entertain the Petition filed as the predominant issue raised in the Petition is administrative in nature and has nothing to do with an employment and Labour Relations dispute. To buttress this argument the 2nd Respondent relied on the case of *Phoenix of EA Assurance Company Limited v S M Thiga T/A Newspaper Services*



(*Supra*), *Capital Markets Authority v Jeremiah Gitau Kiereini & Another [2014] eKLR* and *Celina Atieno Ogotu v Undugu Society of Kenya [2019] eKLR*.

11. On the Petitioner's capacity, the 2nd Respondent like the 1st Respondent maintained that the Petitioner lacks the capacity to institute the petition and that right is reserved for a registered trade union.
12. In conclusion the 2nd Respondent argued that the Petition as filed is without substance, is in fact a waste of Judicial time and urged this Court to be guided by the authorities cited and uphold the 1st Respondent's Preliminary Objection dated March 4, 2021.

Petitioner's Submissions

13. The Petitioner opposed the Preliminary Objection and submitted that the same as filed does not meet the threshold set out in the case of *Mukisa Biscuits v West End Distributors Limited [1969] EA 696*.
14. On the issue of jurisdiction, the Petitioner maintained that this Court is clothed with the requisite jurisdiction to hear and determine this matter by dint of the provisions of Articles 22, 23 and 162(2) of the *Constitution* of Kenya, 2010 as read with Section 12 of the *Employment and Labour Relations Court Act*.
15. The Petitioner further submitted that its legal status as contended by the Respondent is a factual issue which would require adjudication and cannot therefore be disposed of by way of a preliminary objection.
16. It is further submitted that the Petitioner has locus to institute the Petition as filed by virtue of the existence of the Collective Bargaining Agreement signed between it and the 1st respondent. To buttress this argument the Petitioner relied on the Supreme Court decision in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2014] eKLR* and the case of *Patel Brotherhood v County Government of Nakuru [2018] eKLR* where the respective Courts in dismissing the Preliminary Objections on capacity to institute suits held that a claim could be instituted by a nongovernmental organization and/or society respectively.
17. In conclusion the Petitioner urged this Court to find the preliminary objection devoid of merit and to dismiss it with costs to the Petitioner.

Analysis and Determination

18. I have considered the pleadings, the notice of preliminary objection and the submissions by the 1st and 2nd Respondent and the Petitioner. The issues for determination are whether the preliminary objection dated March 4, 2021 is merited, and whether the same ought to be allowed.
19. A preliminary objection was defined in the case of *Mukisa Biscuits Manufacturing Co Ltd v Westend Distributors Limited [1969] EA 696* as consisting 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 point may dispose of the suit."
20. The Respondents object to the suit on grounds of jurisdiction of this Court and the capacity of the Petitioner.
21. The Respondents have only faulted the jurisdiction of this Court to her prayers 1, 2, 3, 4, 5, 7 and 8 of the petition but agree that the Court has jurisdiction in its preliminary objection.



22. The prayers in the petition are as follows -

1. A Declaration be and is hereby issued that the decision and or proposal by the 1st Respondent to relocate the School of Agriculture and Enterprise Development (SAED) from Main Campus in Nairobi to Kitui Campus is unlawful, illegal, unprocedural, and null and void ab initio.
2. A Declaration be and is hereby issued that the decision and or proposal of the 1st Respondent to relocate the School of Agriculture and Enterprise Development (SAED) from the Main Campus in Nairobi to Kitui Campus violates the rights and fundamental freedoms of the Petitioner and its affected members who are faculty in the said School.
3. A Declaration be and is hereby issued that the decision and or proposal of the 1st Respondent to relocate the School of Agriculture and Enterprise Development (SAED) from the Main Campus in Nairobi to Kitui Campus contravenes Articles 2, 3, 10, 19, 20, 22, 23, 24, 27, 36(1), 38(1), 41(4), 47 and 50 of the Constitution of Kenya, and contravenes the rights of the Petitioner and its affected members who are faculty of SAED.
4. An Order of Certiorari do and hereby issue removing into the Court and quashing the proposal and/or decision the 1st Respondent to relocate the School of Agriculture and Enterprise Development (SAED) from the Main Campus in Nairobi to Kitui Campus.
5. An Injunction be and is hereby issued barring/prohibiting the 1st Respondent, its officers and or agents from in any way proceeding with the intended relocation the School of Agriculture and Enterprise Development (SAED) from its Main Campus in Nairobi to Kitui Campus.
6. An Injunction be and is hereby issued barring/prohibiting the 1st Respondent, its officers and or agents from in any way subjecting members of the Petitioner from the School of Agriculture and Enterprise Development (SAED) to any disciplinary action or retribution on account of failing to report or relocate to Kitui Campus.
7. A Declaration be and is hereby issued that the failure by the 2nd Respondent to respond to the Petitioner's petitions addressed to it are unreasonable and contravenes the petitioner's constitutional right to information.
8. Any other Orders and/or Relief the Honourable Court may deem just and fit to grant and/or as may be necessary to meet the ends of justice at any stage of the proceedings.
- (9) Costs of this petition be awarded to the Petitioner.

23. The jurisdiction of this Court is set out under Article 162(2) of the Constitution and Section 12 of the Employment and Labour Relations Court Act as follows:

Article 162(2)

- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—



- (a) employment and labour relations; and
- (b) the environment and the use and occupation of, and title to, land.

Section 12

12. Jurisdiction of the Court

1. The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the [*Constitution*](#) and the provisions of this Act or any other written law which extends jurisdiction to the Court 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 union's organisation;
 - (d) disputes between trade unions;
 - (e) disputes between employer organisations;
 - (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.
- (2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.
- (3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—
 - (i) interim preservation orders including injunctions in cases of urgency;
 - (ii) a prohibitory order;
 - (iii) an order for specific performance;
 - (iv) a declaratory order;



- (v) an award of compensation in any circumstances contemplated under this Act or any written law;
 - (vi) an award of damages in any circumstances contemplated under this Act or any written law;
 - (vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or
 - (viii) any other appropriate relief as the Court may deem fit to grant.
- (4) In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just.
- (5) The Court shall have jurisdiction to hear and determine appeals arising from—
- (a) decisions of the Registrar of Trade Unions; and
 - (b) decisions of any other local tribunal or commission as may be prescribed under any written law.

24. It is not in doubt that the Petitioner is a trade union representing the employees of the 1st Respondent. It is further not in doubt that the transfer of the campus would involve relocation of staff who are members of the Petitioner to the new campus.

25. The issue whether or not in so doing the 1st Respondent violated the rights of the Petitioner’s members is a matter that can only be determined upon hearing evidence by all the parties. The prayers alone cannot determine the same. Issues of transfer of staff are employment matters and fall within the jurisdiction of this Court.

26. In the case of *Celina Atieno Ogotu v Undugu Society of Kenya [2019] eKLR* the Court stated: -

“... the jurisdiction of this court is attracted by the reason of the fact that the factual background of the claims presented by the Claimant arose out of his contract of employment Once the Court is clothed with the jurisdiction to determine that aspect, it has full authority to determine the whole matter by virtue of its accrued or consequential jurisdiction.”

27. Further that: -

“Jurisdiction will be determined from the most dominant issue subject be clothed with jurisdiction to determine all secondary issues.”

28. All the prayers in the petition are anchored on the fact the employees to be affected by the relocation of the campus are members of the Petitioner. Whether or not it is entitled to the orders is for determination by the Court within the petition.

29. On the issue of capacity to sue, the Petitioner is, as admitted by the Respondents, a trade union. Whether or not it is registered is again a matter that can only be determined by evidence.

30. A preliminary objection can only be raised on a pure point of law and not on matters that require delving into the evidence. The registration of the Petitioner is therefore a question that does not lend itself to determination by way of a preliminary objection.



31. From the foregoing, I find that the preliminary objection dated March 4, 2021 is without merit and accordingly dismiss the same with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 3RD DAY OF NOVEMBER 2022

MAUREEN ONYANGO

JUDGE

