



REPUBLIC OF KENYA



**Lagat v International Potato Center & another (Petition E128 of 2021)  
[2022] KEELRC 13435 (KLR) (7 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13435 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E128 OF 2021  
JK GAKERI, J  
DECEMBER 7, 2022**

**BETWEEN**

**BETHWEL KIPKOECH LAGAT ..... PETITIONER**

**AND**

**INTERNATIONAL POTATO CENTER ..... 1<sup>ST</sup> RESPONDENT**

**CAREER DEVELOPMENT LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This is a preliminary objection by the 2<sup>nd</sup> respondent dated August 18, 2021 based on the grounds that;
  - i. The petition dated August 10, 2021 as framed is incompetent and fatally defective.
  - ii. The petition as filed does not raise any triable cause of action before this honourable court.
2. Briefly stated, the 1<sup>st</sup> respondent engaged the Petitioner as an OFSP Puree Processing Intern from June 25, 2015 to September 28, 2015 at Kshs 2,000/= per day.
3. The 1<sup>st</sup> respondent offered the petitioner a further contract of 6 months from November 1, 2015 to April 30, 2016 on similar terms.
4. Based on his performance as an intern, the petitioner was offered an OFSP Puree Processing Research Assistantship effect May 1, 2016 to October 31, 2016 at Kshs 2,000/= per day. Under a subsequent contract effective December 1, 2016 to April 2017, the petitioner was entitled to Kshs 2,200/= per day and Kshs 8,000/= per month subject to delivery of week reports and storage room reports of quality as approved by Dr Jan Low.



5. The petitioner was offered a further 2 months contract from October 1, 2017 to November 30, 2017 on similar terms and a further 2 months from December 1, 2017 to December 31, 2017. On December 15, 2017, the petitioner was offered the position of junior research assistant – Post Harvest effective 3<sup>rd</sup> January to December 31, 2018 at the 1<sup>st</sup> respondent’s office at Kisumu. He was further offered a 3 months contract effective January 1, 2019 to March 31, 2019 which was renewed from April 1, 2019 to June 30, 2019.
6. Intriguingly, on February 6, 2020, the 2<sup>nd</sup> respondent offered the petitioner a position of research assistant and seconded him to the 1<sup>st</sup> respondent for 6 months effective 6<sup>th</sup> January, to June 30, 2020 at Kshs 4,210/= per day.
7. The petitioner alleges constitutional and statutory violations by the respondents.
8. The petitioner prays for various reliefs including declaration of violation of fair labour practices, social and economic rights and discrimination, unpaid salary compensation and costs of the petition.
9. This is the petition, the 2<sup>nd</sup> respondent is objecting to.
10. The preliminary objection was canvassed of by way of written submissions.

## 2<sup>nd</sup> Respondent’s Written Submissions

11. The 2<sup>nd</sup> respondent relied on the decisions in *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* (1699) EA 696, *Anarita Karimi Njeru v Attorney General & others* and *David Sironga Ole Tukai v Francis Arap Muge & 2 others* to submit that the petition was defective as it did not point out any cause of action attributable to the 2<sup>nd</sup> respondent on the grounds that;
  - i. A preliminary objection raises a pure point of law which is argued on the assumption that all the facts by the other side are correct.
  - ii. The petition as framed does not meet the threshold of a constitutional petition as regards the provisions allegedly infringed, and the manner in which they are allegedly infringed.
  - iii. Parties are bound by their pleadings and unless amended they remain the foundation of the case.
12. It was the 2<sup>nd</sup> respondent’s submission that it engaged the petitioner for a period of 6 months from January 6, 2020 to June 30, 2020 and seconded him to the 1<sup>st</sup> respondent and the contract ended by effluxion of time and all statutory deductions were made.
13. It was urged that the petitioner had not identified a single constitutional or statutory violation attributable to the 2<sup>nd</sup> respondent not even the unpaid salary computations.
14. It was submitted that the petition as framed did not meet the constitutional threshold and should be dismissed in so far as it involves the 2<sup>nd</sup> respondent.
15. Reliance was made on the decision in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR to underscore the essence of precision in pleadings in the administration of substantive justice.
16. The court was urged to allow the preliminary objection and award costs to the 2<sup>nd</sup> respondent.



## Petitioner's Submissions

17. The petitioner identified two issues for determination;
  - i. Whether the objection met the test of a preliminary objection.
  - ii. Whether the petition disclosed a reasonable cause of action.
18. As regards the 1<sup>st</sup> issue, reliance was made on the Court of Appeal decision in *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* (supra) to underscore the essence of a preliminary objection.
19. The petitioner submitted that the objection did not meet the test of a preliminary objection on the grounds that;
  - i. It does not raise any point of law. It does not state the provisions of law the petition offends.
  - ii. The petition seeks reliefs from the respondents before the factual circumstances are ascertained, such as role of the 2<sup>nd</sup> respondent and its liability if any.
20. It is the petitioner's case that these issues can only be ascertained after consideration of the evidence before the court.
21. As to whether the petition discloses a reasonable action against the 2<sup>nd</sup> respondent, reliance was made on the decision in *DT Dobie & Co (K) Ltd v Muchina* (1982) eKLR for an explanation of the essence of reasonable cause of action.
22. It is urged that paragraphs 46 – 52 of the petition explained the petitioner's complaints against the 2<sup>nd</sup> respondent.
23. That paragraph 53 identified the violations by both respondents and the reliefs were joint.

## Determination

24. The singular issue of determination is whether the objection before the court meets the threshold of a preliminary objection.
25. While the 2<sup>nd</sup> respondent contends that its objection meets the threshold of a preliminary objection, the petitioner submits that it does not as it does not raise any pure point of law.
26. It requires no gainsaying that a preliminary objection must be on a point of law as enunciated in *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* (supra) where Law JA stated as follows;

“ . . . A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the 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.”



27. On his part, Sir Charles Newbold P. had this to say;

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of which is usually 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 . . .”

28. This formulation of a preliminary objection has been adopted and applied in countless decisions.

29. The issue for determination is whether the 2<sup>nd</sup> respondent’s preliminary objection raises a pure point of law.

30. The 2<sup>nd</sup> respondent submits that the petition dated August 10, 2021 as framed is incompetent and fatally defective as it does not meet the constitutional threshold set out in *Anarita Karimi Njeru v Attorney General & others* (supra) in terms of precision and raises no triable cause of action.

31. As adverted to elsewhere in this ruling, the gravamen of the petition is an employment dispute between the petitioner and the respondents which generally hinges on the facts of the case. The petitioner’s complaint is about unpaid salaries and violation of his rights for which he seeks compensation.

32. Needless to emphasize, these are factual issues and would have been canvassed more effectively in an ordinary cause but the petitioner has chosen the petition route which is documentary based.

33. In the courts view, the two grounds relied upon by the 2<sup>nd</sup> respondent are questions of law and fact as opposed to pure points of law which is the nature of a preliminary objection.

34. To that extent, the court is not persuaded that this is an opportune time to strike out the petition on the grounds relied upon as it would dislodge the petitioner from the seat of judgement before the substantive issues raised are considered.

35. Relatedly, it would not be in the interest of justice to strike out the petition at this early stage.

36. For the foregoing reasons, the preliminary objection dated August 18, 2021 is disallowed.

37. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 7<sup>TH</sup> DAY OF DECEMBER 2022**

**DR. JACOB GAKERI**

**JUDGE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 has 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.



**DR. JACOB GAKERI**  
**JUDGE**

