



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. E034 OF 2020

ENG. DAVID MATHU KIMINGI.....PETITIONER

VERSUS

SMEC INTERNATIONAL PTY LIMITED.....RESPONDENT

RULING

1. The Respondent/Applicant filed a Notice of Motion Application dated 21<sup>st</sup> October 2020 seeking that this Honourable Court be pleased to strike out the Petition herein dated 18<sup>th</sup> August 2020 and filed on 19<sup>th</sup> August 2020 against the Applicant. It also sought costs of the motion be provided for. The application was grounded on the arguments that the Petition did not meet the legal threshold as to what constitutes a Constitutional Petition in as far as the Petitioner alleges the violation of his rights and fundamental freedoms under the Bill of Rights. It was asserted the Petition is vague and evasive as regards the alleged constitutional violations. It was argued that the alleged violations as stated in the Petition by the Petitioner against the Applicant do not amount to infringement of any rights or fundamental freedoms under the Bill of Rights but are statutory in nature arising from the termination of the Petitioner's employment by the Applicant. The Respondent asserts that the matters raised as a Petition are an employment dispute that are not substantial to warrant the Honourable Court to sit as a Constitutional Court in order to assess whether the issues raised in the Petition are genuinely constitutional grievances. The Respondent argues that the issues arising out of the Petition ought to be adjudicated under the Employment Act, 2007 through a normal suit by way of a statement of claim under the rules of procedure of this Court. The Respondent urged the Court to preserve its integrity and ensure due process is adhered to against improper transmission of normal disputes or ordinary issues of litigation being disguised as Constitutional Petitions such as in the instant petition. The Respondent asserts it is just and equitable in the circumstances that the orders it seeks be granted by the Honourable Court and the Petition herein be struck out and costs awarded to the Applicant.

2. The Petitioner/Respondent filed a Replying Affidavit sworn on 23<sup>rd</sup> November 2020 averring that his Petition is properly drafted in conformity with the legal threshold required for constitutional petitions. He deponed that his Petition sets out precisely which of his constitutional rights have been infringed, namely Articles 27(5), 41(1) and 47(1) and that he has further pleaded the manner in which the Respondent has infringed on the said rights in paragraphs 13 to 23 of his Petition; that the right to be free from discrimination, fair labour practices and fair administrative action are protected under the abovementioned Articles of the Constitution. He asserts that his Petition thus raises *bona fide* issues and a reasonable cause of action against the Respondent who is yet to file a substantive reply to the issues he has raised. The Petitioner avers that under Article 165(3) of the Constitution this Court has jurisdiction to hear and determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. That the said power is concurrent with the court's jurisdiction to hear labour and employment matters under Article 162(2) of the Constitution and Section 12 of the Employment and Labour Relations Court Act. He asserts that Article 165(3)(b) of the Constitution read together with Article 23 empower this Court to hear his Petition and grant him the reliefs sought. He further avers that the Respondent's dispute can only be determined by presentation of arguments supported by evidence at the hearing and that the Respondent's assertion that seeking redress for infringement of fundamental rights arising from termination of employment can only be adjudicated through a statement of claim under the Employment Act is a misinterpretation of the law. He avers that the Respondent's application is meant to delay the hearing and determination of the Petition. He asserts that striking out of a petition is a draconian measure that can only be done in extreme circumstances and that the characteristics of the Petition herein do not qualify it for striking out. He argues that the Respondent's application is frivolous, vexatious and an abuse of the Court process. In the Petitioner's List of Authorities dated 25<sup>th</sup> November 2020, he relies on the authorities of **Peter M. Kariuki v Attorney General [2014] eKLR**; **Paul Omondi Otiende & 10 Others v Attorney General & 3 Others [2016] eKLR**; and that of **Kevin Turunga Ithagi v Fred Ochieng & 5 Others [2015] eKLR**.

3. The parties argued their cases orally and filed skeletal submissions. The Respondent/Applicant through its counsel Mrs. Cosima Wetende argued that the matter before me is not a Petition but a claim under labour law and that the Respondent wished to stamp out the practice of advocates filing a petition to fast track to overlap matters that are pending. The Respondent asserts that from a reading of paragraph 13 of the Petition it is clear that it is a claim on the right to be heard which is an employment issue and that the Petitioner references Section 41 of the Employment Act. Counsel argued that there was a claim of discrimination and it that the discrimination followed suspension. The Petitioner alleges that the person who took over is an expatriate hence the assertion of discrimination. Counsel argued that this does not alter the character of the suit as it is a claim as the Petition was vague and evasive. She cited the case of **Siaya County Public Service Board v County Assembly of Siaya & Another [2020] eKLR** where the Court held that the Petition therein failed for failure to provide or state with precision the acts which the Respondents had allegedly done which were in breach of the Articles cited in the petition and further the manner in which its rights had been infringed by the said actions. Mrs. Wetende argued that the alleged infarctions by the Respondent should not be magnified and we should let the statutes apply. She also cited the cases of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR** and **Leonard Munyua Kamau v Kenya Wildlife Service & 2 Others [2020] eKLR** as well as that of **Rachel Otieno Odumo & 27 Others v Kenya Engineering Workers Union Headquarters & 2 Others [2017] eKLR**.

4. The Petitioner's Counsel Mr. Njuguna argued that the Respondent had misconstrued the Petition and citing the case of **Peter M. Kariuki v Attorney General [2014] eKLR** submits that a Court can only strike out if the issue is frivolous, fictitious or abuse of court process. He argued that a Court should always seek to determine a matter on merit. Counsel asserts that there is no requirement to particularise the

Petition and the only requirement is to make available evidence of the requisite injustice meted out. On the issue of competency threshold, he argued that the Court should be reluctant to dismiss a case unless in very clear cases. He submitted that on the basis of the case of **Kevin Turunga Ithagi v Fred Ochieng' & 5 Others [2015] eKLR** the courts had moved from the position of **Anarita Karimi** to a purposive position. Mr. Njuguna stated that the 1<sup>st</sup> authority in the Respondent's List of Authorities is clearly distinguishable as it was a finding upon full hearing. That similarly for authority number 2 the Court of Appeal allowed it after the hearing on merits and that the same is repeated in authority number 3 where appeal was after full hearing. That only authority number 4 is on striking out (refer to the last page at para 10, 11 and 12) and that the reason O.N Makau J. struck it out is because the pleadings as presented to court were so bad that they did not make out a case or be relied on by court to enable out a case. That the Learned Judge used the word pathetic in para 10 and stated that the pleadings were almost impossible to comprehend and that the Judge further ordered the petitioner to bring a better suit. It is Mr. Njuguna's argument that nothing will be prejudicial if the Respondent challenges the same issues in a response and he prayed that the Court dismissed the Motion with costs.

5. The main issue for determination in the application before me is whether the Petition raises any issues on violation of the Constitution to meet the threshold of a constitutional petition. In the Petition while the Petitioner has cited Article 41(1) of the Constitution as having been allegedly contravened, he has failed to specify the said provision and further give particulars of the said contravention within the body of the Petition. The Petitioner further alleges violation of his constitutional right under Article 23(3) in the Orders he seeks in the Petition yet the same is not averred with specificity and particulars given on how the Respondent violated the said right. It is my considered opinion that the Petitioner has failed to satisfy the threshold of specificity as espoused in the celebrated cases of **Anarita Karimi Njeru v Republic (No. 1) [1979] 1 KLR 154** and **Mumo Matemu v Trusted Society of Human Rights Alliance, Civil Appeal No. 290 of 2012 [2013] eKLR**. Whereas the Constitution of Kenya 2010 is meant to be interpreted with purposiveness free of the shackles of the past stiffness in interpretation, a Court cannot breathe life to a matter that is dead on arrival. The court in **Elizabeth Mburu v Kenya Breweries Ltd [2014] eKLR** which cited with approval the decision in **Petronella Nellie Nelisiwe Chirwa v Transnet Limited and Others (CCT 78/06) [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC) ; [2008] 2 BLLR 97 (CC) ; (2008) 29 ILJ 73 (CC) (28 November 2007)**. In my view it could not have been the intention of the Legislature to allow an employee to raise what is essentially a labour dispute in terms of the Act as a constitutional matter. The Court was categorical that not all issues in an employment dispute are constitutional issues. Further in the case of **Francis James Ndegwa v Tetu Dairy Co-operative Society Limited [2016] eKLR**, the Court reiterated that not all breaches of the law pave way for a constitutional petition. It is therefore my opinion that this is an employment dispute elevated to a constitutional dispute and the same is evidenced in the reliefs sought by the Petitioner. The Respondent's application dated 21<sup>st</sup> October 2020 is merited and it follows that the Petition ought to be struck out for failing to meet the specificity threshold. Petition struck out with costs to the Respondent.

It is so ordered.

**Dated and delivered at Nairobi this 24<sup>th</sup> day of February 2021**

**Nzioki wa Makau**

**JUDGE**