



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MERU

ELRC PETITION NO.E001 OF 2021

(Before D.K.N.Marete)

DANIEL MWANGI NKONGE.....PETITIONER

VERSUS

FLAMINGO HORICULTURE LTD.....RESPONDENT

RULING

This is an application by way of preliminary objection dated 22nd February, 2021 as provided vide paragraphs 14, 15 and 16 of the Answer to Petition which comes out as follows;

14. *The Respondent also states that by virtue of the allegations that the Petition is premised on alleged work –related injuries, this court lacks original jurisdiction to hear this Petition in light of the provisions of the Work Injury Benefits Act.*

15. *The Respondent avers that the Jurisdiction of this court is only to hear Appeals from the Director of Occupational Safety and Health.*

16. *The Respondent gives notice that it shall seek the determination of the foregoing preliminary objection before directions are taken.*

The Petitioner/Respondent opposes the preliminary objection with prayers that the same is dismissed with costs.

The Respondent in her written submissions dated 12th May, 2021 submits that this petition is premised on work related injuries and further that the alleged constitution's infringements are linked to the alleged injuries.

Further, the petitioner on the 17th February, 2018 suffered an industrial accident which left him permanently incapacitated.

Again, the petitioner could no longer perform his duties with the respondent due to the nature of injuries suffered and resigned effectively on 15th October 2018 for medical reasons and the respondent accepted the same.

The Respondent further submits and seeks to rely on the authority of **Bernard Murage vs Fine Serve Africa Ltd & others (2015) eKLR** and **Patrick Mbau Karanja vs Kenyatta University (2012) eKLR**.

The Petitioner in his written submission dated 27th May, 2021

“...the petitioner has invoked the constitution of Kenya, 2010 because of his rights to fair labour practices and in particular the provision to reasonable working conditions under Article 41(2) of the Constitution was breached. The Respondent is a company exclusively dealing with flowers. The Respondent is therefore not an individual. The holding in the decision in UNITED STATES INTERNATIONAL UNIVERSITY (supra) is therefore applicable in the circumstances of this petition.

... I submit that since this dispute primarily concerns the interpretation of the constitution under article 41(2), that cannot limit this court to award damages for injuries under the doctrine or principle of accrued or consequential jurisdiction, this court cannot adopt a narrow path and refuse to determine the whole matter as it has authority the matter falling within its jurisdiction to determine the same by virtue of its accrued or consequential jurisdiction. ...to send the petitioner elsewhere would not only create

duplicity in evidence but it would also be uneconomical use of judicial time to split claims of similar factual background and evidence.

The Respondent/Objector further seeks to rely on the authority of **George Joshua Okungu vs Kenya Pipeline Company Limited & 3 others (2016) eKLR** where the court observed thus;

“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 his contract of employment with the 1st respondent and 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. It would not only create duplicity in evidence”

... the Respondent has relied on authorities from the High Court on general interpretation of the constitution. What is before you is different. The petitioner herein seeks interpretation of the constitution in line with Article 41. He relies on the authority of United States International University (ibid) which falls on all fours on the jurisdiction of this court. My lord there is no alternative remedy or court to file petition to breach of fundamental rights under Article 41 apart from this court. The dispute herein is not between individuals as stated by the Respondent.

The petitioner is not enforcing any contract but his right. This petition cannot therefore be determined by the director as the Respondent wants to insinuate.

Levels of enforcement of rights are not disputed. However, courts should be wary of situations where parties camouflage direct issues in constitutional rights.

I agree with the Respondent/Objector.

The subject of this petition is basically work injury related. It squarely falls onto the domain of work Injuries Benefits Act, 2007, popularly referred to as WIBA. This being the case, adjudication on the subject falls and a different sphere of law and therefore jurisdiction.

This is material for the Director of Occupational Safety and Health, foremost. All other aspects, be they constitutional or otherwise, fall therein and only come to this jurisdiction on appeal. That is the law. The claim is therefore struck out.

I am therefore inclined to allow the preliminary objection with orders that each party bears their costs of the application.

Dated and delivered at Nyeri this 19th day of July, 2021.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Mwanzia instructed by M/s Muia Mwanzia & Company Advocates for the Petitioner/Respondent.
2. Mr.Kiplagat instructed by Munene Wambugu & Kiplagat Advocates for the Respondent/Objector