



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. 70 OF 2018

IN THE MATTER OF ARTICLES 22(1), 23(1), 28, 47(1), 50(1), 258 AND 259 OF THE CONSTITUTION, 2010

AND

IN THE MATTER OF VIOLATION AND/OR INFRINGEMENT OF THE FUNDAMENTAL RIGHTS OF THE PETITIONERS

AND

IN THE MATTER OF THE EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)
PRACTICE AND PROCEDURE RULES, 2013**

BETWEEN

FRANCIS NDAVI & 527 OTHERSPETITIONERS

VERSUS

PUT SARAJEVO GENERAL ENGINEERING COMPANY.....RESPONDENT

JUDGMENT

1. In the Petition filed on 16 November 2018, the Petitioners had alleged breach of contract in that PUT Sarajevo General Engineering Co (the Respondent) had not paid them salaries from November 2017 to September 2018, totalling Kshs 104,560,555/-.

2. The Petitioners sought orders:

i. An order directing the Respondent herein to settle all salary arrears of the Petitioners forthwith and without further delay and thereafter to promptly pay such salaries when they become due.

ii. An order in the form of a declaration that the Petitioners are entitled to fair labour practice and fair administration of justice.

iii. That the cost of this Petition be provided for.

3. The Petitioners filed at the same time a Motion under a certificate of urgency seeking orders compelling the Respondent to outstanding salaries and allowances and restraining the Respondent from selling certain of its properties.

4. The Court issued a restraining order stopping the Respondent from alienating the properties. It also directed that the Motion be served.

5. Upon service, the Respondent filed a Notice of Preliminary Objection on 28 November 2018 contending:

- i. THAT the Honourable Court lacks jurisdiction to hear and determine this matter.
- ii. THAT the matter is *sub judice* and contravenes section 6 of the Civil Procedure Act as similar matters are pending in the Chief Magistrates Court at Kangundo, namely Cause 218, 219, 220, 221, 222, 223, 224, 225, 226, 227 and 264 of 2018.
- iii. THAT the jurisdiction of this Honourable Court has not been properly invoked.
- iv. The Petition filed by the Petitioners is a normal Cause which need not be determined as a Constitutional Petition.
- v. The Petitioners have failed to comply with Employment and Labour Relations (Procedure) Rules which lays down the procedure for seeking redress.
- vi. The verifying affidavit in support of the Petition is fatally defective as the deponent therein, Collins O. K'Oremo, does not have the authority of the Petitioners to swear it.
- vii. The Respondents rights under Article 40 of the Constitution of Kenya 2010 have been grossly violated.
- viii. The Petitioners lack capacity/locus standi to seek orders affecting the Respondent's property as they have no interest in the matter.
- ix. That there has been misjoinder of parties in the suit as each Petitioners contract is unique.
- x. The proceedings and more particularly the Notice of Motion dated 16 November 2018 amount to an abuse of due process of law.

6. The Respondent also filed a Replying Affidavit and Response to Petition by way of Replying Affidavit on 1 February 2019.

7. On the same day, the Respondent's Human Resources and Administration Manager filed a supplementary affidavit on behalf of the Petitioners.

8. The Petitioners also filed their submissions to the Preliminary Objection on the same day, while the Respondent filed its submissions on 4 February 2019.

9. On 2 May 2019, the Court ordered that the Objection be taken during the hearing on the merits as it required examination of facts/evidence.

10. The Court, therefore, directed the parties on 18 February 2020 to file and exchange submissions with mention to confirm compliance set for 27 April 2020.

11. The Petitioners filed their submissions on 29 April 2020.

12. On 5 August 2020, the Petitioners filed another Motion seeking orders restraining the Respondent from disposing of some of its properties, and the Court granted the orders on the same day pending an *inter-partes* hearing.

14. The Petitioners filed their submissions on this Motion on 23 September 2020.

14. The Respondent filed a replying affidavit to the Motion on 2 December 2020.

15. On the same day, the Respondent filed a Motion seeking an injunction restraining the Petitioners through their auctioneers from selling certain properties which had been attached pursuant to a Court order from the High Court in Homa Bay.

16. In light of the many applications on file, the Court gave directions on 27 January 2021 that all the Motions and Petition would be taken together.

17. The Court also directed the parties to file and exchange affidavits and submissions ahead of the delivery of Judgment today.

18. The Petitioners caused a replying affidavit in opposition to the Respondent's Motion to be filed on 3 February 2021.

19. The Respondent filed a replying affidavit sworn by its Human Resource and Administration Manager on 3 February 2021, the Petitioners filed Supplementary submissions on 26 February 2021. The Respondent filed its submissions on ...(should have been filed by 27 March 2021).

20. The Court has considered the record, Motions, Objections, affidavits and submissions.

Parallel proceedings/sub judice

21. In the Replying Affidavit in Response to the Petition, the Respondent contended that the Petitioners had filed on 12 November 2018, Kangundo SPMCC No. 264 of 2018, *Patrick Makau Ngie & 20 Ors v PUT Sarajevo General Engineering Co Ltd* and Kangundo SPMCC No. 219 of 2018, *Hannah Wangui Mwangi v PUT Sarajevo General Engineering Co Ltd* in which the cause of action was a breach of contract in respect to failure to pay salaries for June, August, November and December 2017, and from February 2018 to time of filing of the Memorandum of Claim.

22. The Respondent had also filed a Notice of Preliminary Objection in which it asserted that the Petitioners had filed Kangundo SPMCC Causes Nos. 218, 219, 220, 221, 222, 223, 224, 225, 226, 227 and 264 of 2018.

23. As already indicated, when the Court dealt with the Preliminary Objection, it held that it address it after examining the facts/evidence.

24. The Court has now looked at the Petition and the affidavits on record.

25. The Petitioners did not disclose that some of the Petitioners had instituted legal proceedings before the Magistrates Court in Kangundo only 4 days earlier, alleging breach of contract (failure to pay salaries amongst others claims).

26. The Petitioners also did not file any affidavit(s) to respond to or deny the depositions in the Respondent's affidavits that there were parallel legal proceedings raising similar allegations as those advanced in the Petition.

27. In the Court's view, it was necessary to disclose that some of the Petitioners had lodged claims with the Magistrates Court before they moved this Court.

28. The failure to disclose the same, the Court finds, was fatal.

29. Further, the mere addition of more Petitioners or parties in the Petition did not change the character of the suit. The doctrine of *lis pendens* is clearly implicated.

Defective affidavits in support of the Petition/Motions

30. The Respondent also took Objection to the affidavits sworn on behalf of the Petitioners for want of authority from some of the Petitioners.

31. It was also contended that the deponent of the affidavits, Collins O. K'Oremo, had been dismissed on 27 March 2017 and was not the Human Resources Manager of the Respondent at the dates he swore affidavits on behalf of the Petitioners.

32. In paragraph 8 of the Petition, it was pleaded:

8. THAT the Petitioners herein have not been paid salaries from the month of November 2017 up to September 2018, all totalling the sum of Kshs 104,560,555/- and that the amount continues to accrue.

33. To the Court, that constituted the gravamen of the Petitioners action.

34. The person who has sworn affidavits in support of the Petition, Mr K'Oremo, had long left employment before the cause of action accrued. He did not state wherefrom he got the facts deposed to. He was no longer an employee of the Respondent. He has not disclosed whether he suffered any legal injury after he had been dismissed.

35. The said Mr K'Oremo never swore an affidavit to rebut the depositions that he had been dismissed in March 2017 or that he was no longer the Human Resources Manager of the Respondent.

36. The evidence in the affidavits by Mr K'Oremo, in the view of the Court and the Court finds, were inadmissible as they were sworn by a legal stranger to the dispute.

Exhaustion of other dispute resolution mechanisms

37. The Respondent alluded to the existence of a collective bargaining agreement between it and a trade union representing the Petitioners. If the Petitioners were members of a trade union, then they ought to have exhausted the dispute resolution mechanisms outlined in Part VII of the Labour Relations Act, 2007.

38. However, the Respondent did not prove that there was a collective bargaining agreement or that it had entered into a recognition agreement with any trade union, and the Court finds this defence not proved to the required standard.

Constitutional threshold

39. The Court has already set out the gravamen of the Petitioners action. The Respondent asserted that it did not raise any constitutional questions, and thus the Petitioners' should have approached the Court in the ordinary way.

40. The Supreme Court addressed this principle in the case of *Communication Commission of Kenya & 5 Ors vs Royal Media Services*

Limited & 5 Ors (2014) eKLR where the Court stated as follows :

The appellants, in this case, are seeking to invoke the "principle of avoidance", also known as "constitutional avoidance". The principle of avoidance entails that a Court will not determine a constitutional issue when a matter may properly be decided on another basis. In South Africa, in *S v. Mhlungu*, 1995 (3) SA 867 (CC), the Constitutional Court, Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.

Similarly, the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it if there was also some other basis upon which the case could have been disposed of (*Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936)).

From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents' claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright- infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court.

41. The High Court also addressed the question in *Uhuru Muigai Kenyatta vs Nairobi Star (2013) eKLR*.

42. This Court has been unable to find any semblance of constitutional dispute pleaded. The Petition consists of general pleadings on breach of contractual provisions capable of redress in a normal suit and not through a constitutional petition.

43. The net effect of the above is that the Court finds the Petition not only lacking in merit but an abuse of the court process.

44. Before concluding, the Court finds that having come to the conclusions above, it would be a mere academic exercise to examine all the other Issues raised in the many applications filed, as the superstructure, the Petition has been found lacking in substance.

Conclusion and Orders

45. From the foregoing, the Court finds that the Petition lacks merit and an abuse of the court process. It is dismissed with costs to the Respondent.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN NAIROBI ON THIS 17TH DAY OF NOVEMBER, 2021

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Petitioners Mr. Awino instructed by Odondi Awino & Co Advocates

For Respondent Mr. Wachira instructed by O & M Law LLP Advocates

Court

Assistant

Chrispo

Aura