



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**PETITION NO. 117 OF 2018**

**IN THE MATTER OF VIOLATIONS OF ARTICLES 41 & 47 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF BREACH OF SECTIONS 2 & 4 OF THE FAIR ADMINISTRATIVE ACTION ACT**

**IN THE MATTER OF BREACH OF SECTIONS 41, 43, 47 & 49 OF THE EMPLOYMENT ACT, 2007**

**IN THE MATTER OF UNLAWFUL & UNFAIR TERMINATION, UNFAIR LABOUR PRACTICES & UNFAIR ADMINISTRATIVE**

**BETWEEN**

**MUNIR SHEIKH AHMED.....PETITIONER**

**- VERSUS -**

**NATIONAL BANK OF KENYA.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Thursday 20<sup>th</sup> December, 2018)

**RULING**

The respondent the National Bank of Kenya filed a notice of preliminary objection on 02.11.2018 through Oraro & Company Advocates and learned Counsel Chacha Odera appeared and urged the same for the respondent. The respondent raised a preliminary objection on the grounds that:

- a) The petition herein is an abuse of process as the claim made by the Petitioner is purely contractual based on alleged unlawful termination of his employment.
- b) The claim and issues raised are predicated on Article 162(2) and (3) and Parliament has enacted the legislation thereof, under which the petitioner has purported to make his claim.
- c) The issues raised and reliefs sought by the petitioner are subject to the provisions of the Employment Act and Labour Relations Court Act, 2011.
- d) That the petition is an abuse of process and is intended to circumvent the provisions of legislation.

The preliminary objection is against the petition filed for Munir Sheikh Ahmed on 26.10.2018 through Issa & Company Advocates and learned Counsel Ms. Agwata Advocates appeared and urged submissions against the preliminary objection.

Parties filed through their respective Counsel the written submissions for and against the preliminary objection and oral highlights were made in that regard.

It is submitted for the respondent that the petitioner's cause of action is based on a contract of service and the claimant ought to have filed an ordinary action or cause and not a constitutional petition. It is submitted that the constitutional – avoidance rule applies and the petition should be struck out. The **Black's Law Dictionary, 10<sup>th</sup> Edition** defines “**constitutional-avoidance rule**” as, “**The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion.**”

It is submitted that looking at the pleadings, the petition raises a claim and allegations of wrongful and unlawful termination and the remedies available from the Court are as per the jurisdiction of the Court under the Employment and Labour Relations Court Act, 2011 and the dispute

is subject to provisions of the Employment Act, 2007. Thus, there being a statutory remedy, the petitioner as the aggrieved party should have filed an ordinary action and not a constitutional petition pretending to allege violation of constitutional rights and fundamental freedoms.

The parties are in agreement that the Court enjoys the jurisdiction to adjudicate disputes alleging violation of rights and fundamental freedoms. They have cited Judicial Service Commission –Versus- Gladys Boss Shollei & Another [2014]eKLR where the Court of Appeal cited with approval the holding in United States International University (USIU) –Versus- Attorney General & 2Others [2012]eKLR, (Majanja J) thus, “Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in Section 12 of the Industrial Court Act 2011 or to interpret the Constitution, would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court. This would give rise to forum shopping thereby undermining a stable and consistent application of employment and labour law. Litigants and ingenious lawyers would contrive causes of action designed to remove them from the scope of the Industrial Court. Such a situation would lead to diminishing the status of the Industrial Court and recurrence of the situation obtaining before the establishment of the current Industrial Court”

The petitioner has opposed the preliminary objection. It was submitted that the petitioner had pleaded both matters of violation of constitutional rights and fundamental freedoms as well as matters of liabilities under the contract of employment so that the petitioner had not been guilty of constitutional-avoidance rule. The Court has perused the petition. The petitioner has, amongst other matters, pleaded as follows under the heading of allegations of misconduct and unlawful termination:

**“54. The petitioner avers that the respondent had already pre-determined that he was liable for gross misconduct and only invited the petitioner for “a disciplinary hearing” without any compliance with the provisions of section 41 of the Employment Act, 2007.**

**60. The petitioner was not given any reason for the termination of employment in blatant breach of section 43 of the Employment Act, 2007 or for summary dismissal contrary to section 45(2) (a) of the Employment Act 2007 which provides that an employee whose employment is terminated has to be given valid reasons for termination.**

**69. The petitioner avers that the purported reason that the “allegations against him had been sufficiently proved” is baseless, vague and does not meet the threshold provided for in section 43 and 45 (2) (a) of the Employment Act. The respondent did not tender any documents or credible evidence to substantiate the allegations against the petitioner at the hearing on 30<sup>th</sup> March 2016.**

**81. That the petitioner therefore prays for reinstatement to the position of Managing Director on the terms that he previously enjoyed for the remainder of the contract period.**

**82. The petitioner further prays, without prejudice to the prayer for reinstatement, for payment of statutory entitlements, terminal dues, remainder of contractual period buyout and damages in the sum of Kshs. 453, 489, 133.00 particularised as follows; ....”**

The petitioner has, amongst other matters, pleaded as follows under the heading of constitutional issues for determination thus, whether the respondent acted in contravention of Articles 41 and 47 of the Constitution, sections 41, 43, and 45 of the employment Act and sections 4(1), (3) (a), (d) and (g) of the Fair Administrative Actions Act in having a predetermined decision to terminate the petitioner’s employment; in failing to give the petitioner adequate notice to attend the disciplinary hearing; in failing to give the petitioner any reasons for the termination of employment; and in failing to adduce any evidence setting out the criteria applied in arriving at the decision to terminate the petitioner’s employment. Further, it is pleaded whether the respondent acted in contravention of Article 28 of the Constitution in the manner in which the petitioner issued press releases making unsubstantiated allegations and having the petitioner arrested and subjected to degrading treatment.

The petitioner prays for, amongst other reliefs:

a) A declaration that the termination of the petitioner’s employment was unprocedural, unfair, unlawful, and wrongful contrary to the provisions of Articles 41 and 47 of the Constitution, sections 41, 43 and 45 of the Employment Act and section 4(3) of the Fair Administrative Action Act.

b) A declaration that the respondent breached the petitioner’s right to fair labour practices, the right to a fair disciplinary and administrative process and denied the petitioner adequate time and opportunity to respond to the allegations against him.

c) Compensation in the sum of Kshs.453, 489, 133.00 including general damages for degrading and inhuman treatment, mental anguish, and damages to professional reputation Kshs.55,000,000.00 plus interest from April 2016 until payment in full.

d) Punitive and aggravated damages for malicious prosecution and lodging a false complaint with the Banking Fraud Investigations Department.

The Court observes that from the pleadings, the petition indeed sets out alleged violations of the constitutional rights, while at the same time, makes claims for breach of the contract of service capable of being pursued in an ordinary action. The Court returns that it will be just, expeditious and proportionate for the matters to be heard and determined in the petition as envisaged in section 3 of the Employment and Labour Relations Court Act, 2011.

In that regard the Court follows the opinion of the Court of Appeal in Prof. Daniel N. Mugendi –Versus- Kenyatta University and 3

**Others, Civil Appeal No. 6 of 2012**, where the Court stated, “**The question now is whether the appellant should go back and ‘sever’ the composite petition alleging violation of his fundamental rights and breach of contract of employment. Much as severance would entail time and resources to effect the necessary amendments and make due motions, we are of the view that with necessary amendments, which appear imperative to make out a clear use of breach of rights being effected, the appellant can and should be heard by the Industrial Court on the two claims i.e. violation of rights and breach of contract of employment. The position that the Industrial Court can and should entertain the claim as laid by the appellant, is in line with the decision of Majanja, J. in Petition No. 170 of 2012 – United States International University(USIU) –Versus- The Attorney General & Others.”**

The Court is in agreement with the submission made for the petitioner that Rule 7(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides that a party who wishes to institute a petition shall do so in accordance with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules. Rule 7(3) thereof then provides that notwithstanding anything contained in this rule, a party is at liberty to seek the enforcement of any constitutional rights and freedoms or any constitutional provision in a statement of claim or other suit filed before the court. The Court follows its opinion in **Prof. Moni Wekesa –Versus- Mount Kenya University [2018]eKLR**, thus, “**The Court holds that the cited Rules 7(2) and (3) are carefully designed to emancipate litigants from burdensome procedural slavery and the same is in line with Article 159 (2) (d) which states that in exercising judicial authority, the courts and tribunals shall be guided by the principle that justice shall be administered without undue regard to procedural technicalities. Thus, the Court holds that a litigant does not need to file an ordinary action and at the same time file a petition with respect to the same facts and transaction but for separate reliefs envisaged under an ordinary action and the petition. The Rule aims at making litigation efficient and cost effective without burdening the litigant with filing of numerous suits arising from the same transaction or set of facts so that all conceivable reliefs are made available in a single legal process or action.**”

The Court has considered the respondent’s submission that in the case of **Rodgers Mwema Nzioka –Versus- The Attorney General & 8 Others[2006]eKLR** it was held that the applicant was trivialising the constitutional jurisdiction as he had deliberately avoided to pursue the available statutory remedies of compensation which amounted to an abuse of the court process and the Court had stated, “**Where a party deliberately avoids to pursue the statutory remedies for compensation or any other remedy (as has happened in this case where specific remedies are set out in the Mining Act and also given a specific right of abuse of access to this court) and he instead purports to invoke s.84 of the Constitution I find that such a move constitutes abuse of the court process and also trivializes the Constitutional jurisdiction. Vindication of any breach of contractual right or alleged duress can be articulated as a private right in the courts of this land. S 84 was clearly intended for vindication of pure fundamental rights and freedoms violations which in turn necessarily never constitute causes of action elsewhere.**”

The Court has considered that holding which was prior to the Constitution of Kenya 2010. The Court considers that under the Constitution of Kenya 2010, it is not trivialising the Constitution by pursuing rights and freedoms as provided in other formal sources such as the statutes and conceivably customary law rights and freedoms because the Constitution by itself elevates such other rights and freedoms to be part of Chapter Four on the Constitutional Bill of Rights; provided such other rights and freedoms are not inconsistent with the provisions in the Bill of Rights. Article 19 (3) (b) of the Constitution provides that the rights and fundamental freedoms in the Bill of Rights do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with the Chapter on the Bill of Rights. Under Article 10 (2) (b) the national values and principles of governance include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, and protection of the marginalised. Article 22 of the Constitution confers every person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. Under Article 23(3) the remedies available in cases of contravention of a right or fundamental freedom include a declaration of rights, an injunction, a conservatory order, a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24, an order of compensation, and an order of judicial review. Then, Article 258 confers every person the right to institute court proceedings claiming that the Constitution has been contravened, or is threatened with contravention. Article 10 (1) of the Constitution then provides that the national values and principles of governance in the Article bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.

By those provisions, the Court holds that human rights and fundamental freedoms as protected in the Bill of rights have been taken to the people; they are to be lived day after day and on a daily basis. By doing so, the Court holds that the people would not be trivialising constitutional matters of rights and freedoms but upholding the Constitutional provisions and intentions. The human rights and fundamental freedoms are not to be revisited and addressed only on a special occasion in a constitutional petition filed in court for that purpose and the Bill of Rights has by the cited constitutional provisions invited all the rights and freedoms wherever their abode or niche in formal sources of law to share a table, in an equal status for all purposes, with only one precondition – that such other rights and freedoms shall not contravene any provision of the constitutional Bill of Rights as set out in Chapter Four of the Constitution. Thus, the Constitution therefore breaks the walls and mixes all the other constitutionally lawful rights and freedoms, wherever they are in law, into the human rights and fundamental freedoms in the Bill of Rights, together as one. The Court therefore holds that litigants will rarely get frowned at by the courts at in the manner they move the courts towards realization and enforcement of rights and freedoms barely on account of procedural considerations and especially in view of Article 159 of the Constitution which provides, inter alia, that justice shall not be delayed, justice shall be administered without undue regard to procedural technicalities, and, the purpose and principles of the Constitution shall be protected and promoted.

The Court has considered the cited constitutional provisions and follows its opinion in **Peter Muchai Muhura –Versus- Teachers Service Commission [2015]eKLR** thus: “**It is the opinion of this court that the barriers or ridge or valley between judicial review proceedings and the ordinary actions as they were has been collapsed by the Constitution of Kenya, 2010. The Constitution has opened avenues to access to justice and all stipulated remedies in the same proceedings; ordinary action or prescribed application. Thus, litigants need not file separate processes to access the different available remedies. It is true that universal procedural rules have not yet fully evolved in our judicial system to keep pace with the constitutional liberation of litigants; a legitimate and urgent project towards full realization of the constitutional principles in Article 159 that justice shall not be delayed; justice shall be administered without undue regard to procedural technicalities; and the purpose and principles of the Constitution shall be protected and promoted.**”

Again, in **Professor Elijah Biama –Versus- University of Eldoret and 2 Others [2014]eKLR** the court stated as follows, “**...The court holds that a venture to distinguish the manner a litigant approaches or ought to approach the court merely on the basis of the**

remedy or the situ (prescription of the right or fundamental freedom as embedded in the Constitution or legislation or other formal source) of the right or fundamental freedom in issue is long dead under the former constitutional dispensation as the new constitutional order prescribes and favours universal approach towards the realization of the rights and fundamental rights irrespective their primary formal situ. In the opinion of the court, future measures of aligning court procedures to the new constitutional order will entail universal procedure for realization and enforcement of the rights and freedoms irrespective the formal source or residence of the right or fundamental freedom because the Constitution incorporates all as part of the Bill of Rights. If every dispute that comes to court entails enforcement of some legitimate right or fundamental freedom which the Constitution has incorporated in the constitutional Bill of Rights, then, in the court's opinion, time for a universal procedure by which parties should move the court has come and it would be pursuit in vanity to look for and attempt to sieve rights and fundamental freedoms that are expressly provided for in the Bill of Rights as was the case in the days of Harrikson –Versus-Attorney General of Trinidad and Tobacco (1980) AC 265. For the time being that the universal procedure is not in place, it is the opinion of the court that litigants will not be faulted for the option they shall adopt of the myriad procedural options that continue to peep their souls from the former constitutional dispensation to the new constitutional order.”

In view of the findings, the Court returns that by reason of the cited constitutional provisions, the application of the constitutional – avoidance rule in the new Republic as enunciated in the Constitution of Kenya 2010 is highly modified towards a diminished or vestigial status like in the instant case.

In conclusion, the notice of preliminary objection filed for the respondent on 02.11.2018 and dated 02.11.2018 is hereby dismissed with costs in the cause and parties are directed to take steps towards the expeditious hearing and determination of the petition.

**Signed, dated and delivered in court at Nairobi this Thursday 20<sup>th</sup> December, 2018.**

**BYRAM ONGAYA**

**JUDGE**