



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**PETITION NO. 6 OF 2016**

**RAPHAEL OTIENO ODUMO & 27 OTHERS.....PETITONERS**

**VERSUS**

**KENYA ENGINEERING WORKERS UNION HEADQUATERS.....1<sup>ST</sup> RESPONDENT**

**STEEL MAKERS LIMITED.....2<sup>ND</sup> RESPONDENT**

**AND**

**KENYA ENGINEERING WORKERS UNION MOMBASA BRANCH.....INTRESTED PARTY**

**R U L I N G**

**INTRODUCTION**

1. The petitioners were employed by the 2<sup>nd</sup> respondent on diverse dates but they were all terminated on account of redundancy on 1/9/2015. Thereafter they brought the petition herein alleging that the said termination infringed their constitutional rights to fair labour practices as enshrined under Article 41 of the constitution of Kenya. Additionally the petitioners have alleged that the said termination was unfair and unlawful because it breached the procedure for terminating employment on account of redundancy as laid down by the Employment Act and the Collective Bargaining Agreement signed between the two respondents herein. In view of the alleged breaches to the law and the CBA, the petitioners pray especially for unconditional reinstatement to their jobs and in the alternative their terminal dues be properly quantified at an aggregate sum of ksh.74,885,891 plus interest at the rate of 14% per annum.

2. The 1<sup>st</sup> respondent has opposed the petition contending that the termination of the petitioners was procedurally and substantively fair. The 1<sup>st</sup> respondent has also undertaken vide her response to assist the petitioners in calculating their rightful terminal dues as soon as they report to her office for a round table with the 2<sup>nd</sup> respondent.

3. The 2<sup>nd</sup> respondent has on the other hand objected to the petition by her notice of preliminary objection dated 3/12/2016 which is now before me for determination. The objection is grounded on the following two grounds.

(a) The petition is incompetent and bad in law.

(b) The petition does not meet the threshold of a constitutional petition as the reliefs being sought

can be remedied under a normal suit brought by a memorandum of claim under the rules of procedure of this court.

The preliminary Objection was disposed of by written submissions.

#### RESPONDENT'S SUBMISSIONS

4. The 2<sup>nd</sup> respondent has submitted that the petition herein does not meet the threshold for a constitutional petition as the reliefs sought can be sought through normal suit commences by a memorandum of claim. In her view, a constitutional petition is a suit whose object is to advance and realize the right in accordance with Article 259(1) of the Constitution Kenya and it is commenced under rule 3 of the constitution of Kenya practice and procedure rules 2012. She further submits that although the petitioner cites breach of article 41 of the constitution, the dispute manifesting from the pleadings is not constitutional one in strict sense but one which squarely lies within the provision of the Employment Act. Specifically it is submitted that the infringement suffered is one of termination of employment on ground of redundancy and which can be rendered through normal suit/claim considered under the Employment and Labour Relations Court (procedure) Rules 2016.

5. Further to the foregoing, the 2<sup>nd</sup> respondent has submitted that the petition before the court is incompetent and bad in law because it is signed by the 1<sup>st</sup> petitioner Mr. Raphael Otieno Odumo as the agent for the other petitioners yet he is not a qualified advocate. In the 2<sup>nd</sup> respondents view, Mr. Odumo is not competent to sign the petition on behalf of the other petitioners within the meaning of rule 4(b) of the constitution of Kenya practice and Procedure rules 2012. She has faulted the first petitioner for not demonstrating that the other petitioner cannot act in their own names, that he has the other petitioners belong to a defined group of class of people and that he had legal mandate to act in their interest; that he is acting in the public interest; and that he is an association and that the other 27 petitioners are his members. She has cited rule 9(b) (v) of the constitution of Kenya Practice and Procedure Rules 2013 to urge that petition herein ought to be signed by the petitioner or their advocate and not Mr. Odumo.

#### PETITIONER'S SUBMISSIONS

6. The petitioners have opposed the preliminary objection on grounds that their right to fair labour practice as enshrined under Article 41 of the Constitution of Kenya and CBA between the respondents herein specifically the petitioners have urged that termination of the employment on account of redundancy on 1/9/2015 was procedurally unfair and infringed their right to fair labour practice and their right to continue working until their retirement age.

7. As regards the alleged incompetence of the petition, the petitioners have contended that the petition is competent within the provision of Article 22(2) of the Constitution and Rule 4(2) of the constitution of Kenya (protection of rights and fundamentals freedom) practice and Procedure Rules 2013. In the petitioners view therefore Mr. Odumo was lawfully qualified to sign the petition on behalf of the other petitioners.

#### ANALYSIS AND DETERMINATION

8. There is no question that the main dispute herein is termination of the petitioner's employment contract by the 2<sup>nd</sup> respondent on account of redundancy on 1/9/2015. The issues for determination in the second respondents' objection are:

(a) Whether the petition is competent

(b) Whether the dispute herein is constitutional question in strict sense whose relief does not lie in a suit commenced by normal claim under the rules of procedure of this court.

#### **Redundancy dispute**

9. There is no dispute that under Article 41 of the Constitution of Kenya, the right to fair labour practice has been elevated to a right under the Bill of rights. Additionally under Article 47 of the constitution the right to fair administrative action is now guaranteed under the Bill of Rights to employees including the petitioners. Consequently, it is not far fetched for an employee to institute a constitutional petition against his employer for infringement and then rights as guaranteed by Article 41 and 47 of the Constitution.

10. However it is also trite that where infringement of a right can be adequately remedied through normal suit commenced under a statute or rules of procedure of the court, the parties should as a matter of principle litigate the dispute under a normal suit and not through constitutional petitions. The dispute herein being a challenge on redundancy under provisions of Section 40 and 45 of the Employment Act, I opine that the reliefs sought can be availed to the petitioners under Section 40 and 49 of the Act if they succeed after trial in a normal suit commenced by a claim under the rules of procedure of this court. I therefore strike out the petition herein and direct the petitioners to file a normal suit by way of claim to challenge their redundancy. In making the said direction, I have considered the fact that limitation period to file fresh suit has not expired. Additionally, I have considered the pleadings in the petition which are pathetic and almost impossible to comprehend. As they bring a fresh suit, the petitioners may wish to be more thorough in drafting their pleadings.

**Incompetent petition.**

11. In view of the foregoing directions, I will not consider the issue of whether or not the petition was rendered incompetent by the single signature of the first petitioner.

**DISPOSITION**

12 .For the reasons that the dispute herein being redundancy can be adequately adjudicated and remedied under the employment Act and the rules of procedure of this court, and the fact that limitation period has not expired, the petition herein dated 28/7/2016 is struck out and the petitioner directed to file normal claim to challenge their redundancy. Each party to bear his or her own costs.

Dated, signed and delivered this 29<sup>th</sup> September 2017

**O.N. Makau**

**Judge**