



**LN (Suing thro' her mother and next friend EMK) v Board of Management, Kereri Girls High School & 2 others (Constitutional Petition 11 of 2022) [2024] KEHC 1881 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1881 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CONSTITUTIONAL PETITION 11 OF 2022  
PN GICHOHL, J  
FEBRUARY 29, 2024**

**BETWEEN**

**LN (SUING THRO' HER MOTHER AND NEXT FRIEND EMK)EMK ..... PETITIONER**

**AND**

**BOARD OF MANAGEMENT, KERERI GIRLS HIGH SCHOOL .... 1<sup>ST</sup> RESPONDENT**

**TEACHERS SERVICE COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**CABINET SECRETARY, MINISTRY OF EDUCATION, STATE DEPARTMENT FOR EARLY LEARNING AND BASIC EDUCATION ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Petitioner, a student of Kereri Girls High School, filed this Petition dated 17<sup>th</sup> October 2022 on two main grounds namely physical and sexual abuse by her teachers. Simultaneously, the Petition filed a Notice of Motion Application dated 17<sup>th</sup> October 2022.
2. Upon being served, the Teachers Service Commission (2<sup>nd</sup> Respondent) filed a Preliminary Objection dated 09<sup>th</sup> December, 2022 contending that this Court lacks jurisdiction to entertain, interrogate and determine this Petition as it falls within the purview of the Employment and Labour Relations Court.
3. Parties agreed that the Preliminary Objection be heard first and that it be disposed of by way of written submissions.
4. In compliance, the 2<sup>nd</sup> Respondent filed his on 6<sup>th</sup> February, 2023 while the Petitioner filed his on 2<sup>nd</sup> March 2023.



5. The 2<sup>nd</sup> Respondent relied on Article 162 (2) (a) of the Constitution, Section 87 of the Employment Act, Section 12 of the Employment and Labour Relations Act to maintain the Preliminary Objection. It urged that the Court to strike out both the Petition and the Application with costs .
6. On the other hand, The Petitioner submitted that this Court has to hear this Petition. He relied on Article 159 of the Constitution of Kenya 2010 and submitted that the Court should administer justice without regard to procedural technicalities so that the Petition should not suffer for being filed before this Court. The Appellant submitted that this Court has to hear this Petition.

### **Determination**

7. From the Petition, the submissions by both parties and the authorities cited therein, the issue for determination is whether this Court has jurisdiction to determine this Petition.
8. The legitimacy of any Preliminary Objection is gauged against the requirement that it must raise not factual issues but pure issues of law capable of disposing of a dispute at once.
9. What Preliminary Objection is was discussed and settled in *Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd*, (1969) E.A. 696. At page 700 the Court observed as follows: -

“...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.”

10. Further, in *Omondi -vs- National Bank of Kenya Ltd & Others* {2001} KLR 579; [2001] 1 EA 177, the Court observed that in determining a Preliminary Objection, a Court can look at the pleadings and other relevant documents but must abide by the principle that the objection must raise pure points of law. It was held thus: -

“In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant’s costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion.”



11. Flowing from *Mukisa Biscuit Manufacturers Ltd*, Ojwang J. (as he then was), stated in the case of *Oraro v Mbaja* [2005] eKLR: -

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.”

12. With the issues as to the nature of Preliminary Objection having been settled, this Court turns to Article 162 (2) of the *Constitution* which provides for establishment courts with the status of the High Court to hear and determine disputes relating to-

(2) (a) employment and labour relations.

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

13. The courts contemplated under Article 162(3) is the Environment and Land Court Act and the Employment and Labour Relations Court.

14. Jurisdiction is the power conferred by law upon the Court to hear and determine the dispute before it. On jurisdiction, the Supreme Court in, *Re the Matter of Interim Independent Electoral Commission* [2011] eKLR, stated as follows: -

“(29) Assumption of jurisdiction by Courts in Kenya is a subject regulated by the *Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in *Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited* [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”

15. Again, the Supreme Court in the case of *Samuel Kamau Macharia & Another v. Kenya commercial Bank & 2 Others*, Application No. 2 of 2011 [2012] eKLR pronounced itself on jurisdiction thus [paragraph 68]:

“(68) A Court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of



mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.....”

16. The jurisdiction of the Employment and Labour Relations Court is provided for under Section 12 of the *Employment and Labour Relations Court Act* which states that: -
- 1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the *Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including
    - a) disputes relating to or arising out of employment between an employer and an employee;
    - (b) disputes between an employer and a trade union;
    - (c) disputes between an employers’ organisation and a trade union’s organisation;
    - (d) disputes between trade unions;
    - (e) disputes between employer organisations;
    - (f) disputes between an employers’ organisation and a trade union;
    - (g) disputes between a trade union and a member thereof;
    - (h) disputes between an employer’s organisation or a federation and a member thereof;
    - (i) disputes concerning the registration and election of trade union officials; and
    - (j) disputes relating to the registration and enforcement of collective Agreements.”
17. This Court has therefore to consider whether the dispute herein falls within the ambit of Section 12 of the *Employment and Labour Relations Court Act*. As stated at paragraph 1 of this Ruling, the Petitioner complains of two main issues namely physical and sexual abuse by her teachers. As to whether the two issues fall within the ambit of a constitutional petition is a matter for determination by the Court at the appropriate time.
18. At this stage, what this Court discerns from the material herein is that the Petitioner was a student and not an employee of Kereri Girls High School. The dispute herein is not between the teachers against whom the Petitioner complains and their employer, the Teachers Service Commission, and is therefore not an employment nor a labour relations matter.
19. From the foregoing analysis, the 2<sup>nd</sup> Respondent’s contention that this is a matter for the Employment and Labour Relation matter is not only misplaced but is also purposely raised with a view to confuse issues and delay the determination of this Petition.
20. Consequently, this Court finds no merit in the Preliminary Objection herein and the same is overruled with costs to the Petitioner.

**DATED, SIGNED AND DELIVERED (VIRTUALLY) AT KISII THIS 29<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**PATRICIA GICHOHI**

**JUDGE**

**In the presence of**



Ms Magoma for Mr. Barongo for the Applicant\*\*

Mr. Nderitu for 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents

Saewa / Aphline, Court Assistant

