



REPUBLIC OF KENYA



**Kashonga v Kashonga & 2 others (Petition E34 of 2022)  
[2023] KEELRC 316 (KLR) (3 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 316 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E34 OF 2022  
SC RUTTO, J  
FEBRUARY 3, 2023**

**BETWEEN**

**LUCY WAMBUI KASHONGA ..... PETITIONER**

**AND**

**REGINAH NASIEKU KASHONGA ..... 1<sup>ST</sup> RESPONDENT**

**ESTHER NAEKU KAMAEI ..... 2<sup>ND</sup> RESPONDENT**

**KENNEDY KASHONGA ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. Through a Petition dated January 11, 2021, the Petitioner states that she is a director and shareholder with the Respondents at Thorn Tree School Ltd and that sometimes in January, 2021, the Respondents without her knowledge entered into an agreement to pay directors a monthly salary of Kshs 50,000.00. She avers that she has never been informed why she has not been receiving the said salary.
2. It is the Petitioner's case that the Respondents' action to deny her access to information are unconstitutional, capricious, arbitrary, injudicious and actuated by malice, self-interest and improper motive and violates Article 35 of the Constitution.
3. In this regard, the Petitioner has cited the Respondents for violation of Articles 27 and 35 of the Constitution.
4. Consequently, the Petitioner seeks the following reliefs against the Respondents:
  - a. That there be a declaration that the Petitioner's fundamental rights and freedoms as enshrined under Articles 35(1) (b) of the Constitution of Kenya 2010, have been contravened and infringed upon by the Respondents by their refusal to give the Petitioner the information it requested.



- b. A declaration that the petitioner is entitled to the payment of damages and compensation for the violation and contravention of its fundamental human rights by the Respondent's herein as provided for under Articles 35(1) (b) of the *Constitution of Kenya, 2010*.
- c. An order directed (sic) Respondents, their employees, agents, representatives, assigns or any other person acting through their direction to release the applicant's accruals amounting to Kshs 600,000 being monthly salary from January to December, 2021.
- d. The costs of the Petition.

### **The Response**

5. In response to the Petition, the Respondents filed a joint Answer to the Petition through which they denied the existence of an employer employee relationship between themselves and the Petitioner. The Respondents further contended that there are no salaries paid to the Respondents or the Petitioner as alleged. That further, the governing documents of the company being the Memorandum of and Articles of Association is clear that if there is to be any payment to the directors, it should only be dividends. That the company has been making losses and the tax returns filed with the relevant authority are self-explanatory on this. That the company has loans with its financier which it needs to settle first before any dividend can be declared and paid, and the Petitioner is well aware of this.
6. The Respondents further stated that under Article 109-111 of the Memorandum and Articles of Association of Thorn Tree School Limited, there is an express provision that the Managing Director is the one entitled to a salary and thus once appointed he or she is different from the Petitioner and the Respondents herein.
7. It was the Respondent's case that the Petitioner is not controlled in any manner whatsoever, directed or even paid by the Respondents who are also shareholders and that their powers emanate from the Memorandum and Articles of Association. That as such, there is no master servant relationship between the parties. That there is no factual or evidential proof to show that the Petitioner is an employee of the Respondents. That the only proof is that of the Petitioner being a director and shareholder. That there has never been a contract of employment between the Petitioner and the Respondents whether in written form, oral or otherwise, to pay wages or salary.
8. The Respondents further maintained that there is no information that has been denied to the Petitioner and that there is no proof of the Petitioner requesting for any information or documents and proof of how the same has been denied.
9. Consequently, the Respondents have asked the Court to dismiss the Petition with costs.

### **Submissions**

10. The Petition was canvassed by way of written submissions. On the part of the Petitioner, it was submitted that the *Constitution* grants citizens access to information as a constitutional right and only the *Constitution* can limit that access. In support of its submissions, the Petitioner placed reliance on the provisions of Article 35 of the *Constitution* and the cases of *Nairobi Law Monthly vs Kenya Electricity Generating Company & 2 others*, *Trusted Society of Human Rights Alliance & 3 others vs Judicial Service Commission* (2016) eKLR as well as the *Attorney General vs Kituo Cha Sheria & 7 others* (2017) eKLR.
11. The Petitioner stated in further submission that the decision or indecision of the Respondent as it stands curtails and or interferes with her economic freedom exposing her to possible loss of earnings



and livelihood thus denying her a fundamental right to access information under Article 35 of the Constitution.

12. On their part, the Respondents submitted that the issue raised in the Petition is one that is purely between the directors and shareholders in the company known as Thorn Tree School Limited. That such a dispute is provided for under Part IX and section 3 of the Companies Act and therefore the Court that is to adjudicate such matters is the High Court. That the Employment and Labour Relations Court is not included in the definition of the word “Court” under the Companies Act. That in addition, the Petitioner is a Director and Shareholder in the strictest sense in Thorn Tree Schools Limited.
13. The Respondents invited the Court to consider the provisions of Article 162(2) (b) (sic) of the Constitution and section 12 of the Employment and Labour Relations Court Act as well as the determination in the case of Geoffrey Asanyo vs Nakuru water and Sanitation & 6 others (2014) eKLR. It was argued that there is no employer employee relationship and the Respondents do not have control of the Petitioner. That as such, the Court lacks jurisdiction to hear and determine the Petition. To buttress their submissions, the Respondents placed reliance on the case of Motor Vessel “Lilian S” vs Caltex Oil (Kenya) Limited (1984) KLR.
14. The Respondents further submitted that there is no information that has been denied to the Petitioner and there is no one time she requested for the information and was denied. That further, there is a fatal non-joinder by the Petitioner as the company Thorn Tree School Limited has not been sued yet it is an independent legal person capable of being sued. Consequently, they urged the Court to strike out the Petition with costs.

#### **Analysis and determination**

15. I have considered the pleadings, the parties’ submissions as well as the authorities cited and two issues stand out for determination in this Petition, thus:
  - i. Is there is an employer employee relationship between the Petitioner and the Respondents?
  - ii. If the answer to (i) is in the affirmative, whether there is a case for constitutional violation.
  - iii. Whether the Court should grant the orders sought in the Petition.

#### **Employment relationship?**

16. The position taken by the Respondents in this matter is that the parties are not in an employer employee relationship. That they are all Directors and Shareholders at the company known as Thorn Tree School Limited. That subsequently, this Court lacks jurisdiction to hear and determine the Petition.
17. It is worth mentioning that initially, the Respondents filed a Notice of Preliminary Objection dated April 29, 2022, through which they raised a jurisdictional issue on account of lack of an employment relationship. Ruling on the Preliminary Objection was reserved for July 15, 2022. Upon noting the submissions by both parties, the Court on July 15, 2022 sought to ascertain from the parties whether there was a contention with regards to the employment relationship. Both parties took different positions on the issue, with Counsel for the Petitioner stating that their instructions were that there was an employment relationship. On the other hand, Counsel for the Respondent told Court that there was no employment relationship between the parties.
18. In light of the foregoing contest regarding the employment relationship, the Court delivered its Ruling on July 22, 2022, overruling the Preliminary Objection noting that the factual issues, being the



relationship between the parties, was not settled. To this end, the Court stated that a determination of the employment relationship between the parties was an issue that could only be determined upon assessment of evidence hence could not be determined through a Preliminary Objection.

19. It is for the foregoing reason that this issue is now up for determination at this point. Indeed, a determination of whether there is an employment relationship between the parties the parties will ultimately resolve the question of jurisdiction and subsequently, the second and third issue that have been isolated for determination.
20. For starters, it is notable that in her Affidavit in support of the Petition, the Petitioner avers as follows:

“That the Respondents and I have been directors and shareholders together at Thorn Tree School Ltd.”
21. To this end, the Petitioner exhibited a copy of the records held at the Companies Registry, containing the particulars of Thorn Tree School Ltd. Such particulars include the names of the directors and shareholders of the said company. In this regard, the Petitioner and the Respondents have been identified as directors and shareholders of the said Thorn Tree School Limited. Notably, this was the only evidence presented in respect of the parties’ relationship.
22. Beyond the directorship and shareholding at Thorn Tree School Ltd, there is no evidence of an employment relationship between the parties. In the context of the *Employment Act*, an employment relationship is the legal link that exists between an employer and an employee and gives rise to certain rights and obligations. Ordinarily, a contract of service is what signifies the existence of an employment relationship. Be that as it may, the *Employment Act* makes provision for oral contracts of employment where the employment period does not exceed three months. In such a case, existence of the employment relationship can be discerned from the conduct of the parties.
23. Section 2 of the *Employment Act* defines an “employee” to mean a person employed for wages or a salary and includes an apprentice and indentured learner. While an “employer” is defined to mean “any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.”
24. On the other hand, a “contract of service” is defined to mean “an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies”.
25. Applying the above statutory definitions to the instant case, there is no evidence that the Respondents engaged the Petitioner as an employee through a contract of service in consideration of payment of wages or salary.
26. In light of the foregoing, it is therefore evident that there is no proof of an employment relationship between the parties. What this means is that the nature of the dispute does not fall within the Jurisdiction of this Court as envisaged under Article 162(2) (a) of the *Constitution* and Section 12 of the *Employment and Labour Relations Court Act*.
27. With regards to Section 12(1) and (2) of the *Employment and Labour Relations Court Act*, this Court has jurisdiction to determine disputes 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 unions organisation;
  - (d) disputes between trade unions;
  - (e) disputes between employer organizations;
  - (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.
28. In light of the Court's jurisdiction aforesated and noting that there is no employer employee relationship between the parties, it is crystal clear that this Petition cannot be heard and determined by this Court.
29. The upshot of the foregoing is that this Court must down its tools for want of jurisdiction. In arriving at this determination, I am guided by the finding in the case of *Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd* [1989] eKLR, where Nyarangi JA (as he then was) rendered himself thus:
- “Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
30. Having determined that this Court lacks jurisdiction to entertain the dispute, it follows that it cannot determine whether there is a constitutional violation and grant any relief.
31. In the premises, the Petition dated January 11, 2021 is hereby struck out with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF FEBRUARY, 2023.**

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**STELLA RUTTO**

**JUDGE**

**Appearance:**

**Mr. Ojienda for the Petitioner**

**Mr. Thimba for the Respondents**

**Abdimalik Hussein Court Assistant**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article



159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**

