



**PRJ v KDF (Tribunal Case 048 of 2022) [2023] KEHAT 422 (KLR) (Civ) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEHAT 422 (KLR)

**REPUBLIC OF KENYA  
IN THE HIV AND AIDS TRIBUNAL  
CIVIL  
TRIBUNAL CASE 048 OF 2022**

**CAROLYNE MBOKU, CHAIR, W.G JAOKO, NW  
OSIEMO, B.O YOGO & J.N NGOIRI, MEMBERS**

**JULY 28, 2023**

**BETWEEN**

**PRJ ..... CLAIMANT**

**AND**

**KDF ..... RESPONDENT**

**RULING**

1. This Ruling is on the Amended Notice of Preliminary Objection dated 22<sup>nd</sup> May 2023 by the Respondent filed in response to the Claim dated 3<sup>rd</sup> November 2022.
2. The Claimant filed the Claim dated 3<sup>rd</sup> November 2022 seeking the following orders: -
  - a. A declaration that KDF in Kenya is not excluded from the operation of the HIV & AIDS Prevention and Control Act.
  - b. An order ascertaining that the Claimant did suffer a violation and infringement of his rights as guaranteed and protected under the HIV & AIDS Prevention and Control Act.
  - c. An order directing the discontinuation at KDF was discriminating against the claimant on grounds of being HIV positive in respect of his enlistment in the KDF
  - d. Awarding payment of damages (general and Punitive) in respect of impairment of dignity, pain and suffering and/or emotional and psychological suffering as a result of the procedural testing and wrongful disclosure made to him by the Respondent.
  - e. Directing KDF to review and update it’s regulations, procedures and/or practices for enlistment and/or recruitment informed by scientific developments in HIV treatment and



management and in compliance with the provisions of the HIV & AIDS Prevention and Control Act and existing standards and guidelines.

- f. An order that KDF should undergo /embark on training of relevant employees on confidentiality, and on HIV counselling and testing procedures and provide evidence of the same before this Honourable Tribunal.
  - g. Grant such further and/or alternative reliefs and give such orders and directions as it may deem fit to meet the ends of justice and
  - h. Order the Respondents to pay costs of the claim.
3. The Respondent entered appearance and filed Notice of Preliminary objection dated 17<sup>th</sup> day of April 2023 and Amended on 22<sup>nd</sup> May 2023 stating That:
- a. The Claimant's claim dated 3<sup>rd</sup> November 2022 and filed before the Tribunal on 20<sup>th</sup> February 2023 contravenes section 6 of the Civil Procedure Rules owing to the existence of Eldoret Elrc Pet. E.028 Of 2022 Pkj V Ag & 2 Others.
  - b. The Claimant's claim dated 3<sup>rd</sup> November 2022 and filed before the Tribunal on 20<sup>th</sup> February 2023 offends rule 27(a) of the HIV & AIDS Prevention and Control Act owing to the existence of Eldoret Elrc Pet. E.028 Of 2022 Pkj V Ag & 2 Others.
  - c. The Tribunal does not have the requisite jurisdiction to grant prayers b, c and d as sought by the Claimant owing to the existence of Royal Media Services Ltd V Ag & 2 Others.
  - d. The claim is an abuse of the process of the Honourable Tribunal and should be struck out with costs.
4. The Tribunal gave directions that the Notice of Preliminary Objection be canvassed by way of written submissions. The Respondent filed submissions together with the Amended Notice of Preliminary Objection on 22<sup>nd</sup> May 2023 while the Claimant filed his written submissions on 20<sup>th</sup> June 2023.
5. The Claimant in opposing the Notice of Preliminary objection submits that the Claim dated 3<sup>rd</sup> November 2022 is not sub judice as the subject matter in Eldoret Elrc Pet. E.028 Of 2022 Pkj V Ag & 2 Others. relates to issues on employment while the claim filed before the tribunal relates to unlawful disclosure of the Claimant's HIV Status and procedural testing of the claimant for HIV which is a violation and infringement of rights as guaranteed and protected under HIV & AIDS Prevention and Control Act.
6. The Claimant further submits that the Tribunal has jurisdiction to hear and determine the claim and grant the orders sought under prayer c, d and e as under section 26 of HIV & AIDS Prevention and Control Act.
7. The Claimant and the Respondent lists two issues for determination: -
- a. Whether the Claimant's claim is sub judice?
  - b. Whether this Honourable Tribunal has jurisdiction to entertain the Claim.
8. The Tribunal having considered the Notice of Preliminary Objection and issues identified by parties considers the following as the issues to be determined:-
1. Whether this Honourable Tribunal has jurisdiction to determine the Claim?
  2. Whether the Claimant's claim is sub judice?



## Determination

### Whether the Honourable court has jurisdiction to determine the claim?

9. Jurisdiction of a Tribunal is derived from the Constitution or statute or both. In the celebrated case of *The Owners of Motor Vessel Lillian "S" vs Caltex Oil Kenya Limited* 1989 KLR 1653 the Court of Appeal held as follows:

“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 downs its tools in respect of the matter before it the moment it holds the opinion that it has no jurisdiction”

10. The Respondent claims that The Tribunal does not have the requisite jurisdiction to grant prayers b, c and d as sought by the Claimant. It argues that the Claimant’s alleged infringed rights under HIV and AIDS Prevention and Control Act, specifically the right to dignity and right to equality and freedom from discrimination are substantive constitutional rights under the bill of rights (Articles 28 and 27 respectively) and even though they are addressed under the ambit of the HIV & AIDS Prevention and Control Act, owing to the supremacy of the constitution by dint of Article 2 of the constitution are subsumed by the constitution under the bill of rights and relied on the authority of *Royal Media Services Ltd v Ag & 2 Others* where justice Mumbi Ngugi observed:

“...I am unable to read in the provisions of article 23(2) or 7 of the sixth schedule to the constitution an intention to confer on the HIV Tribunal the jurisdiction to hear and determine questions on whether a right or fundamental freedom has been violated, infringed or threatened as provided under Article 22 of the constitution”

11. The Tribunal has perused the authority of *Royal Media Services Ltd V Ag & 2 Others*. The petitioner therein moved to the High Court to determine whether Subordinate Courts and Tribunals like the HIV & AIDS Tribunal can hear and determine alleged denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of rights under Article 23 of the Constitution. Justice Mumbi Ngugi while determining the Petition held:

- a) I hereby declare that only the High Court and courts of similar status currently have jurisdiction to hear and determine matters of violation of fundamental rights and freedoms in the Bill of Rights.
- (b) I hereby declare that in the absence of legislation enacted by Parliament to give subordinate courts original jurisdiction to hear and determine matters of denial, violation and infringement of right or fundamental freedom in the Bill of Rights, subordinate courts and tribunals, including, the 2<sup>nd</sup> respondent, do not have jurisdiction to hear and determine matters arising from the Bill of Rights.
- (c) I hereby issue an order of prohibition directed against the 2<sup>nd</sup> respondent prohibiting it from hearing and determining issues of violation of fundamental rights under Article 28 and 31 raised in Tribunal Case No. HAT 004 of 2013.

12. From the foregoing, the HIV & AIDS Tribunal is barred from entertaining cases brought under the Bill of rights but is not barred from exercising it’s mandate of hearing and determining matters brought



under the provisions of the HIV & AIDS Prevention and Control Act from which it derives its jurisdiction at Section 26 (1) (a) and (c) thereof which provides:

“The Tribunal SHALL have jurisdiction to hear and determine complaints arising out of any breach of the provisions of this Act;... and to perform such other functions as may be conferred upon it by this Act or by any other written law being in force.”

13. The object and purpose of HIV & AIDS Prevention and Control Act is found at Section 3 thereof which provides as follows:

The object and purpose of this Act is to—

- a. Promote public awareness about the causes, modes of transmission, consequences, means of prevention and control of HIV and AIDS;
- b. Extend to every person suspected or known to be infected with HIV and AIDS full protection of his human rights and civil liberties by—
  - i. Prohibiting compulsory HIV testing save as provided in this Act;
  - ii. Guaranteeing the right to privacy of the individual;
  - iii. Outlawing discrimination in all its forms and subtleties against persons with or persons perceived or suspected of having HIV and AIDS;
  - iv. Ensuring the provision of basic healthcare and social services for persons infected with HIV and AIDS;
- c. Promote utmost safety and universal precautions in practices and procedures that carry the risk of HIV transmission; and
- d. Positively address and seek to eradicate conditions that aggravate the spread of HIV infection.
  1. The prayers in the claim herein have been brought under the provisions of the HIV & AIDS Prevention and Control Act and not the Bill of rights as insinuated by the Respondent. The claimant was specific on the orders he sought and indicated that the same are as provided for in the HIV & AIDS Prevention and Control Act. A cursory glance at the prayers sought reveal that the orders sought are Orders awardable by the Tribunal. While discharging its mandate, the Tribunal has discretionary powers under section 27 (7) of the HIV & AIDS Prevention and Control Act, to:
    - (a) Confirm, set aside or vary the order or decision in question;
    - (b) Make such other order as may be appropriate in the circumstances;
    - (c) Without prejudice to the generality of paragraph (b), make an order—
      1. For the payment of damages in respect of any proven financial loss, including future loss, or in respect of impairment of dignity, pain and suffering or emotional and psychological suffering as a result of the discrimination in question;
      2. Directing that specific steps be taken to stop the discriminatory practice;
      3. For the maintenance of the status quo of any matter or activity



which is the subject of the complaint or appeal until the complaint or appeal is determined;

4. Requiring the respondent to make regular progress reports to the Tribunal regarding the implementation of the Tribunal's order.
15. We therefore find that the orders sought in the Claim are brought under the provisions of HIV & AIDS Prevention and Control Act and as such, this Tribunal has jurisdiction to hear and determine this Claim.

**Whether the Claimant's claim is sub judice?**

16. The Respondent submits that the Claim dated 3<sup>rd</sup> November 2022 and filed before the Tribunal on 20<sup>th</sup> February 2023 contravenes section 6 of the Civil Procedure Rules and Section 27(a) of the HIV & AIDS Prevention and Control Act owing to the existence of Eldoret Elrc Pet. E.028 Of 2022 Pkj V Ag & 2 Others.
17. The Claimant in opposing the allegation maintained that the Claim dated 3<sup>rd</sup> November 2022 is not sub judice as the subject matter in Eldoret Elrc Pet. E.028 Of 2022 Pkj V Ag & 2 Others relates to issues on employment while the claim filed before the tribunal relates to unlawful disclosure of the Claimant's HIV Status and procedural testing of the claimant for HIV which is a violation and infringement of rights as guaranteed and protected under HIV & AIDS Prevention and Control Act. The Tribunal has not been able to ascertain the said position as the pleadings filed in the petition were not shared.
18. In *Mukisa Biscuit Company v Westend Distributors* [1969] E A 696, the Court of Appeal held :

“ a preliminary objection Consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit (as per Law, J. A.) ..... raises a pure point of law which is argued on the assumption that all 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 a judicial discretion (as per Sir Charles Newbold P).”
19. As discussed earlier, pleadings in Eldoret Elrc Pet. E.028 Of 2022 Pkj v Ag & 2 Others have not been brought before the Tribunal. It would be necessary for the Tribunal to ascertain the existence of this suit and the issues raised so as to ascertain whether the prayers sought by the Claimant are similar in the 2 cases before deciding whether or not this suit is sub judice.
20. In conclusion we find that the Preliminary objection has been improperly raised as a preliminary objection. The Notice of Preliminary Objection dated 22<sup>nd</sup> May 2023, is hereby dismissed with costs. Parties to consider taking directions for further steps towards the expeditious determination of the claim.

**DATED AND SIGNED AT NAIROBI THIS 28<sup>TH</sup> DAY OF JULY 2023.**

**DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF JULY 2023.**

.....  
**HON. CAROLYNE MBOKU (CHAIRPERSON)**

.....  
**HON. W.G. JAOKO (PROF.) (MEMBER)**



.....

**HON. N.W. OSIEMO (MEMBER)**

.....

**HON. B.O. YOGO (MEMBER)**

.....

**HON. J.N. NGOIRI (MEMBER)**

.....

**HON. S.K. MUSANI (DR.) (MEMBER)**

**DELIVERED VIRTUALLY IN THE PRESENCE OF:**

Mrs. Katee h/b for Ms. Katindi, Advocate for the Claimant

No appearance for the Respondent

Judith Chepngenoh.....Court Assistant

