



REPUBLIC OF KENYA



KENYA LAW
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**Obure v Attorney General (Petition E357 of 2021) [2022] KEHC 11092 (KLR)
(Constitutional and Human Rights) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11092 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E357 OF 2021

HI ONG'UDI, J

MAY 31, 2022

**IN THE MATTER OF SECTION 84 OF CONSTITUTION
IN THE MATTER OF ARTICLES 28, 29, 30, 31, 39, 43, 47, 48,
49, 50, AND 51 OF CONSTITUTION OF KENYA 2010.**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTION
70, 72(1) & (2), 74, 76, 77 AND 84 OF THE CONSTITUTION
OF KENYA RULE 9 OF THE CONSTITUTION OF KENYA
(PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
OF THE INDIVIDUAL) HIGH COURT PRACTICE AND
PROCEDURE RULES, 2006**

**IN THE MATTER OF THE CONSTITUTION OF KENYA
(PROTECTION FO RIGHTS AND FUNDAMENTAL FREEDOMS)
PRACTICE AND PROCEDURE RULES, 2013**

BETWEEN

HENRY ONYANGO OBURE PETITIONER

AND

ATTORNEY GENERAL RESPONDENT



RULING

1. The petitioner filed the Petition dated 10th August 2021. The same is supported by his sworn affidavit of even date. The same is premised on Articles 70, 72(1) & (2), 74, 76, 77 & 84 of *the Constitution* of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2006.
2. He thus seeks the following orders:-
 - a. A declaration that the circumstances under which the petitioner was arrested, detained, tortured tried and/or convicted following the attempted coup de tat of 1st August 1982 constituted a breach of petitioner's rights as provided for in Section 70 (a) of the repealed Constitution of Kenya and Articles 28, 29, 48, 49, 50 and 51 of *the Constitution* of Kenya 2010.
 - b. A declaration that the period between 1st August 1983 when the petitioner was arrested and subsequently purportedly discharged from the said Force constituted a period of continued breach of petitioner's rights to liberty guaranteed under Section 72 of the repealed Constitution of Kenya and Articles 39 of *the Constitution* of Kenya 2010.
 - c. A declaration that the detention of the petitioner in various detention centers is grossly inhuman and degrading conditions between the periods of 1st August 1982 and March 1983 amounted to cruel and inhumane treatment and was a breach of Section 74 of the repealed Constitution of Kenya and Article 28, 29 and 39 of *the Constitution* of Kenya 2010.
 - d. A declaration that the failure of the Kenya Armed Forces (Kenya Defence Forces) to pay the Petitioner any form of benefits upon their purported discharge from the said force constituted cruel inhumane treatment and was in breach of Section 74 of the repealed Constitution of Kenya and Article 43 of *the Constitution* of Kenya 2010.
 - e. General damages consequently upon the above declarations and/or such orders, writs or directions for the purpose of enforcing and securing enforcement of the provisions herein above disclosed as having been breached in relation to petitioner.
 - f. A declaration that there was no power vested constitutionally in the 82 Air Force to terminate the Applicants and the purported terminations was illegal and void ab initio.
 - g. Costs of this Petition.
 - h. Aggravated punitive and/or exemplary damages for the arbitrary, highhanded and oppressive conduct by security officers of the government towards the petitioner.
 - i. Interest on all monetary awards.



- j. Such other, further, additional, incidental and/or alternative reliefs or remedies as Court shall deem just and expedient.
3. This Ruling is in respect of a preliminary objection dated 31st January 2022 filed alongside the respondent's replying affidavit. The said preliminary objection is based on the following grounds:-
 - i. The Petitioner herein is guilty of laches having instituted his claim more than thirty-eight years since the same became due hence the suit is an abuse of the court process.
 - ii. This suit is fatally defective.
 - iii. The Respondent seeks dismissal of the suit with costs.
4. The Petitioner did not file any response to the said preliminary objection.
5. Parties filed and exchanged written submissions. The respondent's submissions are dated 17th February, 2022 and filed by W. W. Kimotho special state counsel for the Attorney General.
6. Counsel for the respondent submits that the petitioner has not explained the delay of over 38 years in filing the petition. He has referred to the saying that "Equity aids the vigilant and not those who slumber on their rights." In support of this he referred to the case of *Abigael Barma v. Mwangi Theuri* ELC No. 393 of 2013 [2013] eKLR. Its counsel's contention that the petitioner's indolence violates Article 50 of the Constitution on which he relies.
7. Counsel argues that the delay has exposed the respondent to contemplated hardships such as:-
 - i. Death of witnesses with plausible evidence.
 - ii. Loss of memory due to effluxion of time for the available witnesses.
 - iii. Destruction and/or loss of key documents and records.
8. He referred to the following cases where the issue of unexplained delays was dealt with:-
 - i. HCPT No. 180 of 2011 James Kanyita Nderitu
 - ii. *Durity v. Attorney General* (2002) – UKPC 20 – a case decided in Trinidad & Tobago.
 - iii. *Joyce Nakacwa v. Attorney General & others*, Constitutional claim No. 2 of 2001 (2020) UGCCI.
 - iv. *Lt. Col. Peter Ngari & Others v. Attorney General* Nairobi constitutional Application No. 128 of 2006 [2009] eKLR where there was unexplained delay of 24 years.
9. In Civil Appeal No. 268 of 2016, *Wellington Nzioka Kioko v. Attorney General* [2018] eKLR arising from the judgment of Mumbi Ngugi J (as she then was) delivered on 18th November 2015 from a constitutional claim filed on 29th October 2013, Alnashir Visram, W. Karanja, & M. K. Koome JJA, stated as follows on the issue of non-explained delay:-

“We agree with the learned Judge that the delay of 30 years was not explained and on that point alone, we hold that the appellants claim was properly dismissed.”



10. The petitioner in his submissions dated 24th February 2022 & filed by Shehi Kipkorir & Yusuf advocates argues that *the constitution* has not set a time limit within which applications for enforcement of fundamental rights should be brought. Counsel relied on the case of Wellington Nzioka Kioko v. Attorney General (supra) where it was held:-

“On the issue of delay, the learned Judge found that the petitioner was filing his claim 33 years after the cause of action relied on, She considered several persuasive decisions of the High Court for instance *Wamabiu Kiboro Wambugu vs. Attorney General*. Pteition No. 468 of 2014; *Mugumo Theuri vs. Attorney General*, *Ochieng’ Kenneth Kogutu vs. Kenyatta University and 2 others*, High Court Petition No. 306 of 2012, and several others. The common thread running through those decisions is that whereas there is no time limitation in respect of constitutional petitions, the delay must not be inordinate and there must be plausible explanation for the delay. The learned Judge found that no justification for the delay of over 3 decades had been given in this matter. Can the Judge be faulted for that?”

Analysis and determination

11. Having considered the preliminary objection, the rival submissions and the law I find the issue for determination to be whether the delay in filing the petition was explained and whether the explanation was reasonable. The incident giving rise to the claims by the petitioner occurred on 1st August 1982. This petition was filed on 12th September 2021 i.e. (39 years after the incident).
12. A preliminary objection was defined in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd* (1969) E.A. 696 where the court stated:-

“...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.”

13. The Court went further to note that:-

“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 objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.”

Also see *oraro vs. Mbaja* [2005] 1 KLR

14. It is undisputed that *the constitution* has not set any time limits for filing of petitions seeking enforcement of constitutional rights. Does this then mean such claims can be filed any time irrespective of the delays? The answer is No, and that is the reason why courts have called on parties to give an explanation for the delay for the court’s consideration. Even in cases where time limits have been set once there is a reasonable explanation the court may allow a party to file late proceedings.
15. In this particular case the petitioner has not given any explanation for the delay of 39 years. He never filed any response to the preliminary objection. Even in his submissions he has given no such explanation. All he says is that there is no time limit for filing of such petitions. There is more to that as can be seen from the authorities cited including the one cited by him, being Wellington Nzioka Kioko



vs. Attorney General (supra). Counsel for the respondent has outlined his predicament if the suit were to proceed.

16. It is true Article 50 of *the Constitution* speaks to fair hearing. Fair hearing does not only refer to the Petitioner. It encompasses the respondent also. The court has to ensure fair hearing to both parties (petitioner and respondent).
17. After consideration of all these I find that the delay by the petitioner in filing his claim was too long and required an explanation which he has not offered, to date. Guided by the Court of Appeal holding in the Wellington Nzioka case (supra) I find that the unexplained delay herein is sufficient ground for this court to dismiss this case. I strike out the petition and dismiss it with costs.

Orders accordingly.

DELIVERED VIRTUALLY, SIGNED AND DATED THIS 31ST DAY OF MAY, 2022 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

