



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Waita v Kenya Breweries Limited (Petition E347 of 2021) [2022] KEHC 16534 (KLR)
(Constitutional and Human Rights) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16534 (KLR)

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

PETITION E347 OF 2021

HI ONG'UDI, J

DECEMBER 20, 2022

BETWEEN

GETRUDE CHAO WAITA PETITIONER

AND

KENYA BREWERIES LIMITED RESPONDENT

RULING

1. This Ruling is in respect of the respondent's preliminary objection (P.O) to the petition dated 2nd September 2021. The P.O is dated 21st September 2021. In the petition the petitioner seeks the following orders:
 - i. A declaration be issued that failure by the respondent to furnish the petitioner with information relating to the terminal benefits and other schemes of George Francis Waita also known as George Francis Mwakima Waita Employee No. 020311 is a violation of petitioner's right to access information under Article 35(1) of *the Constitution*.
 - ii. A declaration be issued that the petitioner is entitled to an Order compelling the respondent to furnish the petitioner at the respondent's cost copies of all documents in paragraph 3.10 of the petition relating to terminal benefits and other schemes of George Francis Waita Employee No. 020311.
 - iii. An order do issue compelling the respondent to pay the petitioner forthwith terminal benefits and other schemes of George Francis Waita also known as George Francis Mwakima Waita Employee No. 020311.



- iv. Damages for intentional violation of Article 35(1)(b) and Article 10 of *the Constitution* and Section 4 of the *Access to Information Act*, 2016 .
 - v. Any other relief that this Honourable Court may deem fit and just to grant.
 - vi. Costs of the Petition.
2. The preliminary objection is premised on the grounds that:
- i. The forum and procedure for addressing claims relating to pension benefits are set out in the *Retirement Benefits Act* and subsidiary legislation made thereunder and hence this Court lacks jurisdiction over such benefits and cannot make orders for their distribution.
 - ii. The claim for payment of pension benefits ought to be made against the Pension Administrators, not the Respondent. The claim is, in any event, time barred pursuant to Section 4(1) of the *Limitation of Actions Act* since a determination on the deceased's pension benefits was made in 1994 and subsequently, in 2004.
 - iii. The respondent was not mandated to keep the employment records of the deceased, George Francis Waita, beyond 6 years from the date of termination of his employment.
3. The petitioner in response to the P.O filed a further affidavit dated 24th May 2022. She deposed that Article 10 of *the Constitution* binds all state organs, state officers, public officers and all persons and so the respondent is bound to uphold the principles set out in Article 35 and 47 of *the Constitution*.
4. She deposed that the respondent's action of denying her information in relation to her son's terminal dues was without any justification therefore violating Article 35 of *the Constitution*. Moreover that the respondent had violated Article 47 of *the Constitution* to the extent that its action of non-disclosure of information violates the constitutional principles of fair administrative actions to be procedural, reasonable, lawful and fair within the meaning of Article 47(1)(2) of *the Constitution*. She argued thus that the respondent's actions were founded on malice.
5. She therefore deposed that this Court has the jurisdiction under Article 165 of *the Constitution* to determine the question as to whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Moreover that Article 259 of *the Constitution* requires this Court to construe *the Constitution* in a manner that promotes its purpose, values and principles. Likewise Article 159(2)(d) of *the Constitution* requires that justice be administered without undue regard to procedural technicalities.
6. It was her disposition thus that she has a legitimate expectation under *the Constitution* to receive the information sought from the respondent. She contended in conclusion that the preliminary objection is misconceived, devoid of any merit and so should be dismissed.

The Respondent's submissions

7. The respondent in support of the P.O filed written submissions dated 3rd October 2022 through the firm of Anne Babu and company advocates. The submissions focused on whether this Court has jurisdiction to determine this matter, whether the suit is time barred and whether the petitioner is entitled to the orders sought as the key areas for determination.



8. On the first issue, Counsel submitted that terminal benefits are due from the employer whereas pension benefits are due from the pension scheme. It was noted with reference to the deceased's terminal benefits that he had resigned from the respondent's employment on 1st November 1994 and so any claim for the deceased's terminal benefits is time barred pursuant to Section 4(1) of the *Limitation of Actions Act*. With respect to pension dues, it was submitted that the distribution of pension benefits is the duty of the trustees of the scheme as espoused under the *Retirement Benefits Act*.
9. In addition Counsel pointed out that one of the duties of the trustees of a Scheme under the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000 is collection, keeping and updating retirement benefits data of each member including maintenance of individual membership records and bank account details of the members for the purpose of payment of benefits.
10. In support reliance was placed on the case of Abdalla Osman & 628 others - vs- Standard Chartered Bank (K) Limited & 11 others ELRC Cause No. 59 of 2018 [2018] eKLR where it was held that considering the pleadings filed by the claimants, the ultimate remedy sought was payment of arrears of their lump sum pension plus interest from the pension schemes and not from the employer. Consequently, the Court being aware that there is an alternative avenue for resolving the dispute provided by statute, it is only fair and just that it upholds the doctrine of exhaustion. Similar reliance was placed on the case of Peter Njogu Mwangi & 3 others v General Motors E. A. Limited & 3 others [2018] eKLR. Counsel therefore submitted that this Court lacks jurisdiction to entertain the instant petition.
11. On the second issue, she submitted that the claim for the deceased's terminal benefits and pension dues is time barred under Section 4(1) of the *Limitation of Actions Act* which provides that actions founded on contract may not be brought after the end of six years from the date on which the cause of action accrued. It was noted that the deceased left employment on 1st November 1994 and his pension benefits were settled in October 1994 and October 2004.
12. It was submitted hence that both claims for terminal benefits and for pension benefits were time barred, having been brought 30 years late while the claim for pension benefits was already adjudicated upon in October 1994 and 2004. Further that the claim for information/records pertaining to the deceased is also time barred. To buttress this point counsel relied on the case of Peter Njogu Mwangi (supra) where the Court observed that a claim arising from a contract of service between the claimants and the 1st respondent expired 6 years after their separation. The same position also obtains for any claim for records of the said contract.
13. On the last point, Counsel submitted in the negative. This she argued is because the respondent was not legally mandated to store the deceased's employment records for more than 6 years after the termination of the deceased's employment. Further that the information/records/claims pertaining to the deceased's pension benefits ought to be sought from the pension scheme.
14. She finally argued that the petitioner's claim had no legal basis under Article 35(1) of *the Constitution*. That the claim for damages was equally baseless.. Similarly it was pointed out that the petitioner had moved this Court with unclean hands for failure to disclose that there are pending succession disputes with respect to the deceased's estate, that is, Succession Cause No. 76 of 2012, In the Estate of George Francis Waita (Deceased).

The Petitioner's submissions

15. The petitioner through the firm of D.G. Wachira and company advocates filed written submissions dated 13th July 2022. Counsel submitted that for one to exercise their right under Article 35 of *the*



Constitution, he/she must show that the information sought is held by the person sued as observed in the case of:

- i. Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 others [2013] eKLR.
 - ii. Katiba Institute v Presidential Delivery Unit and 3 others (2017)eKLR
16. Counsel noted that the information in issue was held by the respondent as proved through the correspondence annexed to the petition. That it was clear that the respondent as a public entity had failed to issue the information sought hence violating this Article.
17. On the issue of jurisdiction counsel argued that Article 159 of the Constitution demands that in exercising judicial authority Courts are to be guided by the set principles including justice being administered without due regard to technicalities as stressed in:
- i. J.O.O (also known as J.M) versus Attorney General & 6 others (2018) eKLR.
 - j. (ii) Trusted Society of Human rights Alliance Vs A.G. & Others High Court Petition No.229 of 2012.
18. Furthermore, Counsel argued that the question before this Court revolves around the question of accessing information held by the respondent as relates to the deceased's benefits and not the issue of the forum and procedure for addressing claims related to pension benefits as set out in the Retirement Benefits Act and subsidiary legislation. He urged the Court to find that the P.O had no merit and should be dismissed with costs.

Analysis and Determination

19. Having considered the P.O and submissions of the parties herein, the only issue I find arising for determination is:

Whether the preliminary objection dated 21st September 2021 is merited.

20. The threshold of proving a P.O was set out by the Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696 as follows:

“...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.”

21. 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 objections 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

22. The instant P.O is premised on the argument that this Court lacks jurisdiction by virtue of the operation of the Retirement Benefits Act with reference to the Pension Scheme. In the same way the objection is pegged on the assertion that the petition is time barred due to the operation of the



Limitation of Actions Act which bars this Court from exercising its jurisdiction over matters caught in the time periods stipulated by the law in this case contractual matters. These two grounds do not bear factual aspects calling for proof by the parties. They are based on legal principles hence raise points of law. The question therefore is whether the petition invokes the two legal principles in respect of this Court's jurisdiction to entertain the matter.

23. The Supreme Court addressing its mind on the issue of jurisdiction in the case of Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others (2012) eKLR opined as follows:

“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 counsels 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 ... where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

24. It is clear that the High Court under Article 165(3) (d) of the Constitution has wide jurisdiction. It is however underscored above that this Court's jurisdiction apart from the Constitution can only flow from a Statute and the Court must exercise its jurisdiction within those confines. In essence, where this Court finds itself lacking jurisdiction to entertain a matter it is required to down its tools accordingly.

25. The uncontested background in this case is that the relationship between the petitioner and the respondent stems from the employment relationship between the respondent and the petitioner's son who is deceased. The petitioner's claim is twofold, first she seeks to be issued with information relating to the terminal benefits and schemes of the deceased and secondly, for this Court to compel the respondent to pay the terminal benefits and other schemes of the deceased to the petitioner. The respondent opposed this claim owing to the jurisdiction of the pension schemes and effluxion of time as relates to the information sought.

26. Article 35(1) of the Constitution provides that:

1. Every citizen has the right of access to-
 - a. information held by the State; and
 - b. information held by another person and required for the exercise or protection of any right or fundamental freedom.

27. Constitutional rights are generally not supposed to be limited unless there is a justifiable reason to limit the same. This is provided for under Article 24 of the Constitution. The impugned limitation is premised on a law. This is Section 4(1) (a) of the Limitation of Actions Act (Cap 22) which provides that:

4. Actions of contract and tort and certain other actions



1. The following actions may not be brought after the end of six years from the date on which the cause of action accrued—
 - a. actions founded on contract;
28. Speaking to the effect of this Section the Court of Appeal in the case of *Devecon V. Samani* (1995-1998) EA 48 as cited with approval in the case of *In Re the Matter of Samuel Kathuri Mwongera* [2013] eKLR held as follows:

“... the meaning of the wording of Section 4(1) ... is clear beyond any doubt. It means that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The Corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action.”
29. The Court went ahead to conclude that:

“...In light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the superior Court did, that the wording of Section 4(1) of the [*Limitation of Actions Act*](#) (Chapter 22), suggests a discretion can be invoked.”
30. This undoubtedly means that where this Section is invoked, this Court’s jurisdiction is barred by operation of the law. The Court in the case of *YH Wholesalers Limited v Kenya Revenue Authority* [2021] eKLR discussing the importance of the limitation of actions opined as follows:

“24. Time bar limits the right to seek judicial redress. It serves an important purpose in that it prevents inordinate delays which may be detrimental to the interests of justice. An applicant for leave to file suit out of time must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable. The 10-year delay has not been explained at all. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court. The applicant has manifestly failed to account for the delay and to lay a basis for this court to grant the leave sought. On this ground alone, the applicants Originating Summons falls for dismissal.”
31. The facts of this case make it clear that the instant suit has been filed out of time by more than 15 years. The petitioner in filing the suit as against the respondent which was premised on its employment contract with the deceased did so out of time and no justification was given. It is not even stated why the petitioner’s son never sought for those records while alive. Nevertheless, it is imperative to note that the discretion to extend time can only be done where the Act provides so, and a reasonable explanation tendered. The Act in this regard does not provide for extension of time in contractual actions and hence as guided by the Court of Appeal decision this Court cannot purport to exercise discretion where such jurisdiction has not been bestowed on it by law as held by the Supreme Court in the case of *Samuel Kamau Macharia* (supra).



32. The consequence of the foregoing is that the petitioner's case for access to information is caught up in the time bar under Section 4(1)(a) of the Limitation of Actions Act with reference to the respondent and so this Court does not have jurisdiction to entertain the matter. This was stressed by the Court in the case of Peter Njogu Mwangi (supra) where it was held that:

“ 16. As already held herein above, the claim for forwarding of employment records for the claimants by the 1st respondent to the 2nd respondent is statute barred by dint of section 4(1) of the Limitation of Actions Act. In that matter, I return that this court's jurisdiction is distinguished by operation of the law of Limitation.”

33. It is imperative to note that Article 35 of the Constitution in this case was limited by operation of a law hence justifiable.

34. Turning to the next point, the benefits sought by the petitioner are based on the terminal benefits as accrued from the employer and other schemes of the deceased. As discussed above the terminal benefits claim status as against the respondent as asserted cannot be confirmed due to the inability to access the records. This means therefore whether or not the deceased was paid the terminal benefits or who was nominated to receive the benefits remains inconclusive.

35. In the other scheme also known as Pension Scheme, the Retirement Benefits Act No. 3 of 1997 which governs its administration provides in its preamble that:

An Act of Parliament to establish a Retirement Benefits Authority for the regulation, supervision and promotion of retirement benefits schemes, the development of the retirement benefits sector and for connected purposes.

36. Section 36A of the Act makes known that:

Treatment of death benefits

Upon the death of a member of a scheme, the benefit payable from the scheme shall not form part of the estate of the member for the purpose of administration and shall be paid out by the trustees in accordance with the scheme rules.

37. My understanding of the above provision is that the schemes benefits are to be paid out in accordance with the Act's Rules and not by the employer. Likewise since this benefit does not form part of the deceased's estate the petitioner was not obliged to inform this Court of pending suits with reference to the deceased estate as claimed by the respondent. Evidently to make a claim for these benefits, the petitioner is required to make such a claim under the dictates of the said Statute. Where a party is dissatisfied with the decision of the manager the Act instructs as follows:

46. Appeals to the Chief Executive Officer

1. Any member of a scheme who is dissatisfied with a decision of the manager, administrator, custodian or trustees of the scheme may request, in writing, that such decision be reviewed by the Chief Executive Officer with a view to ensuring that such decision is made in accordance with the provisions of the relevant scheme rules or the Act under which the scheme is established.



2. A copy of every request under this section shall be served on the manager, administrator, custodian or trustees of the scheme.
1. Further where a party remains dissatisfied with the decision of the Chief Executive Officer, they are at liberty to make an appeal under Section 48(1) to the Appeals Tribunal. This Section provides:
 1. Any person aggrieved by a decision of the Authority or of the Chief Executive Officer under the provisions of this Act or any regulations made thereunder may appeal to the Tribunal within thirty days of the receipt of the decision.

2. The respondent asserted that the deceased's pension benefits were made in October 1994 and October 2004 as per the correspondence with the schemes manager. The petitioner in this matter has not demonstrated whether these decisions were appealed against as prescribed by the Act before invoking this Court's jurisdiction. This means the petitioner failed to exhaust the existing mechanisms. The Court of Appeal in the case of *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others*(2015) eKLR in this regard opined as follows:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.”

38. The consequence of the above is that the instant claim for the deceased's employment information with reference to his benefits and an action against the respondent is statute barred. Likewise, that the petitioner failed to exhaust the existing remedies under the *Retirement Benefits Act* before filing this petition. It is my humble finding that the existence of these legal elements in essence bars this Court from exercising its jurisdiction to entertain the instant petition.
39. The upshot of the foregoing is that the preliminary objection dated 21st September 2021 is merited and is accordingly allowed. The petition dated 2nd September 2021 is struck out with costs.

Orders accordingly.

Delivered virtually, dated and signed this 20th day of December 2022 in open Court at Milimani, Nairobi.

H. I. Ong'udi

Judge of the High Court

