



**Omar & another (As executors of the will of Omar Bin Khamis) v Kenya
Airports Authority & another (Environment and Land Constitutional Petition
E007 of 2023) [2023] KEELC 21893 (KLR) (28 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21893 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E007 OF 2023
NA MATHEKA, J
NOVEMBER 28, 2023**

BETWEEN

**ABEID AWADH OMAR 1ST PETITIONER
OMAR KHAMIS OMAR 2ND PETITIONER
AS EXECUTORS OF THE WILL OF OMAR BIN KHAMIS**

AND

**THE HON. ATTORNEY GENERAL 1ST RESPONDENT
KENYA AIRPORTS AUTHORITY 2ND RESPONDENT**

RULING

1. That by dint of Section 3(1) of the *Public Authorities Limitation Act*, actions against the government ought to be brought within twelve (12) months from the date the cause of action arose. As such, the Petitioners purported cause of action having arisen on 19th February, 1979, the same ought to have been filed on or before 19th February, 1980.
2. That by dint of Section 3(2) of the *Public Authorities Limitation Act*, actions against the government based on contract ought to be brought within Three (3) years from the date cause of action arose. As such, the purported cause of action having arisen on 19th February, 1979, the present suit ought to have been filed on or before 19th February, 1982.
3. That by dint of Section 4 1(a) of the *Limitation of Actions Act*, actions based on contract ought to be brought within six (6) years from the date when the cause of action arose. As such, the purported cause of action having risen on 19th February, 1979 the present suit ought to have been filed on or before 19th February, 1985.



4. That in light of paragraphs 1-3 above, the Petitioners' Petition is time barred and the same cannot be entertained by this Honourable Court.
5. I have considered the preliminary objection and submissions therein. Under Article 22 of the Constitution;

22

- (1) Every person has the right to institute court proceedings claiming that a right or a fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
 - (2) In addition to a person acting in their own interest, court proceedings under clause may be instituted by –
 - a) A person acting on behalf of another person who cannot act in their own name;
 - b) A person acting as a member of, or in the interest of a group or class of persons;
 - c) A person acting in the public interest; or
 - d) An Association acting in the interest of one or more of its members.”
6. From the above provisions of the Constitution, it is clear that this Court has the requisite jurisdiction at the first instance to entertain this petition. The petitioners have pleaded what they allege to be violations against their guaranteed rights under the Constitution and they cited the specific constitutional provisions. As to whether those alleged violations are established is what this court will be determining. This court being of equal status with the High Court, I am guided by the decision rendered in A.O.O & 6 Others v Attorney General & Another (2017) eKLR where the High Court held that:

Article 165 (3) (d) (i) & (ii) of the Constitution vests power to the High Court to hear any question respecting the interpretation of the Constitution including the determination of the question whether or not any law is inconsistent with or in contravention of the Constitution and also the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution. An unconstitutional statute is not law; and more important judicial function includes the power to determine and apply the law, and this necessarily includes the power to determine the legality of statutes. The judiciary has a special role in our system with respect to constitutional interpretation. Courts are bound by the Constitution and must interpret it when a dispute so requires.”

7. It is the 1st respondent's contention that the instant petition is time statute barred. The 1st respondent urges the court to find that the matter has been filed over 40 years after the alleged cause of action arose. The petitioners aver that this is a constitutional petition that cannot be time barred. Section 3(1) of the Public Authorities Limitation Act, provides that;

No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.”



Section 3(2) of the *Public Authorities Limitation Act*, provides that;

No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action occurred.”

8. As to whether the instant petition is time barred, the question of limitation of time in regard to allegations of breach of human rights and fundamental freedoms has in many cases been raised by the state and in the case of *Joan Akinyi Kaba Sellab and 2 others vs Attorney General*, Petition No. 41 of 2014, the learned judge observed *inter alia* that in a line of cases such as *Dominic Arony Amollo vs Attorney General*, Nairobi High Court Misc. Civil Case No. 1184 of 2003 (OS) 2010 eKLR, *Otieno Mak’ Onyango vs Attorney General and another*, Nairobi HCCC No. 845 of 2003, (unreported), courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights.
9. In the present case, it is submitted on behalf of the petitioners that the deceased and the estate were dissatisfied with the entire acquisition process culminating in the survey in 1979 hence the numerous letters in support of the petition in dispute of the illegal fencing off of the suit property and finally filing the instant suit.
10. In Mombasa Civil Case No. 128 of 1962, *Rawal v Rawal* (1990) KLR 275 the learned judge stated thus;

The effect of any limitation enactment is to prevent a plaintiff from prosecuting state claims on the one hand and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time. It is not to extinguish claims”
11. The point was further successfully made in *Abraham Kaisha Kanzila alias Moses Savala Keya t/a Kapco Machinery Services and Milamo Investments Limited vs Government Central Bank of Kenya and 2 others*, Misc. Civil Application 1759 of 2004 where the court observed that;

In my view failure by a constitutional court to recognize general principles of law including, limitation expressed in the *Constitution* would lead to legal awarding or crisis. It would also trivialize the constitutional jurisdiction in that Applicants would in some cases ignore the enforcement of their rights under the general principles of law in order to convert their subsequent grievance into a ‘constitutional issue’ after the expiry of the prescribed limitation periods”.
12. In view of the foregoing analysis it is the clear the cause of action arose way back in 1979. Be that as it may and from documentary evidence that the parties had been corresponding on the said matter as late as 2014. After considering the pleadings, the submissions and the law cited herein above, I find and hold that this is a constitutional petition and the petitioners have pleaded what they allege to be violations against their guaranteed rights under the *Constitution* and they cited the specific constitutional provisions. This court is therefore inclined to disallow the preliminary objection on ground that the suit is time barred. I strike out the preliminary objection and order that the petition proceeds to hearing. Costs to be in the cause.
13. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF NOVEMBER 2023.

N.A. MATHEKA

JUDGE

