

- (1) A declaration that the Petitioners' fundamental rights and freedoms under Articles 20, 27 and 41 of the Constitution were contravened and grossly violated by KALUWORKS LIMITED (the Respondent), its servants, agents, and/or employees as pleaded in paragraphs 4, 5, 6 and 7 of the Petition;
- (2) A declaration that the Petitioners are entitled to the payment of damages and compensation for violation and contraventions of their fundamental rights and freedoms under the aforementioned provisions of the Constitution, and as pleaded in paragraphs 4, 5, 6 and 7 of the Petition;
- (3) A declaration that the refusal to pay the Petitioners their annual benefits as pleaded in paragraph 8 of the Petition is unconstitutional;
- (4) A declaration that the Respondent is bound to settle the Petitioners' final annual dues and/or benefits as required by law as pleaded in paragraph 8 of the Petition;
- (5) Costs of the Petition and interest on orders under paragraph 3 and 4 above until payment in full;
- (6) Such other orders as the court shall deem just.

2. The Petition was supported by the Affidavits of Sila Onyango Mauga (1st Petitioner), sworn on 4th September, 2013, and undated statements filed on the same 4th September, 2013 of Wisdom Mwachala Mwandawiro (the Second Petitioner), Jeremiah Owuor Amuok (the Third Petitioner), Francis Mwanja Kilunda (the Fourth Petitioner) and Otieno Okong'o Ahomo (the Fifth Petitioner) and in which Petitioners reiterated their respective claims stated in paragraph 8 of the Petition.

3. The Petition was argued by the First Petitioner, Sila Onyango Mauga on behalf of the four surviving Petitioners. Mr. Onyango submitted that one of the Petitioners had passed away. He did not indicate the name of the deceased Petitioner.

4. The Petitioners representative, a lay person, argued well, that their rights as workers (employees of the Respondent) were violated by the Respondent. He argued that it is a violation of a worker's right for an employee who had worked for ten or more years to be paid Shs. 29,000/= upon termination of his services. The Petitioner urged the court to look at their case in the same manner as that of the Teachers and award them their rightful compensation. In particular the Petitioner argued, the Petitioners had no annual leave, earned no overtime pay, and that unless the court examines their Petition critically, and allows or grants the orders sought in the Petition, many workers would continue to suffer (due to violation of their rights). The Petitioners worked overtime, worked on public holidays and were dismissed without notice, and the Respondent did not make clear to them whether what they were paid, was bonus, or terminal benefits. For those reasons the Petitioners urged the court to grant the orders sought in the Petition.

5. The Petition was however opposed by the Respondent through the Replying Affidavit of Hezrone Rachilo sworn on 18th February, 2014 and filed on 19th February, 2014. The Respondent's case is that the claims and issues raised in the Petition were raised and determined in Mombasa ELRC Cause No. 342 of 2012 between the Petitioners and the Respondent and that the claims and issues herein had been dismissed by the court in a Ruling delivered on 20th December, 2012, and that the Petition herein is both *res judicata* and abuse of the court process and that it is not open for the Petitioners to raise the same issues though a Petition in the High Court, and that the Petition should therefore be dismissed with costs against the Petitioners.

6. The issue raised in the Petition, and framed by Mr. Nanji counsel for the Respondent is whether it is open for the Petitioners to raise the same issues which had been raised before the Employment and

Labour Relations Court in Cause No. 342 of 2012. I agree with the submission by said counsel that it is not open for the Petitioners to raise the same claims and issues in this court under the guise of a Constitutional Petition, although this is a common practice in this court, even where parties are represented by counsel, where parties would maintain parallel claims in the several Divisions of the court. It is both an unhealthy practice, and abuse of process and the court will at all times discourage such practice by ordering consolidation of such actions, or as appropriate striking out such Petitions.

7. Adverting to this Petition, Article 159 of the Constitution is not a cure all provision unless there is disclosed a substantive issue to be determined without regard to undue technicalities.

8. The Petition is anchored upon Article 41(1) of the Constitution of Kenya 2010 which guarantees every person the right to fair labour practices which in respect of every worker includes the right to –

- (a) fair remuneration;
- (b) reasonable working conditions,
- (c) to join or participate on the activities and programmes of a trade union; and
- (d) to go on strike;

9. Article 41(1) does not however define fair labour relations or fair wages, or reasonable working conditions. Those conditions are to be found in the Employment Act, (Cap 226, Laws of Kenya), and the Labour Relations Act, (2007).

10. The Petitioners were employees of the Respondent. They were therefore subject to the provisions of the Employment Act, and Labour Relations Act, which flesh out and give meaning to fair labour relations and fair wages referred to in Article 41 of the Constitution. Consequently the Petition cannot stand alone without reference to the provisions of those statutes, or be circumvented by mere reference to the constitutional provision (Article 41).

11. In this regard, the fundamental rights to fair labour practices are limited by Section 90 of the Employment Act which requires that claims be brought within three (3) years from the date when the cause of action arose.

12. Article 162 (2) of the Constitution provides for the establishment of the Industrial Court with a constitutional mandate to deal with employment and labour relations disputes and that court has mandate to enforce fundamental rights as provided under Article 23, subject to the limitations under Article 24 of the Constitution.

13. Consequently, the Petitioners' claims are not only barred by limitation under Section 90 of the Employment Act, 2007, but the Petition cannot also breathe any life into already extinguished claims.

14. In addition, the Petition is misconceived, *res judicata* and an abuse of the court process. The Petitioners are in effect seeking the same remedies which they had sought in Mombasa Industrial Court Cause No. 85 of 2012 (formerly Nairobi Industrial Court Cause No. 342 of 2012 – **Sila Onyango Mauga & 4 others vs. Kaluworks Limited**) which was dismissed in a Ruling delivered by Radido Stephen J. on 20th December, 2012.

15. The issue of limitation cannot be cured by the provisions of Article 159 (d) that justice be administered without undue regard to procedural technicalities. There has to be first established a right which should not be defeated by procedural technicalities. That right if it existed has been defeated by Section 90 of the Employment Act 2007.

16. There is therefore no violation or infringement of any Bill of Rights by the Respondent to warrant consideration of any of the claims in the Petition.

17. For those reasons, I find and hold that the Petition herein lacks merit and the dictates of justice demand that the Petition be and is hereby dismissed with costs.

18. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 28th day of April, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Mr. Munga for Petitioner

Mr. Odongo for Respondent

Mr. S. Kaunda Court Assistant