



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MOMBASA

Petition 1 of 2006

IN THE MATTER OF: ARTICLES 22, 23, 28, 41, 47, 50

**AND 159 OF THE CONSTITUTION OF KENYA AND IN THE MATTER OF THE
CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT
PRACTISE AND PROCEDURE RULES, 2006**

IN THE MATTER OF: ALLEGED CONT

REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MOMBASA

**RAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 22, 23, 28,
41, 47, 50 AND 159 OF THE CONSTITUTION OF KENYA**

BETWEEN

ELIZABETH KWINI AND MARY MARTHA MASYUKI,

THE JOINT ADMINISTRATORS OF THE ESTATE OF

JOSEPH M. INDO PETITIONER

V E R S U S

THE MANAGING DIRECTOR 1ST RESPONDENT

KENYA PORTS AUTHORITY 2ND RESPONDENT

RULING

1. **JOSEPH INDO (*hereinafter called the Deceased*)** filed this Petition alleging that his rights guaranteed under Sections 70, 74 (1), 77 and 82(2) of The Former Edition of The Constitution had been infringed by the Respondents and in the end sought the following prayers-

“(a) That Court declares the letter of termination of service by the Respdnent to the Petitioner dated 5th July, 2005 as null nad void and the termination of employment of the Petitioner with the 2nd

Respondent be declared unconstitutional as it contravenes the fundamental rights under Sections 70(a), 74(1), 77, 82(2) and 84 of the Constitution.

(b) The Respondents reinstate the Petitioner to the 2nd Respondent's employment, with full benefits upto time that the Petitioner should have retired at the age of (55) fifty five years. In the alternative the Petitioner be paid his full benefits upto the time when he should have retired as the Petitioner had 48 months and 15 days left before he was due to retire."

2. The Deceased died on 11th August 2007 while the Petition was pending. Elizabeth Kwini Matheka and Mary Martha Masyuki, the Administratrix to his estate have filed a Chamber Summons dated 30th June 2011 in which they seek that they be made the Petitioners and parties to this Petition in place of the Deceased Petitioner.

3. The Respondents are opposed to the application. In their view the prayers and reliefs sought in the petition in the form of fundamental constitutional rights are of a personal nature and the cause of action does not survive the Deceased. The principle "***actio personalis movitur cum persona***" (a personal right of action dies with the person) was cited. It is the Respondents further view that the Applicants are guilty of laches, having taken out Letters of Administration three years after the death of the Deceased and then waiting for another two years to apply for substitution.

4. As a first step this Court must determine whether or not the Petitioner's right of action survives him. A Constitutional Petition is a legal action of a special nature. It is an action in which the Court is either asked to interpret the Constitution or to hear and determine applications for redress of a denial, violation, infringement or threat to a fundamental freedom.

5. In this petition the Deceased sought a declaration that the termination of his employment by the Respondents was unconstitutional as it contravened the fundamental rights under Section 70(a), 74(1), 77, 82(3) and 84 of The Constitution. In addition the Deceased sought, and it bears repetition, the following redress-

"The Respondents reinstate the Petitioner to the 2nd Respondent's employment, with full benefits upto time that the Petitioner should have retired at the age of (55) fifty five years. In the alternative the Petitioner be paid his full benefits upto the time when he should have retired as the Petitioner had 48 months and 15 days left before he was due to retire." (emphasis mine)

6. The alternative prayer in which the Deceased sought payment of full benefits is in my view a Chose in Action as it is premised on the contract of employment. Halsbury Laws of England 4th Edition has defined a "***Chose in action***" to include "***a right of action arising under a contract, including a claim for unliquidated damage for breach of contract.***" (Paragraph 8). And as a general rule, upon the death of an individual all choses in action to which he was entitled pass to his personal representative. (Paragraph 17 of Halsburys. (supra))

7. This Court is of the view that in so far the Petition goes beyond merely seeking a declaration that the conduct of the Respondents is unconstitutional, its circumstances can be distinguished from those in **Karugaba –Vs- Attorney General EALR [2003] 2EA 484** cited by the Respondents. The rationale of that decision, as I understand it, is found in the following passage-

***"In my view, the right of proceeding in a court of law by Nakachwa to recover pecuniary damages for the tortuous wrongs inflicted on her, could be pursued by her estate for the benefit of her dependants in a competent court. But this would have to be done under the Law Reforms (Miscellaneous Provisions) Act (Chapter 74). That right of action did not abate when constitutional Petition number 2 abated under rule 15. What was abated was the right of action to petition the Constitutional Court seeking the interpretation of a provision of an article of the Constitution. Rule 15 of Legal Notice number 4 of 1996 is therefore, not inconsistent with Article 26(2) of the Constitution."* (my emphasis)**

What distinguishes the two is that in this Petition the Court is not only asked to make certain declarations but also to grant a pecuniary remedy. The jurisdiction invoked in this Petition is the Courts enforcement and not interpretative jurisdiction.

8. This Court is of also of the view that as it also seeks a pecuniary remedy, the Petition takes on the complexion of a Civil action. One could then look to the provisions of Section 2(1) of The Law Reform Act (Chapter 26) on the effect of death on certain causes of action. That Section provides-

“Subject to the provisions of this Section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate.

Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery.”

Whichever way I look at it the right of action in this Petition survives the death of the deceased.

9. Whether or not a right of action in a Constitutional Petition survives the death of the Petitioner depends on the nature of the Petition and the relief sought.

10. Having come to that conclusion I must now decide whether the Applicants deserve to step into shoes of the Deceased in this Petition bearing in mind the considerable delay in them approaching Court. The Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of The Individual) High Court Practice and Procedure Rules, 2006 (popularly known as the “***Gicheru Rules***”) is silent on the substitution of a Deceased Petitioner. Yet where, as here, the right of action survives a Deceased Petitioner, the Deceased personal representatives must be substituted for the Deceased Petitioner so as to prosecute the Petition.

11. There being no time prescribed for the substitution of a Deceased Petitioner, one will need to seek guidance from Section 58 of The Interpretation and General Provisions Act (Chapter 2) which provides-

“Where no time is prescribed or allowed within which anything shall be done, such thing shall be done without unreasonable delay, and as often as due occasion arises.”

12. The Deceased Petitioner having died in August, 2007, a delay of four (4) years would seem inordinate and unreasonable. Let us, however, examine the explanation given by the Applicants for this delay. Elizabeth Kwini Matheka made the following explanation in her affidavit sworn on 30th June 2011-

“4. That I am advised by the Deceased’s Advocates now

my Advocates which advise I honestly believe to be true that the aforesaid pending petition still continue and survives for the benefit of the Deceased’s Estate.

5. That I timely upon the aforesaid advise petitioned

for the Grant of Letters of Administration which were granted to Mary Matha Masyuki and myself on 14th January, 2009. (I annex a copy of the same and mark it “JM1-2”.

8. That following the death of Mr. Indo and the

attendant loss to the family it took time to arrange for Letters of Administration and also to source for funds to pay for the advocate to draw and file this application. As so much time has been spent I now pray that the petition be accorded a hearing on a priority basis.” (my emphasis)

The Deceased died on 11th August 2007 and the Succession Cause in respect to his estate filed in 2008. Grant of Letters were issued on 5th January 2009. Given the speed of disposal of cases generally in our Courts the time lapse from August 2008 to January 2009 would not be unusual. However, the Court is more concerned about the delay from January 2009 upto June 2011 when this application was filed. This is about 2¹/₂ years after the Applicants had been clothed with the necessary legal authority to seek substitution. The reason given for this delay is that they were arranging for funds to instruct their Advocate. Although no evidence of this effort was laid before me, this Court is not unaware of the financial constraints faced by many Kenyans. In accepting this explanation the Court also considers that the Respondents have not stated that the delay has prejudiced their defence or position.

13. The result is that I allow the application dated 30th June 2011. The Petition shall be amended and served within fourteen (14) days to reflect the substitution with a right of reply to the Respondents to be exercised within fourteen (14) days of service. As this is indeed an old matter the Petitioners shall take steps to have the matter heard without further delay.

14. Costs shall be in the cause.

Dated and delivered at Mombasa this 25th day of September, 2012.

F. TUIYOTT
JUDGE

Dated and delivered in open court in the presence of:-

Miss Nyamweya for the Petitioners

Miss Ikegu for the Respondents

Court clerk - Moriasi

F. TUIYOTT
JUDGE