



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL APPLICATION 463 OF 2006**

**ALFRED MOKYAYA ONCHUKI.....PETITIONER**

**AND**

**UNILEVER EAST AFRICA LIMITED..... RESPONDENT**

**THE HON. ATTORNEY GENERAL..... INTERESTED PARTY**

**JUDGMENT**

Alfred Mokaya Onchuki, the Petitioner herein, brought this amended Petition dated 7/2/08 against his former employer Unilever East Africa Ltd alleging violation of his fundamental rights under S 70 to 83 of the Constitution. He therefore seeks the following declarations

1. A declaration that S 14 among other sections of the Employment Act contradicts and offends the provisions the spirit of chapter 5 of the Constitution and violates the Petitioner's rights.
2. A declaration that the Employment Act cannot qualify the Bill of rights and enable violation with impunity the Petitioner's constitutional rights.
3. A declaration that the provision of S 14 of the Employment Act are not reasonably justifiable a democratic society in that they violate the very basis of and protection of the law to the Petitioner
4. A declaration that the keeping of the petitioner for a period of ten years as a casual employee is inhumane, degrading treatment which amounted to slavery and servitude.
5. A declaration that continuous employment of the petitioner as a casual for a period of 10 years created a legitimate expectation that he would be confirmed on a permanent and pensionable employment.
6. A declaration that continuous employment of the petitioner as a casual for a period of ten years is unjustifiable in a democratic society.
7. A declaration that the Respondent's decision to discontinue the Petitioner's employment on the ostensible ground that he had attained the age of 40 years is discriminatory, expand punishment, inhumane and degrading.
8. A declaration that the Respondent's refusal to issue the Petitioner with a certificate of employment as required by the law is an infringement of his legal and constitutional rights and it is tantamount to depriving him of his right and it is tantamount to depriving him of his right to earn a livelihood.
- 8 (a) That the failure of the 2<sup>nd</sup> Respondent to streamline the Employment Act to accord with the fundamental rights and freedoms of the Petitioner is a gross violation of his rights and is indeed ultra vires S 3 of the Constitution.
9. A declaration that by virtue of the aforesaid unconstitutional acts on the part of the Respondent, the Petitioner is entitled to damages and compensation for loss of earnings, inconvenience and suffering.
10. A declaration that the petitioner be deemed to have been in continuous uninterrupted employment with the Respondent

for the period of 10 years and upto the normal retirement age of 55 years.

11. A declaration that the Petitioner is entitled to normal terminal benefits and pension.

The petition is supported by an affidavit sworn by the Petitioner on 18/8/06, further affidavit dated 11/9/06, submissions dated 8/11/07 and after submissions dated 7/2/06.

The brief facts of this case are that the Petitioner was engaged by the Respondent as a casual labourer on 23/8/1995 in terms of the letter of employment Exhibited as ANO 1. He worked for the Respondent till January 2006 when he reported back to work after the usual break but was not called to work, and on enquiry was informed that he had attained 40 years and his services were no longer required. That is why he complains that he was treated inhumanely, in a degrading manner which was in breach of his fundamental rights. That he hoped to be taken on permanent terms but his legitimate expectation has been threatened because he hoped to work till he attained the age of 55 years.

The petition was opposed and Gathoni Wang'ombe, the Human Resource Director of Uniliver Kenya Ltd, filed an affidavit in opposition in which she deposed that neither the Constitution of Kenya nor the Employment Act places any obligation on the Respondent to take anyone into employment as the petitioner envisages. That the Respondent's nature of business is such that they require casual workers and that it all depended on availability of work and was on a first come first served basis. That it is upto the Respondent to set the medical fitness and qualifications criteria for the employees and the terms applied to all workers without discrimination. That the pay of casuals was on agreed flat hourly rates and no terminal benefits were payable. She urged the court to dismiss the petition for lacking any factual basis, being made in bad faith and an abuse of the court process.

Fundamental rights and freedoms are owed and guaranteed by the Government. In this case the Respondent is a private Ltd Liability Company and cannot be accountable to the Applicant. In the Amended Petition the Attorney General was only brought in as an Interested Party not a substantive party against whom orders can lie. In the case of *KIRIBATI* case of *TEITIWNNANG V ARIONG (1987) LRC* Const 517 which was cited with approval in the cases of *KENYA BUS SERVICES LTD V AG* and *RICHARD NDUATI KARIUKI V LEONARD NDUATI KARIUKI MISC 7/06*, that court held as follows;

***“Dealing now with the question can a private individual maintain an action for declaration against another private individual or individuals for breach of the fundamental rights provisions of the Constitution. The rights and duties of individuals are regulated by private law. The Constitution on the other hand is an instrument of Government. It contains rules about the Government of the country. It follows therefore that the duties imposed by the Constitution under the fundamental rights provisions are owed by the Government of the day to the governed. I am of the opinion that an individual or a group of individuals as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or a group of individuals since no duty can be owed by an individual or group of individuals to another individual under the fundamental rights provisions of the Constitution.”***

The above holding represents what the law is in Kenya. The Respondent is a private body which cannot guarantee the Applicant's rights and no declarations can issue against it.

The petitioner alleges generally that the Applicant's rights under section 70 to 83 were breached. It is not specifically pleaded which section, subsection or paragraph breached nor is the nature of the breach specified. It is trite law and there is a wealth of authority on this point, that applications under S 70 to 83 have to be pleaded with particularity, whereby the Applicant has to state the section, subsection or paragraph allegedly or likely or being contravened. In the case of *ANARITA KARIMI NJERU V REP (NO I) 1979 KLR 154* Trevelyan and Hancox JJ held;

***“We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”***

The courts have affirmed that proposition in *CYPRIAN KUBAI V STANLEY KANYONGA MWENDA HMISC 612/02* and *MATIBA V REP HMISC 666/1990*. In the instant case the pleadings are very vague and it is difficult for the Respondent to respond to the allegations at all. I therefore find that no cause of action is disclosed to which the Respondent could ably respond.

As for Attorney General who was brought in as an Interested Party, no order can lie against a mere Interested Party. Besides apart from alleging that the Attorney General has failed to streamline the laws to accord with the Petitioner's rights, there is no evidence to support that prayer.

The Petitioner pleaded that the relationship between him and the Respondent was one of contract. He exhibited the letter of casual employment. If the Petitioner was dissatisfied with the terms of employment he would simply walk off and seek employment elsewhere. Similarly, if the Respondent wanted to terminate the contract of employment, it would do so in accordance with the contract. The Applicant is therefore trying to enforce private rights of contract through public law litigation. There is no constitutional obligation placed on the Respondent to employ the Petitioner and I do agree with Mr Gachuhi's submissions that invoking the Constitutional provisions is an abuse of the court process. No constitutional issue is disclosed. If the Applicant is aggrieved by the Respondent's actions his remedy lies in a civil suit in the ordinary civil courts but not a constitutional application such as this.

From the foregoing, I think that there is no reason to consider each of Ss 70 to 83 because there are no specific allegations made under those sections and I find the petition to be without any merit and it is hereby dismissed. In view of the Petitioner's status, I order that each party bears their own costs.

Dated and deliver at Nairobi this 4<sup>th</sup> day of June, 2010.

**R.P.V. WENDOH**

**JUDGE**

**In the Presence of:**

Ms Chelagat for Petitioner

Mr. Gachuhi for Respondent

Muturi court clerk