REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 548 of 1995

SAMUEL CHEGE GITAU & 20 OTHERS…..……..PLAINTIFF

- VERSUS -

THE ATTORNEY GENERAL……..…….…….DEFENDANT

RULING

The background information relevant to this ruling is that the initial plaint is dated 21st day of February 1995 and filed the same date. It is indicated to have been presented by 24 plaintiffs then. The same is indicated to have been filed against the Attorney General. Just below the title "*plaint*" there is indicated that the same was filed in pursuance to leave to file suit out of time granted by Lady Justice Aluoch on 14.2.95. Since then amendments have been effected leading to the current standing plaint, which is the further amended plaint, further amended at Nairobi on 24th day of June 2005 and filed on 24th June 2005. It is the basis on which the plaintiffs have commenced presentation of their case. The first witness has given evidence in chief and is in the process of being cross-examined.

It is noted from the record that in the course of cross-examination, counsel, for the defence, started putting questions as to why the suit was not filed from 1982 till 1995. Counsels for the plaintiffs raised objections and that is why the court advised counsel for the defence to put in a formal application to have both sides heard on it so that a ruling is made on the same. It is on the basis of the said courts' advise that the defence presented this application by way of notice of motion dated 10th day of July 2008.

The application is brought under Section 27, 28 and 29 of the Limitation of Actions Act, Order L, Rule 1 of the Civil Procedure Rules and Section 3 A of the Civil Procedure Act. The grounds in support are found in the body of the application, supporting affidavit, case law and oral representation in court. The salient features of the same are as follows:

(1) That the plaintiffs filed an exparte application vide Nairobi HC Misc. Application No. 109/95 seeking leave to file suit out of time, which application was heard and allowed on14th February 1995.

(2) That during the cross-examination of the plaintiffs first witness PW 1 Ex- Major Josphat Nathan Irungu, when asked as to why the suit was filed out of time, counsel for the plaintiffs namely Mr. Ojwang' Agina objected to that line of cross-examination, contending that the issue of limitation had been settled by the order which gave leave to file suit out of time and as such those issues have been foreclosed.

(3) That the defendant has pleaded in its defence that it will raise and challenge the issue of the said leave at the time of trial. To them this is the opportune time to invited the court, to rule on their right to

cross-examine the witness in the witness box on the issue of leave granted out of time.

(4) That they are within the applicable principles of law as well as case law on the subject.

The plaintiffs counsel who objected to the move put in grounds of opposition dated 15th July 2008 and filed on16th July 2008. They contain 6 grounds namely:-

(1) That this application is tailored to delay the expeditious and fair trial of this case.

(2) The issue of limitation is Res judicata in this suit.

(3) That Section 27, 28 and 29 of the Limitation of Actions Act Chapter 22 of the Laws of Kenya does not apply.

(4) That the grounds upon which the notice of motion is founded are deceitful.

(5) That the affidavit of Waigi Kamau does not state the prejudice that has been occasioned to the defendant by the filing of this suit in 1995.

(6) That the application is misconceived and bad in law.

In the oral highlights in court Mr. Okeyo, stressed the following:-

(1) They contend that the application to file suit out of time was not exparte because when it was filed on 2.2.95 and matte went before Aluoch J. as she then was (now JA.) the learned Judge made an order that the Attorney General be served so that the application is heard inter partes. The Attorney General was duly served but failed to turn up for the inter partes hearing. They were given an opportunity to respond to the affidavit in support of the application and also to put in either an opposing affidavit or grounds of opposition to that effect. The Attorney Generals' failure to so act fore closes their right to revisit that matter as the matter is now Res judicata.

(2) That Mr. Agina filed an application on 27.1.05 seeking leave of the court to add more plaintiffs to the suit. It is contended that the Attorney General was served with that application and invited to participate in the hearing of the same. They did participate in the hearing of the same and raised the issue of limitation which was canvassed inter parties and a ruling was given in favour of the plaintiffs and as such the Attorney General cannot revisit that issue.

(3) They submit that even if it is correctly contended that the Attorney General is entitled to revisit that issue, they contend that issues of limitation are issues of law which should best be left for counsels submissions as the witness is not in a position to handle legal issues.

(4) It is also their stand that if the defendant wished to challenge the leave granted to file suit out of time, then immediately they entered appearance and filed defence, they should have applied to have the suit struck out on the grounds of limitation and have the issue ruled upon. Once that option was not taken and the suit has now been processed for trial and trial commenced objection to it cannot be allowed.

(5) They contend that it is mischievous on the part of the defence to state that they have no problem with the order granting leave to file suit and then at the same time try to attack it through a witness in the course of the trial.

Mr. Onyancha also for plaintiffs opposed the application and stressed the following:-

(1) The courts inherent jurisdiction invoked by citation of Section 3 A of the Civil Procedure Act is not available to the applicant because the application lacks forthrightness as the applicant has withheld important information from the court as they failed to disclose that the issue of limitation had been canvassed inter partes. They even failed to disclose that in the second application to add more plaintiffs,

the defendants opposed it on the grounds of limitation which fact was not disclosed by the applicant. As such they have come to court, with unclean hands, which disentitles them to the relief they are seeking.

Mr. Agina also for plaintiffs stressed the following:-

(i). That the right that the plaintiffs wanted to champion is their constitutional right, but as at the time they came to court, there were no guidelines on how they would approach the court, and that is why they came by way of plaint.

(ii). They contend that limitation of action provisions cannot govern how a litigant should come to court.

(iii). He contends that cross-examination on limitation at this stage of proceeding will be of no value to the proceedings.

In response to the plaintiff/respondents submissions, counsel for the applicant reiterated his earlier grounds and then stressed the following:-

(i) The exparte order of the court to grant leave to file suit out of time did not waive the operation of the provision of Section 28 (1) of Cap 22 Laws of Kenya which allows the application to challenge the leave to be made during the proceedings.

(ii) They contend that the matter is not Res judicata as the matter has not been canvased inter partes, as the issue that was canvassed was on joinder of the parties.

(iii) They contend that there is no mischief in their application as all they want to do is to bring out all the facts regarding the delay in bringing the proceedings out of time.

(iv) They contend that they have properly invoked the courts' discretion under Section 3 A of the civil Procedure Act as all they want is for the court, to make proper findings on the matter.

(v) It was not necessary for them to bring out all that had transpired in the file as these are already on record.

(vi) They contend that the plaintiffs came to court byway of plaint and there is nothing constitutional in it. And if the plaintiffs wanted to agitate their constitutional rights, then they should have come by way of petition. On the basis of the above they urged the court to allow their application.

On case law parties referred the court to the following cases:- The case of **CEMENTERS LTD.D VERSUS TELKOM KENYA LTD. AND 2 OTHERS, NAIROBI MILIMANI COMMERCIAL COURTS HCC NO. 861 OF 2001** decided by Azangalala J. on 29th October 2004. The gist of its holding is that in the courts', opinion issues of limitation were to be best handled at the trial and during submissions.

The case of **GICHUKI VESRUS MUNJUA AND ANOTHER [2004] 1 KLR 18** where it was held inter alia that when an applicant decides to give selective and inadequate information as the basis for the application, the courts discretioin cannot be exercised in his favour.

The case of **CRISPIN NED NGARI AND ANOTHER VERSUS CHIRCHIR ODERO, KISUMU CA 233 OF 1998** decided on 26th November 1998. From a reading of the decision in the body of the judgment argument on appeal was zeroed in on the question as to whether the plaintiffs suit was time barred, as pleaded in the defence despite leave to file appeal out of time having been granted before filing of the suit. It is observed at page 3 of the judgment line 1 from the top that, "*although, issue of limitation, was much alive in the proceedings, the learned Judge of the superior court did not rule on it*." At page 5 of the judgment lline 9 from the bottom it is observed:- "*The Judge has to be satisfied that the requirements of the three Sections of the Act are satisfied before he proceeds to grant such leave*." At page 7 line 11 from the bottom the court of appeal ruled:- "*It bears repetition to state that all facts of*

decisive character were fully known to both the next friend and Mr. Kasamani and that therefore the application for extension of time was an abuse of the process of the court, and such action cannot be countenanced by this court. The upshot of all this is that leave to file suit not withstanding that the three year limitation period had expired was wrongly granted."

The case of **ORITA AND ANOTHER VERSUS NYAMATO [1958] KLR 590**. Under inquiry, was that, the claim, related to a suit for damages for personal injuries. The plaintiff was granted leave exparte to file suit out of time. The defendant raised a preliminary objection, that suit, was time barred and challenged the granting of leave. The objection was overruled by the superior court. On appeal the court of appeal held inter alia that:-

"***(1)*** *Pursuant to the Limitation of Actions Act (Cap 22) Section 28 and the Civil Procedure Rules Order XXVI Rule 3 (c) an application for extension of time for the purposes of Section 27 of the Act is to be made exparte and the defendant is not in a position to oppose it. However, there is no provision in the Act for an application to set aside the order but a defendant can raise the matter as an issue at the trial.*

(2) *At the exparte stage, the Judge considering the application for leave is required to form on the evidence before him a prima facie view a to the matters which the Act contemplates will be decided if leave were to be granted only in the action itself namely:-*

(a) *Whether the plaintiff has a good cause of action.*

(b) *Whether the plaintiff has fulfilled the requirements of Section 27 (2).*

(3) *The respondent having obtained leave to file action as required by the law, that order could only be queried at the trial but not only by an applicant to discharge it or by a preliminary objection, otherwise the provisions of the Act in providing for obtaining an order exparte would be rendered nugatory.*

(4) *The applicant could raise the objection at the trial and the trial Judge would have to deal with the matter on the evidence to be adduced at the trial."*

The case of **OLIVE CASEY JAUNDOO VERSUS A.G. OF GUYANA [1971] CA 972**, where it was held inter alia that since neither Parliament nor the rule making authority of the Supreme court, had exercised their power under Article 19 (6) to make provisions with respect to practice and procedure, the method was unqualified and the right wide enough to cover applications by any form of procedure whereby when the High Court, could be approached to invoke its powers and an originating motion was one of the ways by which that could be done.

The case of **DIVECON LIMITED VERSUS SHRINKAHANU SADRUDIN SAMANI, NAIROBI C.A. NO. 142 OF 1997** decided by the CA on 17th day of February 1998.

The brief facts of the case are that the appellant was a defendant in a case where the respondent sued for damages for her sons' death which occurred on 11th June 1983 in an air crash. It was not six years and 4 months later on 23rd February 1990 that the action was filed. The suit was based on tort and had become time barred on 11th June 1986, three years after the cause of action accrued, she obtained extension of time to file her suit again some three years later on 16th February 1990.

At page 6 of the judgment line 1 from the bottom it is observed that "*it is now settled that a Judge in a trial can consider and accept or reject the exparte order granted by another Judge for extension of time under the Act*."

The case of **L.T. COL. BENAJAMIN MUEMA VERSUS A.G. AND 2 OTHERS, NAIROBI, HCCC NO. 2230 OF 2004** decided by Ojwang J. on 2nd June 2006. At page 4 of the judgment line 3 from the top, it is observed that "*it was pleaded in the defence that the plaintiffs suit was time barred by virtue of Section 2 (1) and (2) of the Pubic Authorities Limitation of Actions Act and on that account the claim is*

based in law and ought to be struck out." Assessment on that argument is found at page 32 of the judgment line 3 from the bottom and it runs thus:- "*but more importantly the instant suit has proceeded up to this stage on the basis that it is validly in court and at no time has a preliminary objection been successfully raised against its prosecution. And in a ruling which I had delivered on 22nd October 2004 I had dismissed technical impediments to the suit raised by learned counsel and ordered that the hearing to continue. Where a case has overcome technical challenge and assumed a momentum of hearing, supported with orders of court, it should be considered that the rule relating to time limit will already have figured in the court's exercise of discretion and so in general the time-bar challenge will no longer be relevant. That principle applies in this case and I would not allow the time-bar argument being raised now, quite apart from the fact that it lacks a factual basis. Besides the issues in this case are of such a complex nature, touching as they do on interplays between the civil law and the military law, and on constitutional principles attached to the criminal process, that it is not possible to determine then by technical case interpretation of limitation periods. This is a case to be determined on the merits and not on mere technicalities. Consequentially I consider not relevant the several authorities on limitation period invoked by learned counsel*."

On the courts assessment of the facts herein, it is clear that, there is no dispute that events subject of these proceedings took place in 1982. It is also common ground that the relationship that existed between the disputants was that of a master and servant and therefore one that is properly known or referred to in legal terminology as a contractual relationship. Like all other contractual relationships known in law, they give rise to rights , duties and obligations. Among them the right, to terminate the relationship under the terms of the contract. From the pleadings and the evidence so far given, as well as the extend of the cross-examination done, it is evident that the defendant accused the plaintiffs of wrong doing in the course of their duties, which allegedly gave the defendant as the employer a right to bring that relationship to an end with or without terminal benefits. In this case the same was done without terminal benefits.

Apparently it took the plaintiffs a period of over 10 years to move to court namely from 1982 when the chain of events took place and 1995 when they came to court. This period obviously brings to the fore issues of the operation of the period of limitation. It is evident from the record that the plaintiffs were conscious of this fact and that is why they filed a HCC Misc. Application No. 109/95 seeking leave to file suit out of time. In doing so they were purporting to comply with the provisions of Sections 4, 27 and 28 of the Limitation of Actions Act Chapter 22 Laws of Kenya. Section 4 of Cap 22 reads:-

"*4 (1) the following action 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 . . .*". The central theme in this provision is found in the words "*may not be brought*." This means that the expiry of six years is not an absolute bar to bringing an action based on contract where a cause of action has accrued. It means there is room or an option to bring such an action if a party so wishes. The Act goes ahead to provide modalities or mechanisms on how a litigant who wishes to avail himself or herself of that a venue can approach the seat of justice to vindicate his accrued cause of action. These are found in Sections 27, 28, 29 and 30. What concerns us here is Sections 27, 28 and 30. These read:-

"*27 (1) Section 4 (2) does not afford a defence to an action founded on tort where:-*

(a) *The action is for damages for negligence, nuisance or breach of duty whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law; and*

(b) *The damages claimed by the plaintiff for the negligence nuisance or breach of duty consist of or include damages in respect of personal injuries of any person and*

(c) *The court has whether before or after the commencement of the action, granted leave for the purposes of this Section and*

(d) *The requirements of sub section (2) are fulfilled in relation to the cause of action*

(2) *The requirements of this subsection are fulfilled in relation to a cause of action, if it is proved that*

material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which :-

(a) *Either was after the three year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period and*

(b) *In either case, was a date not earlier than one year before the date on which the action was brought.*

(3) *This section does not exclude or otherwise affect:-*

(a) *Any defence which in an action to which this Section applies, may be available by virtue of any written law other than Section 4 (2) whether it is written law imposing a period of limitation or not or by virtue of any rule of law or equity or*

(b) *The operation of any law which apart from this Section would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.*

28 (1) *An application for leave of the court, for the purposes of Section 27 shall be made exparte except in so far as the rules of court, may otherwise provide in relation to application made after the commencement of a relevant action.*

(2) *Where such an application is made before the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if on evidence adduced by or on behalf of the plaintiff, it appears to the court, that if such an action were brought forthwith and the like evidence were adduced in that action, that evidence would in the absence of any evidence to the contrary be sufficient.*

(a) *To establish that cause of action apart from any defence under Section 4 (2) and*

(b) *To fulfill the requirements of Section 27 (e) in relation to that cause of action.*

30 (1) *In Sections 27, 28 and 29 of this Act, on reference to the material facts relating to a cause of action, is a reference to one or more of the following:-*

(a) *The fact that personal injuries resulting from the negligence, nuisance or breach of duty constituting that cause of action.*

(b) *The nature or extent of the personal injuries resulting from that negligence, nuisance or breach of duty.*

(c) *The fact that the personal injuries so resulting were attributable to that negligence, nuisance or breach of duty or the extent to which any of those personal injuries were so attributable.*

(2) *For purposes of Section 27, 28 and 29 any of the material facts relating to a cause of action shall be taken, at any particular time to have been facts of a decisive character if they were facts which a reasonable person knowing those facts and having obtained appropriate advise with respect to them, would have regarded at that time as determining, in relation to that cause of action, that apart from Section 4 (2) an action would have a reasonable prospect of succeeding and of resulting in the award of damages sufficient to justify the bringing of the action.*

(3) *Subject to sub section for the purposes of Section 27, 28 and 29, a fact shall be taken at any particular time to have been outside the knowledge (actual or constructive) of a person if but only if:-*

(a) *He did not know that fact; and*

(b) *In so far as that fact was capable of being ascertained by him, he had taken all such steps (if any as it was reasonable for him to have taken before that time for the purpose of ascertaining it;*

(c) *In so far as there existed and were known to him circumstances from which with appropriate advise that fact might have been ascertained or inferred, he had taken all such steps (if any) as it was reasonable to have taken before that time for the purpose of obtaining appropriate advise with respect to those circumstances*."

Applying the provisions of Section 27, 28 and 30 to the matters under inquiry herein, it is clear that leave was sought before the commencement of the suit. As per the requirements in those Sections, the Judge seized of the matter is supposed to have looked at the documentations and then satisfied herself that the necessary ingredients required to be satisfied before such leave is granted are present. This court is unfortunate, in that, it does not have the privilege, of having the file, in which leave was granted, before it, as at now in order to determine what reasons the plaintiffs gave for seeking leave to file suit out of time at that point in time. Neither have they put in an affidavit to that effect in opposition to the application subject of this ruling. Instead they put in grounds of opposition. Neither does the court have the proceedings in the miscellaneous file before it in order to know the reasoning that the learned Judge gave when granting the said leave.

The court was further informed that similar issues had arisen during an application for leave to join more plaintiffs to the suit and ruled upon. The court has perused the record and traced an application by way of chamber summons under Order 1 Rules 10 (2) and 22 of the Civil Procedure Rules, Section 3 A and 63 of the Civil Procedure Act dated 27th January 2005 and filed on 28th January 2005. The main prayer was to the effect that the 60 listed applicants were applying to be enjoined to the proceedings as co-plaintiffs because their claim was similar in all material particulars like the claim of the other plaintiffs already on board. This court has had the privilege of perusing the grounds in the body of the application as well as the supporting affidavit and finds that all that the plaintiffs put forward as reason for applying to be enjoined to the proceedings were:-

(i) *The move was meant to avoid injustice, a multiplicity of suits and decisions.*

(ii) *They are aggrieved because they were illegally deprived of their employment and the benefits of 82 Air force in utter breach of the Armed Forces Act Chapter 199 of the Laws of Kenya.*

(iii) *They were illegally detained, tortured and suffered permanent injuries and are entitled to compensation. Each of them was subjected to inhumane, degrading treatment totally inconsistent with the Constitution of Kenya and the Armed Forces Act and the Armed forces standing orders and the Geneva Contention.*

(iv) *Their respective contracts with the Kenya Air force were terminated illegally, irregularly and in total violation of the law of natural justice, their properties looted and their families subjected to inhuman treatment.*

It is to be noted that even those who came on board in 2005 did not offer an explanation as to why they were coming to court at that late hour.

As submitted by the plaintiffs counsel, as at that point in time, the Attorney General was already on board. They were indeed served with the application and they filed grounds of opposition dated on 9th February 2005 and filed on 11th February 2005. They contained 4 grounds namely:-

"***(1)*** *That the intended claimants are guilt of laches.*

(2) *That the claim by the intended applicants is statute barred.*

(3) *That the intended applicants have not complied with the mandatory provisions of the Government Proceedings Act.*

(4) *That the application as filed is incompetent, frivolous and an abuse of the court process."*

It is to be noted that the said grounds were signed by counsel on record namely Waigi Kamau.

As submitted by the plaintiffs counsels, the said application was contested and the same was heard inter partes and it gave rise to a ruling by Hon. Mr. Justice. J. B. Ojwang delivered on 15th April 2005. At the beginning of the ruling it is clearly indicated that the said ruling is in respect of the application dated 27th January 2005 and filed on 28th January 2005. At page 4 line 5 from the bottom it is noted that the application had been opposed by the plaintiffs already on board. While at page 5 line 6 from the top it is indicated that the said application had also been opposed by the office of the Attorney General. The grounds of opposition relied upon by the Attorney General and which have already been set out herein were set out on the same page 5 between line 5 – 12. Discussion and or assessment of the parties arguments on the application runs from page 5 line 7 from the bottom and page 14 line 12 from the bottom. The courts analysis and findings run from page 14 line 11 from the bottom to page 19. The relevant portion runs thus from page 14 line 7 from the bottom to page 17 line 5 from the top thus:-

"*The basis of claims in the plaint is set out in paragraphs 5, 6 and 7 of the re-amended plaint of 4th June 2004 – particularly in paragraph 6 which reads – the plaintiffs aver that the commanding officer of the said so-called "82 – Air force" had no power or jurisdiction to discipline, dismiss, discharge, terminate and/or take any enforceable action against the servicemen contracted for service by the Air Force (herein after known as KAF) as constituted by the Armed Forces Act Cap 1999, Laws of Kenya*.

Considering that this is the background to all the claims of unlawful dismissal, denial of retirement benefits, loss of terminal benefits, loss of privileges denial of severance benefits, denial of pensions, etc, which mark practically all of the claims by the score some plaintiffs, I would not agree with the learned counsel who have maintained that the suit is concerned purely with contracts and torts. The foundation of the claims is lack of jurisdiction and violation of statutory safeguards for employees of the armed forces. I would entertain no doubts at all that such claims are at a general level public law claims which must be seen as belonging to the categories of constitutional law and administrative law. On the contrary to the position taken by counsel for the plaintiffs, a determination of the specific claims on the plaint must start with declarations of a constitutional nature. Unless such declarations are made, the pleadings on file may not facilitate effective proof of the employment issues which are presented as the proximate grounds for damages.

It means therefore and with much respect that the contention of counsel that the limitation periods of torts and contracts as specified in Section 3 of the Public Authorities Limitation Act (Cap 39) is not well founded in law; and that the position of counsel for the applicants is preferable.

Several, learned counsels, for the respondents, contend that the applicants had acted in bad faith , after failing to meet the terms of the limitation periods, by seeking a joy ride on a suit process founded on contract and tort, they urged the applicants to start a new process based on constitutional reference. Such a submission with much respect has no basis as I have already found and held that that the foundation of the existing suit is constitutional and not contractual or tortious. This of course would point in the direction of joinder as prayed for by the applicants as the correct way to go.

It was argued for the plaintiffs that the intending co-plaintiffs (the applicants) ought to give one months notice to the Attorney General of their intended suit by Section 13 A of the Government Proceedings Act. In a normal situation, I think such an argument would have been upheld, as has been done in other cases. See ***THURANIRA KARAURI VERSUS AGNES ICHEICHE, CIVIL APPEAL NO. 192 OF 1996, JAMES MWAMBA AND 2 OTHERS VERSUS THE COMMISSIONER FOR LANDS AND 2 OTHERS, HCCC NO. 2106 OF 1996****. I have found much merit in the argument of Mr. Agina for the applicants that there would be no need for such notice here, since a suit was already rolling on, having been initiated with precisely the notice period as prescribed. There is no need for a repeat job, giving the Attorney General further notice when the applicants will simply be filtering into the process of suit already in progress*."

The setting out of the learned judges' findings in extensor as et out above is solely meant to act as building blocks in the resolution of issues raised for and against the application. It is also to be noted that the said orders were made by a Judge of concurrent jurisdiction, and as such that decision is not binding on this court. This court, is entitled to revisit the issue and arrive at its own conclusions on the matter. More so when the learned Judge did not rule conclusively that those who were already on board would also benefit from those orders. Or alternatively that, that would be the prevailing position throughout the entire proceedings affecting even those who were joined to the proceedings after the decision of 15.4.2005.

A number of questions arise for determination in the resolution of the matter:-

(1) The first one deals with the question as to whether the orders granting leave to the original plaintiffs to file this suit complied with the ingredients or the requirements of the provisions of Sections 27, 28 and 30 of the Law of Limitation of Actions Act Cap 22 Laws of Kenya and therefore un assailable. In response, this court, makes observations as made herein earlier on, that neither the entire file, pleadings accompanying the said application nor the order granting leave has been availed to this court, to enable it know the reasons the court assigned as reasons allowing the plaintiffs to file an application to seek leave to file suit out of time. It is therefore not easy for this court to state affirmatively that the said provisions were complied with or not, and whether the same is un assailable or not.

(2) The foregoing finding not withstanding, the court, has to deal with the question as to whether the said issue can be revisited or not. Case law cited herein among them the court, of appeal decision in the case of **DIVECON LIMITED VERSUS SHRINKAHANU SADRUDIN SAMANI (SUPRA) AND ORUTA AND ANOTHER VERSUS NYAMATO (SUPRA)** whose decisions to the effect that a party aggrieved by an order to file suit out of time, can not move to the exparte proceedings file, and apply to have those orders set aside, and or discharged. It is now settled law as shown by the said decisions that a court, seized of the matter, despite the existence of the order granting leave, to file suit out of time, made by a competent court, such a court, has both the jurisdiction and the power to revisit that issue upon request have the same deliberated upon and then rule on the same. The remedies available to such a court, are namely:-

(i) Confirmation of the order granting leave to file suit out of time.

(ii) Varying the said order granting leave to file suit out of time.

(iii) Setting aside the order granting leave to file suit out of time. Where the order is confirmed or varied the proceedings survive and are continued to their logical conclusions, whereas where the orders are set aside, the proceedings crumble and are discontinued.

In view of the foregoing findings, the court, is satisfied that the defence was entitled to request to revisit that issue during the trial herein. As to whether that request has merit or not, or whether it stands or not will depend on the determination of the remaining questions.

(3) The 3rd question is whether the orders made by Hon. Mr. Justice J. B. Ojwang on 15.4.05 operate to affect the entire proceedings are limited to the application that gave rise to the orders of 15.4.2005 and therefore benefits only applicants to that application and if so the effect of such operation or non operation of those orders to the entire proceedings. Lastly whether by virtue of existence of those orders on record go a long way to avail the defence of Res judicata to the benefit of all the plaintiffs.

Res judicata is defined in Section 7 of the Civil Procedure Act as follows:- "*No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.*" *Kimaru J. in the learned Judges decision in the case of* ***WILLIE VERSUS MUCHUKI & 2 OTHERS [2004] KLR 357*** *decided on 20th September 2004 drew out the ingredients of this provision in holding 4 thus:-*

(4) *For the doctrine of Res judicata to apply three basic conditions must be satisfied. The party relying on it must show:-*

(a) *That there was a former suit or proceeding in which the same parties in the subsequent suit litigated.*

(b) *The matter in issue in the later suit must have been directly and substantially in issue in the former suit.*

(c) *That a court competent to try it had heard and finally decided the matter(s) in controversy between the parties in the former suit.*"

This court in its own ruling delivered on the 10th day of June 2008 in the case of **GATHARA CHUCHU AND 473 OTHERS VERSUS GITUTU COFFEE GROWERS CO-OPERATIVE UNION LTD. NAIROBI, HCCC NO. 3619 OF 1983** discussed the ingredients of Res judicata at page 10 line 5 from the bottom through to page 11 line7 from the top thus:- "All that the objector needs to establish as per the following ingredients is that:-

(i) *There is a suit in court.*

(ii) *The matter directly or substantially in issue has been directly and or substantially dealt with in a former suit.*

(iii) *It must be between the same parties or other claiming through them.*

(iv) *Parties must be litigating under the same title.*

(v) *The court must be competent to try the suit.*

(vi) *The issue must have been heard and finally decided by such a court."*

Applying these identified ingredients to the facts demonstrated herein, and considering them in line with the rival arguments put forward, the court, proceeds to make the following findings:-

(1) There is no doubt that there is a suit in existence in court, whose trial has just started and even the first witness for the plaintiff who is still in the witness stand, is still undergoing cross-examination and is not yet though with it.

(2) The ingredient of there being in existence a former suit does not arise as the parties are still litigation in the same suit. For this reason, this court, is of the opinion that the ingredient does not only apply to suits but also proceedings as held by Kimaru J. in the case of **WILLIE VERSUS MUCHUKI AND 2 OTHERS CASE (SUPRA)**. When so applied, this court is of the opinion that there is no doubt the issue of limitation or the plaintiffs claim being statue barred has been substantially in issue in the proceedings involving the application dated 27.1.2005 decided on 15.4.2005 and as such the issues of limitation and statue barring has been directly and or substantially dealt with in that proceeding in so far as the 60 plaintiffs who were applying to be enjoined and the defendant are concerned.

(3) There is no doubt that the issue of limitation is being raised between he same parties in so far as the 60 plaintiffs who were applying to be enjoined to these proceedings and the defendant is concerned. As for the other plaintiffs who were already on board, they cannot be said to be claiming through the said 60 plaintiffs who were applying to be enjoined as they were already on board in their own right with specific claims, which though anchored on common ground and or circumstances, they are however peculiar to each distinct from each other in so far as the individual claim and resultant take home benefit is concerned.

(4) There is no dispute that the parties are still litigating under the same title.

(5) The competence of the court to deal with the issue of re-opening of the issue of limitation is not in doubt.

(6) There is no doubt that the issue has been subsequently raised in the proceedings dealing with the application dated 27.1.2005 and decided on 15.4.2005. This issue was ruled upon as between parties to that application. The key question is whether the other plaintiffs who were already on board and who also participated in that application can be said to be bound by that ruling, or whether in other words, they can take refuge under the said ruling and say that the issue has been substantively decided between them and as such it cannot be revisited. This question brings to the fore, the discussion of the ingredients in number 7.

(7) Ingredient 7 requires that the issue must have been heard and finally decided by such a court. As previously observed there is no doubt that the court, which dealt with the application of 27.1.05 and made orders of 15.4.05, thereon is a competent court of concurrent jurisdiction to this court. It is also correctly observed by this court, that there is no doubt that the 60 plaintiffs who had presented that application seeking to be enjoined to these proceedings had claims which were to be anchored on the same similar background information or circumstances similar to those that, the other plaintiffs already on board had anchored their claims. It is not in dispute that those plaintiffs on board had also presented their claims out of time, and had only been permitted to present these claims with the permission and or leave of the court. The orders granting such leave are still on record and have not been upset. Likewise the orders made by this court on 15.4.2005 have not been appealed against and upset on appeal. Neither were they sought to be reviewed and set aside. In this courts opinion, this being the case, as long as the orders of 15.4.2005, stand the issue of limitation is foreclosed to the defence in so far as the 60 plaintiffs are concerned, because the same was substantively argued by both parties and substantively ruled upon by the court. It can be said that it was finally determined by the court since the defence did not appeal against those orders, neither did they seek to have them reviewed and set aside.

The foregoing finding leaves the issue of the other plaintiffs who were already on board, as to whether they too, can also take refuge under that foreclosure benefiting the 60 who were brought in by the orders of 15.4.2005. Due consideration has been given to this matter and this court, is of the opinion that the basis on which the defence stood to oppose the inclusion of the 60 plaintiffs sought to be enjoined vide the application of 27.1.05, is the same basis upon which the defence can stand to attack the filing of the suit out of time by the plaintiffs who are the beneficiaries of the orders of leave granted on 14.2.1995 by Aluoch J. as she then was (now JA). This court is also of the opinion that had the defence succeeded in blocking the claims of the 60 plaintiffs who had sought to be brought on board vide the orders of 15.4.2005 on the basis of limitation by virtue of the claim being statute barred, such a finding would also have operated retrospectively to knock out the claims of the other plaintiffs who were already on board and whose orders of leave to file suit out of time had not been tested on an inter parties basis and found to withstand the test of the, claim not being knocked out. This court is therefore of the opinion that so long as the orders of 15.4.2005 have not been upset either on appeal or review, and still stands on record, and so long as the competence of the court, which made them has not been questioned, and so long as the issue of limitation whose end result those orders were, remain to have been specifically ruled upon, and so long as the trial is joint, unless if there are special circumstances as ruled by him on 15.4.2005, that stand should be maintained for the sake of consistency. Truncating the proceedings at this juncture and ruling that the issue of limitation is foreclosed in so far as the 60 plaintiffs who are beneficiaries of the orders of 15.4.2005 is concerned, but not foreclosed in so far as the other plaintiffs who were not beneficiaries of the orders of 15.4.2005 is concerned will lead to a situation of differential justice likely to lead to injustice in that one batch will have the hearing of their cause on merit secured. Whereas the other batch will have to have that issue revisited in accordance with the provisions of the law so that, should it be found that leave was improperly granted, then that will be the end of the pursuit of justice on their claim.

This court is also of the opinion, that a reading of the learned Judges' ruling, of 15.4.2005, the same does not say that it does not operate as regards those who had been granted leave earlier on or those of the same group wishing to join the proceedings after 15.4.2005. For this reason it is safer to envisage that since the learned Judge had occasion to consider the nature of the claims intended to be agitated, the

position obtaining as a result of the ruling given will apply to similar situations until the said orders are upset either by review or appeal. As noted, the orders still stand. As long as they still stand, this court, or any other court, of concurrent jurisdiction cannot comfortably give a contrary ruling contrary to that made on 15.4.2005 upsetting the balance on limitation of actions, in so far as the plaintiffs claim is concerned without upsetting the orders of 15.4.2005 if a contrary view were to be given. And in doing so it will be opening itself to accusations of sitting on appeal over orders of a court of concurrent jurisdiction through the back door, and without being properly invited to do so. For this reason it is safe to say that the issue of limitation of actions, in so far as the plaintiffs claim is concerned, in so far as it emanates from the common factors and or circumstances akin to those of the plaintiffs who are the beneficiaries of the orders of 15.4.2005 is Res judicata and reopening cross-examination of the witnesses on the same will not serve any useful purpose.

(4) The 4th question deals with a determination of the nature of the plaintiffs claim. Whether tortious, contractual and or constitutional. The current plaint is the one dated 24th June 2005 and filed the same date. As observed by Ojwang J, the cause of action is set out in paragraph 6, 7, 8, 9 and 9 A of the further amended plaint. This court has given due consideration to the same and it is satisfied as did Ojwang J., in his ruling afore mentioned that it is not easy definitely to say that these claims can be ruled to be exclusively tortious, contractual, administrative or constitutional. This is so because:-

(1) Breach of contractual terms of employment is contractual.

(2) Failure to comply with the terms of the Armed forces Act is both contractual and administrative.

(3) Being subjected to inhumane treatment is both tortious, constitutional and human rights.

(4) Loss of terminal benefits is also both contractual, constitutional and a human rights issue

(5) Failure to follow the correct procedure when terminating the respective employment and failure to give them a right of hearing is both a constitutional and human rights issue.

From the above, it is clear that the said claims qualify to be termed as mixed grill sort of claim. As such in this courts opinion, it is not easy to confine them to the provisions of Section 27, 28 and 30 of the Limitation of Actions Act Cap 22 Laws of Kenya. It is therefore possible to tuck them into those provisions and require compliance with those provisions, and yet at the same time, tuck them into constitutional and human rights swaddling clothes. For this reason it is better to consider these issues under all these possibilities:-

(a) Under the provisions of Section 27, 28, 29 and 30 of the Limitation of Actions Act, Cap 22 Laws of Kenya, a perusal of these provisions reveals that the main considerations are mainly 2:-

(i) The reason as to why the action was not filed in time.

(ii) The nature of the cause of action.

Concerning the reason as to why the cause of action was not filed in time, a reading of paragraphs 6, 7, 8, 9 and 9 A of the further amended plaintiff, it is clear that the plaint alleged that they were bundled out of their offices by the defendant, robbed of their ranks, employment emoluments, and terminal benefits by an unlawful entity called "*82 Airforce*". That it was not until 25th August 1993 that the entity which had lawfully employed them before they were bundled out was reinstated. Should this court find at the end of the trial and give a declaration to the effect that the "*82 Airfoce*" was a non-entity, it will mean that there was a vacuum between the period starting 1st August 1982 upto 25th August 1993, when the existence of the entity which had employed them was restored. In this courts' opinion, this is the only entity that can provide a link between the plaintiffs and the office of the Attorney General. It is the spring board or anchor on the basis of which the plaintiffs can stand to file their claims.

It therefore follows that even if lack of existence of an entity to act as a spring board or anchor on which to stand and file the action is not cited as a reason for the delay, but if in the courts opinion, it is a sound legal argument to be put forward, it alone can surfice to bring the plaintiffs claim into the provisions of Section 27, 28, 29 and 30 of Cap2 2 Laws of Kenya.

Turning to the requirement (ii) namely the second aspect of the requirement namely, the existence of a sound cause of action, this court is of the opinion that an overview of the key averments in the plaint reveals that the plaintiffs grievance are centered on un procedural removal from their employment. In this courts opinion, there is a genuine complaint herein to be interrogated by the court, and there is therefore good reasons for sustaining the cause of action and have the same ruled upon on merit.

While still on the issue of compliance with the provisions of Section 27, 28 and 30 Cap 22, the court agrees with the observations made by Ojwang J. that it is the determination of the declarations raised by the plaintiffs which will determine whether the plaintiffs have genuine claims or not. In other words the determination will crystallize the plaintiffs' claims.

Turning to the constitutional and administrative clothing of the claims, it is clear that the plaintiffs in their claims complain of irregularities and illegalities. This court has already made observations that these irregularities and illegalities can be easily tucked into the constitutional and human rights swaddling clothes. It is further noted that a reading of the entire plaint does not reveal that the core of the claim is constitutional law and human rights based. It is also to be noted that the claim has not been presented byway of a petition as it is provided for by the former Chunga rules and now the Gicheru rules.

Counsel for the plaintiffs submitted that as at the time the plaintiffs came to court in 1995 these rules were not yet promulgated and as such the only way they could come to court was by way of plaint. The question to be raised herein is whether despite failure to follow the current procedures on presentation of constitutional law claims, this court can still go ahead and consider whether these claims can take refuge under the constitutional and human rights prescriptions in order to bring them above the operation of the provisions of the Limitation Actions Act, in order to escape the penalties under the said provisions, should the court, ultimately find that the claim falls squarely into the Cap 22 procedures.

To resolve the above, this court, has to seek guidance from decisions both by the courts of concurrent jurisdiction and the court, of appeal. This has arisen because Ojwang J. in his ruling of 15.4.20025 apart from simply mentioning that these claims qualify to be what is usually termed as administrative and constitutional claims, the learned Judge did not go ahead to expound as to why he though that these claims fall into those categories one such decisions is the one decided by Nyamu J. on 6th day of June 2008 in the case of **REPUBLIC VERSUS BUSINESS PREMISES RENT TRIBUNAL AND 2 OTHERS NAIROBI MISC. APPLICATION NUMBER 562 OF 2007**. At page 9 under the heading, findings and holdings the learned Judge observed thus:-

"I have no doubt that this is a very unique case and calls for new thinking because of special circumstances as described above.

The fact that the situation is unique is not good reason for me to fold my hands or seek to perch on the nearest fence and do nothing. The facts of each case that comes before the court cry out in a special way for justice to be done. Some of the past situations have clear guidelines and in most cases the courts do justice in accordance with those guidelines. However if laws are applied too strictly and mechanically, law ceases to keep pace with social innovation and societal needs.

If there is an entirely new situation as I have encountered on the basis of the unique facts in this case, such a situation calls for individual justice hence the development of equity. The new facts demand dynamism and growth in the law to meet the new situation. Law regulates behavior either to reinforce existing social expectation or to encourage constructive change and laws are most likely to be effective when they are consistent with the most generally accepted societal norms and reflect the collective morality of society.

I derive great comfort on the thought that the path ways of justice are infinite and every generation of Judges will always find the path ways to follow I f they are to look out of the window of their chamber or the court room."

At page 16 line 1 from the top the learned Judge went on to state further:- "*Judicial orders maybe given by a constitutional court to secure or safeguard rights and freedoms enshrined in the constitution under Section 84 of the constitution. No leave need be sought and the court could if necessary move on its own motion to issue judicial orders in deserving cases*."

At page 22 line 1 from the bottom the learned Judge went on:- "*Justice is the greatest objectives of the constitution and I must for the reason grant the relief sought since it is in accordance with the law. Principles of equity, and good conscience. By conscience I do not mean my conscience but the collective conscience of our people which identifies justice and nods when justice is seen to have been done*."

At page 31 line 9 from the bottom, it is added:-

"*Perhaps the third one is the need for the court to always demonstrate its readiness to rise to the challenge in every situation. Past history has sufficiently demonstrated that in the practice of law, just as in other endevours, it is those who have tried to think out of the box or those who have stepped out of the boat who have become the greatest catalyst or agents of change. By thinking out of the box or stepping out of the boat new perspectives and new path ways of justice emerge which in turn lift societies to greater jurisprudential heights. That way we render a better account of our stewardship of justice*."

Applying those observations to the matters herein it is clear that the case law on the subject handed down to the superior court, on the subject by the court of appeal did not explore the possibility of claims being availed the constitutional and administrative veils in order to bring them above the reach of the limitation axe found in Sections 27, 28 and 30 of Cap 22. This challenge was taken up by Ojwang J. in his ruling of 15.4.2005. However the learned Judge did not explain how the plaintiffs' claims could avail themselves of those veils. Since this court, has agreed that indeed those claims can take refuge under those veils, it is imperative upon this court, to carry the torch further and attempt to demonstrate how these veils can be invoked if indeed they can be invoked.

The first to be considered is the constitutional veils followed by the human rights veil. Accompanying these two is the notion of access to justice. This will call into play consideration as to whether limitation laws can deny a litigant the exercise of his/her right to access to justice. And secondly whether the defendant as a representative of the state can also take refuge under the limitation laws to escape its responsibilities to its citizens so far as guaranteeing them due process in the right to discipline them and or withhold the citizens right to earn a living within its borders.

Under the constitutional veil, access to justice falls under what has become popularly known as basic human rights recognized by the state. At the national level there is Section 77 (a) of the Kenya Constitution which provides thus:- " *A court or other adjudicating authorities prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established bylaw and shall be independent and impartial and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time*." There is no mention that the exercise of that right is subject to the claim not being time barred, or that such a claim is subject to success by the law affecting the claim.

Section 3 of the Kenya Constitution provides:- "*This constitution is the constitution of Kenya and shall have the force of law, throughout Kenya and subject to Section 47, if any other law is inconsistent with this constitution, this constitution shall prevail and the other law shall to the extend of the inconsistence be void*." This means that should the court rule that the right of a litigant's access to justice or litigation is superior to limitation laws, then that holding will prevail irrespective of whether the conditionalities required to be met by a litigant in Sections 27, 28 and 30 of Cap 22 shall have been met or not.

As regards the human rights veil, the plaintiffs complaint being one of loss of employment and terminal benefits would fit, the right to work, which falls under the fundamental rights, liberties and guarantees found in Section 70 – 83 of the Kenyan Constitution, whose detailed analysis is beyond the scope of this ruling. Further on this the court has judicial notice that such prescriptions are also found both at the regional (African region) and at the international level. They are contained in prescriptions found in both regional and international human rights instruments that Kenya is party to. At the regional level there is the African charter on human and people's rights. Article 7 (2) thereof provides that:- "*Every individual shall have a right to have his cause heard*." There is no qualification that the cause will only be heard if it passes the test of the national laws of limitation.

Article 10 and 12 thereof provides for state responsibility in the provisions of those rights among them the right of access to justice. Articles (1) "*The Member States of the Organization of African Unity (now AU) parties to the present charter shall recognize the rights, duties and freedoms enshrined in this charter and shall undertake to adopt legislative or other measures to give effect to them.*

(2) *Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, torture, birth or other status*."

At the international level there is the universal declaration of human rights. Article 8 thereof provides:- "*Every one has the right to an effective remedy by the competent national tribunals of acts violating the fundamental rights granted him by the constitution or by law*." Article 5 on the other hand provides:- "*No one shall be subjected to torture or to cruel inhuman or degrading treatment or punishment*." Its counterpart under the ACHPR articles also provides:- "*Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All form of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited*." Article 23 of the UDHR provides:- "*Every one has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment*." Its counterpart under the ACHPR is Article 15. It provides "*Every individual shall have the right to work under, equitable and satisfactory conditions and shall receive equal pay for equal work*." State responsibly in the UDHR is found in Article 30 which provides:-

"*Nothing in this declaration may be interpreted as implying for any state, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."*

While still at the international level there are presumptions found in the international covenant on economic, social and cultural rights. Article 7 thereof guarantees enjoyment of just and favorable conditions of work which ensure in particular among others, a decent living for themselves and their families. Vide article 2 thereof, the state parties undertake to avail those rights to their subjects through legislative measures. Whereas Article 7 of the international covenant on civil and political rights prohibits the subjection of anyone to torture, or cruel, inhuman or degrading treatment or punishment. State responsibility under this convention is found in Article 2 (3). Thereof and provides:- "*Each state party to the present convent undertakes:-*

(a) *To ensure that any person whose right or freedoms as herein recognized are violated shall have the effective remedy not withstanding that the violation has been committed by persons acting in an official capacity.*

(b) *To ensure that any person claiming such a remedy shall have his right there to determined by competent judicial, administrative or legislative authorities or by other competent authority provided for by the legal system of the state and to develop possibility of judicial remedy.*

(c) *To ensure that the competent authorities shall enforce such remedies when granted*."

The above analysis will not be complete without highlights of state commitment in both national, regional and international level. At the national level there is the political statement in Section 70 of the Kenyan Constitution. Section 70 (c) among others prohibits deprivation of property without compensation. The provisal to that section spells out clearly that:- "*The enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or public interest*." The reservation made by the provisal in Section 70 of the constitution does not reserve any right on the part of the sate to trample upon its citizens rights without it being held accountable to the aggrieved. The use of the words that the "enjoyment of these rights is subject to respect to other persons rights and public interest" enjoins the state to justify its actions in so far as the withholding of those rights is concerned. There is no mention that the enjoyment of those rights is subject to limitation laws.

In this courts opinion, ones earnings qualify to fall into the category of ones property. It therefore means that denial and or withholding of the same from a litigant has to be justified within the exceptions outlined above. This would appear to mean that any aggrieved party is entitled to call upon the party exercising the right to withhold, to justify that action.

At the regional level the political statement is found in the AU Constitutive Act. Vide preamble 9 there is an undertaking to protect human and people rights, consolidate democratic institutions and culture and to ensure good governance and the rule of law which values are also reflected in the commitment to the objectives under Article 3 (h) and the principles under Article 4 (h).

At the international level there is the commitment in the Charter of the Untied Nations charter. Vide Article 55 (c) thereof the state parties undertake to ensure "*universal respect for and observance of human rights and fundamental freedoms for all without distinction . . .*"

The binding force in treaties is given strength by Article 26 of The Vienna Convention on the Law of Treaties which provides that:- "*Every treaty in force is bind upon the parties to it and must be performed by them in good faith*." Article 27 thereof prevents a state party from invoking provisions of its internal law as justification for its failure to perform a treaty. The exception to the general rule is found in Article 46 (1) whereby it can only be allowed where the internal law is one of fundamental importance.

The reason for this courts excursion into the constitutional and human rights prescriptions in its attempt to resolve the issues raised by the defence application has been four fold, namely:-

(1) Whether supposing that the court is of the opinion that the plaintiffs claims can be tucked into the provisions of Section 27, 28 and 30 of Cap 22, is it ripe for this court to rule substantively on the issue at this juncture or is it ripe for the court to wait till the witnesses are cross-examined on it and then rule on it or go ahead and rule substantively on the matter. In response to this, the court is satisfied that case law cited on the subject did not specify that it is only where evidence has been given as regards to the reasons for the delay that the court can effectively rule upon the subject. This being the case it is therefore possible for this court to rule upon this matter conclusively on the matter since the same has been raised and argued substantively on the basis of the application subject of this ruling.

(2) The second fold is that this courts excursion into the arena of fundamental human rights, protective prescriptions was simply to demonstrate that once the plaintiffs claims are vested with the constitutional and basic human rights vestments, these remove the said claims from the operation of the provisions of Cap 22 Laws of Kenya on limitation, because of the supremacy of the constitutional provisions over other laws on the one hand and the human rights under pinnings of those prescriptions on the other hand.

(3) The 3rd fold was to try and demonstrate that the state duties and responsibilities to its citizens both at the national, regional as well as the international level, is that these prescriptions are not expressed to be subject to local laws. In fact by virtue of the articles quoted above, in the Vienna Law of Treaties, a state can only be excused from its obligation if the law under which it intends to act is one of fundament nature and importance. In this courts opinion, Cap 22 Laws of Kenya is a procedural law and it cannot be termed to be one of a fundamental nature in comparison to the constitution. This means that the state cannot waive it in the face of the plaintiffs as a weapon to shield it from being called upon to answer the

plaintiffs claim as to whether they were rightfully deprived of their means of livelihood or not.

(4) The 4th fold was simply to demonstrate that when it comes to matters of litigation, where a sate party is involved as a party, it stands on equal footing before the seat of justice. It odes not enjoy any privileged position and in this courts', opinion, it is entitled to be called upon to justify its actions to the plaintiffs. In other words, the right to be heard and be given an effective remedy supercedes the right of the state to take refuge under the limitation laws to block the plaintiffs claims.

In conclusion and for the reasons given above the court, makes the following findings:-

(1) As per decisions on case law on the subject of limitation under the provisions of Sections 27, 28, 29 and 30 of the Law of Limitation Act, Cap 22 Laws of Kenya, it would appear that the defendant is entitled to raise the issue of limitation in the course of the trial in instance where leave to file suit out of time was granted exparte. In the circumstances of this case, this right would extend and be limited to the plaintiffs who are beneficiaries of the leave to file suit out of time orders granted by Aluoch J. as she was (now JA) on 14.21995. However, since the same issues was canvassed inter parties and ruled upon substantively leading to he orders made by Ojwang J. on 15.4.2005 in favour of the plaintiffs who had applied to be enjoined to the proceedings, by which orders the defence was overruled on their plea of action being statute barred, and which orders still remain in force as they were not appealed against, and or sought to be reviewed and set aside, in this courts', opinion the issue of limitation is fore closed on the defence because:-

(i) The ruling of 15.4.2005 by Ojwang J. allowed the plaintiffs to be enjoined to the on going proceedings, to present and agitate claims anchored on the same set of facts as those plaintiffs who were already on board and had been granted leave to file out of time, present and agitate their claims vide leave granted on14.2.95. It therefore follows that any attempt by this court to revisit that issue would definitely amount to sitting on an appeal of the orders of 15.4.2005 through the back door and or alternatively without being properly invited to do so.

(ii) The basis of Ojwang J's refusal to uphold the defences plea of limitation was because the plaintiffs claims are unique in that they fall into the categories of both administrative and constitutional claims. By virtue of which they are elevated above the Sections 27, 28, 29 and 30 of the Laws of Limitation Act Cap 22 Laws of Kenya, procedures because of the supremacy of the constitution over other laws among them Cap 22 Laws of Kenya, and which constitution does not have any limitation clause giving time frame through which claims anchored on its provisions can be presented and agitated.

(iii) Ojwang J's holding of 15.4.2005 elevating the plaintiffs claims to constitutional claims has not been upset and by virtue of requirements in the constitution that this court has judicial notice of that, these provisions are to be applied without any distinction on discrimination whatsoever, this would operate to cover the claims of all the plaintiffs on board in these proceedings. Thus making the issue of limitation to be Res judicata. As such there is no need to allow the plaintiffs to be cross-examined on the same.

(2) This court having concurred with Ojwang J's ruling of 15.4.2205 that the plaintiffs claims fall into the category of constitutional claims and are thus elevated above the Cap 22 Laws of Kenya limitation provisions and procedures, the limitation provisions cannot operate to oust the constitutional protection of these claims. This finding too would militate against the reopening of cross-examination on the issue of limitation as that will be an exercise in futility as ruling otherwise would be un procedural, in terms, to the un upset orders of 15.4.2005.

(3) In addition to the plaintiffs claim being constitutional in nature, they are also capable of being human rights based. In that the plaintiffs right of access to justice, right of being heard and the right of being given an effective remedy guaranteed both by the constitution and other human rights instruments that Kenya is party to, cannot be ousted by the limitation laws. The state obligation to avail those rights as outlined herein is paramount. As such the state through the Attorney General cannot take refuge under the limitation laws to deny the plaintiffs a right to be heard on their claim and to be given an effective remedy either as winners or losers on their claims.

(4) In this courts opinion the right to livelihood is s right to property whose protection is guaranteed both by the constitution and human rights instruments. The framing of the relevant provisions on the guarantee of its protection calls for justification on withholding of the same, which justification can only be attained if both parties are heard on the matter on equal footing. By equal footing is meant that the state as a litigant does not enjoy any special privileges before the seat of justice. Its rights to litigation ranks equal to that of its citizens.

(5) Alternatively should the court be wrong in its finding above in number 1, 2, 3, and 4, that the plaintiffs claims can avail themselves of the constitutional and human rights vestures, which operate to elevate them above the limitation of Actions Act provisions Cap 22 Laws of Kenya, whose interrogations has been found by this court to be of no useful purpose and will only be an exercise in futility and only go along way to delay the trial, then the plaintiffs plea that the "82 Air Force" which is the entity that terminated their services and denied them their emoluments, is in effect a non-entity, then subject to proof, it would appear to have been a vacuum in the exercising authority from the time the plaintiffs were relieved of their employment till 25th August 1993 when KAF which had initially employed them became operational again. This would mean that should the "*82 Air Force*" be ultimately found to have been a non-entity, then in the intervening period, time would not start running against the plaintiffs. It means further that if calculated to run form 25th August, 1993 to the period the plaintiffs came to court in April 1995 the period of limitation as we know it both for tort and contact had not run out on the plaintiffs. Should this court be right in that holding, then it would mean that even the leave sought in the first instance was uncalled for though there is no harm in the plaintiffs having taken that precautionary step in the event that the "*82 Air Force*" would in any event be ultimately have been found to be a legal entity after all time could only start running from the time there was a competent entity (KAF) in office which was capable of suing and being sued.

(6) Matters aforesaid in number 5 above are issues of law best suited to be handled by the lawyers as opposed to litigants and so these do not call for cross-examination on the same.

(7) For the reasons given in No. 1, 2, 3, 4, 5, and 6 above the defendants application dated 10th July 2008 and filed on 14th July 2008 be and is hereby dismissed with costs to the respondents.

DATED, READ AND DELIVERED AT NAIROBI THIS 15TH DAY OF AUGUST 2008.

R.N. NAMBUYE

JUDGE