



REPUBLIC OF KENYA



**Wafubwa v Attorney General & 3 others (Constitutional Petition E427 of 2020)
[2023] KEHC 1852 (KLR) (Constitutional and Human Rights) (17 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1852 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E427 OF 2020**

M THANDE, J

MARCH 17, 2023

BETWEEN

CAPT JAMMIES N WAFUBWA PETITIONER

AND

THE HON ATTORNEY GENERAL 1ST RESPONDENT

THE NATIONAL TREASURY 2ND RESPONDENT

KENYA DEFENCE FORCES 3RD RESPONDENT

THE NATIONAL ASSEMBLY 4TH RESPONDENT

RULING

1. By a Petition dated October 15, 2020 and amended on September 30, 2022, the Petitioner seeks the following reliefs:
 - i. A Declaration that the Defence Council State misled the National Assembly in repealing the *Armed Forces Act* Cap 199 (Rev 1980) and Cap 200 to achieve total concealment of the *Armed Forces Act* which provided for the compensation to members of the Military upon removal from service;
 - ii. An order repealing the *Defence Forces Act* of 2012, Legal Notice No 61 of 1980 and the *Military Veterans Act 2022* and reinstating *Armed Forces Act* Cap 199;
 - iii. An Order that the State and its agents be restrained from issuing and ordering the deployment of the military personnel until the National Assembly regularizes the Military laws with the Public Laws;



- iv. An order that the Cabinet Secretary Finance/Treasury do establish and appoint the Members of the Appeal Tribunal to cater for the rights of the members of the military and an order transferring the Petitioner to the National Service Act as a reservist;
 - v. An order directed to the 2nd Respondent to assess the Petitioner's pensions benefits of his salary, allowances and promotions be calculated as from the time he was wrongly retired;
 - vi. An order that the Petitioner was wrongfully retired and that the Petitioner's salary, allowances and promotions be calculated and paid together with the Kshs 1,500/= per month for the silver star medal as from the time he was wrongly retired;
 - vii. An order against the 1st Respondent to make public and freely circulate the concealed Act in particular Cap 206 to legalize the deployment of the Military in to the public sphere.
 - viii. Interest on the amount assessed in (v) above.
 - ix. Costs.
2. It is the Petitioner's case that he joined the military on 22.5.78 as a cadet and was retired on 22.5.93 as a pilot. Believing that he was wrongfully retired, he filed HCCC No 674 of 1993 challenging his retirement and rank. He also sought damages. He was dissatisfied with the orders given and filed Civil Appeal No 278 of 2003 which was dismissed. Upon dismissal of his appeal, he discovered that the State had concealed the *Kenya Regiment (Territorial Force) Act* Cap 200, the Kenya Armed Forces (Pension and Gratuities) Act Cap 201, the Kenya Armed Forces Cantonment Act Cap 203, the Kenya Armed Forces National Service Act Cap 206 and Legal Notice 61 of 1980. According to him, the concealment of these statutes was calculated to deny members of the military and their lawful dependents of their rightful compensation. The Petitioner raised the issue with the Cabinet Secretary of Defence who acknowledged that he was retired on grounds of age and assessment of his dues duly done. The Petitioner thereafter petitioned Parliament to correct his illegal retirement but that the Clerk blocked his petition.
3. It is the Petitioner's contention that the Defence Council has limited powers of transfer but cannot retire military members and that his retirement is supposed to be governed by Section 227(1) (a) of [Capp 199](#) (repealed). His main complaint is that there was bad faith and malice in his retirement which he terms as illegal. He stated that his only avenue for redress is the Appeals Tribunal which the Cabinet Secretary for Treasury has failed to set up. Accordingly, his rights continue to be violated on account of this failure. The Petitioner has therefore moved to this Court seeking relief as his efforts to have the issues raised resolved by the Treasury, Attorney General and the National Assembly have failed.
4. The Petitioner has filed several Applications in this matter. By an application dated 20.4.21, he sought orders restraining the 3rd Respondent from receiving views, comments and memoranda from the public on draft regulations of the [Kenya Defence Forces \(Pensions and Gratuities\) \(Officers and Service Members\) Regulations 2021](#) pending the hearing and determination of the application and Petition.
5. In yet another application dated 15.9.21, the Petitioner sought the following orders:
- 1. That national Treasury be ordered to assess the salary, allowances and promotions be assessed as prayed in paragraph 11 of the supporting affidavit.



2. The Petition be amended to include a prayer for interest and costs.
 3. Costs be provided for and any other orders that meet the ends of justice.
6. At paragraph 11 of his supporting affidavit, the Petitioner averred as follows:

That I truly believe that in the absence of any transfer orders to deploy me to the National reserve as the enrolled GSO officer, my monthly salary, allowance and promotions changed to that of a Major on the 22nd day of May 1993, thereafter to Lt Col In 1998, then to Colonel in 2002, then to Brigadier in 2004, then to Major General in 2007, then to General in 2014 and thereafter the amount continues to accrue until a lawful notice of retirement is issued by the Central Manpower Committee. At my age of 62 years, the amount continues to accrue at the scale of the Chief of Defence Forces in terms of monthly payments till payment in full.

7. The Petition and applications are opposed by the Respondents. The 3rd Respondent filed a notice of preliminary objection dated 29.6.21 opposing the Petition and another dated 1.10.21 opposing the amended Petition and Application dated 15.9.21. The objections are similar, to wit that the Court lacks jurisdiction to entertain the matter as the same is res judicata and violates Section 7 of the *Civil procedure Act*. The Petition has been brought against the same or similar parties or under the same or similar titles and raises issues that were directly and substantially in issue in the following decided cases.
- i. In HCCC No 674 of 1993, *Captain J M Wafubwa v The Honourable Attorney General (on behalf of the Government and the Chief of General Staff Kenya Armed Forces)* [2001] eKLR, the Petitioner sought orders inter alia a declaration that the retirement notice was invalid and that he was entitled to be promoted to the rank of Major. He also sought damages for unlawful termination and an award of compensation for flying maneuver display he had designed. In its decision on 26.6.03, the Court awarded the Petitioner payment of his terminal benefits calculated at the time the Petitioner would retire as Major at the age of 44 years, together with payment of the salaries of 5 years from the time the Petitioner herein retired as a Captain to when he would have retired as a Major.
 - ii. In Nairobi CA No 278 of 2003, *Captain J N Wafubwa v The Attorney General, General Mohamoud Mohamed and Major General D K Wachira* [2006] eKLR, the Petitioner appealed the High Court decision to have inter alia his terminal benefits assessed at the rank of Lt Col and not the rank of Major and a reassessment of his terminal benefits not based on salary alone. The Attorney General cross appealed on 5.7.03 on the instructions of the 3rd Respondent. By its judgment of 27.10.06, the Court of Appeal dismissed the Petitioner's appeal with costs and set aside and vacated the High Court judgement with all consequential orders while allowing the cross appeal by the Attorney General. The Court found that the suit in the High Court was wholly misconceived and further that the Petitioner had been lawfully retired on age basis, one of the basic terms and conditions of his service with the Kenya Armed Forces.
 - iii. In HC Pet No 715 of 2006, *Captain J N Wafubwa v The Honourable Attorney General and The Minister for Finance* [2007] eKLR, the Petitioner filed an application dated 24.11.05 seeking that the Minister of Finance observes that the Petitioner's employment was statutorily protected and to meet with the Petitioner to negotiate the terms of the reassessment of his terminal benefits. The Court dismissed the application on 12.10.07 noting that the Court of Appeal had already rendered itself on the issues and that decision was binding on the court. In the same cause, vide an application dated 24.11.06 the Petitioner sought that the Minister of



Finance be compelled to compute his benefits for services rendered, under Military laws. On 25.5.09, the Court found that it lacked jurisdiction to entertain the application which it found totally incompetent and misconceived and an abuse of court process in view of the Court of Appeal judgement in CA No. 278 of 2003. The Court proceeded to dismiss the same.

- iv. In JR Misc Civ Appl No 368 of 2009, *Captain J N Wafubwa v The Hon Attorney General and The Minister for Finance* [2009] eKLR, the Petitioner sought orders of mandamus to compel the Minister of Finance and the Principal Secretary National Treasury to delegate any Principal Pension Officer to compute his benefits under Section 3 and 4 of the *Pensions Act*. On 13.4.11, the Court dismissed the proceedings for being res judicata (raising issues directly and substantially in issue in HCCC No. 674 of 1993, CA No. 278 of 2003 and HC Pet No 715 of 2006). In an application dated 3.5.11 in the same cause, the Petitioner sought inter alia further judicial review orders and a declaration that doctrine of res judicata, is not applicable to the issue of computation of pensions since the High Court lacks jurisdiction over assessment of military pensions. This application was also dismissed. In a ruling of 21.1.12, the Court found the application incompetent, misconceived and an abuse of the process of the court. noted that it could not sit on appeal the decision of another court of concurrent jurisdiction. The Petitioner filed yet another application this time seeking the setting aside of the ruling of 13.4.11 and to thereafter enter judgment as prayed in the substantive application for judicial review dated 28.6.28. In a ruling of 17.7.12, the Court dismissed the application dated 10.2.12 by its on July 17, 2012.
 - v. In HC JR Misc Civ Appl No 79 of 2013, *Captain JN Wafubwa v General Julius Karangi, Monica Juma, the PS Defence, Nancy Kirui, Outgoing PS Defence* [2014] eKLR, the Petitioner sought Orders of Mandamus against the Chief of Defence Forces and the Principal Secretary, Ministry of Defence to compel them to reassess and pay his retirement benefits. The Court dismissed the application on the ground that it did not meet the threshold for Judicial Review.
 - vi. In HC JR Misc Appl No 454 of 2014, the Petitioner filed for orders of *mandamus* to compel the Minister for Finance/Treasury to reassess his terminal benefits in compliance with Military law. The Court dismissed the application on the ground that it did not meet the threshold for Judicial Review.
 - vii. In ELRC Case No. 2115 of 2015, *Captain J N Wafubwa vs The Defence Council [2016] eKLR, the Petitioner sued the (Kenya Defence Forces) Defence Council* over his retirement and the reassessment of his retirement benefits. The Court struck out the claim on 18.11.19 for being res judicata. He subsequently filed an application, in the already struck-out suit, against the Attorney General and Solicitor General to re-assess his terminal benefits which was struck out on 3.11.17 for being res judicata.
 - viii. In HCCHR Pet No E427 of 2020, the Petitioner seeks orders, among others that the National Treasury be directed to assess his pensions benefits of his salaries (sic), allowances and promotions and pay the same. He has also filed an application under seeking orders to stop the KDF from receiving public vies, comments and memoranda on the Draft KDF (Pension and Gratuities) (Officers and Service Members) Regulations, 2021.
8. In yet another application which is dated 20.1.23, the Petitioner seeks judgment in default of defence. He claimed that the Respondents had failed to file a response to the amended Petition. In a somewhat difficult to understand wording, he went on to state that it “is unjust and unfair for the Court to



waste its time on the preliminary objections since the concealed statutes, Section 86 of the repealed Constitution and the current constitution are available to the court to reach a fair conclusion that-

- i. The basic fundamental military rights are infringed.
 - ii. The sovereignty of the state is endangered.
 - iii. Lack of checks and balances for delivery of justice compromised peace in the country.
9. On 2.2.23, the Court directed that the preliminary objections be dispensed with first. It is these preliminary objections that are the subject of this ruling. Parties filed their written submissions which I have duly considered.
10. The 3rd Respondent contends that the matter herein is res judicata. As such, this Court lacks the jurisdiction to entertain the same. The Petitioner however holds the position that in all the cases cited by the 3rd Respondent, no final judgment was made by the High Court or Court of Appeal. He contends that his rights were abused by his former employer by not paying his final dues and pension. He therefore has the right under Article 19 of the Constitution to seek the payment due to him.
11. The issue of the Petitioner's retirement and his retirement benefits and the computation thereof have been the subject of at least 8 suits including the present Petition. I have looked at some of the cases filed. I note that the Petitioner initially moved to Court in HCCC No 674 of 1993, Captain J M Wafubwa v The Honourable Attorney General (on behalf of the Government and the Chief of General Staff Kenya Armed Forces) [2001] eKLR, challenging his retirement and claiming that he was entitled to promotion to the rank of major. He also sought damages for unlawful termination and an award of compensation for flying maneuver display he had designed. In its decision on 26.6.03, the Court awarded the Petitioner payment of his terminal benefits calculated at the time the Petitioner would retire as Major at the age of 44 years, together with payment of the salaries of 5 years from the time the Petitioner herein retired as a Captain to when he would have retired as a Major. Not being satisfied with the decision of the Court, he appealed the same in Nairobi CA No 278 of 2003, Captain J N Wafubwa vs The Attorney General, General Mohamoud Mohamed and Major General D K Wachira [2006] eKLR. The 3rd Respondent also filed a cross appeal. On 27.10.06, the Court of Appeal dismissed the Petitioner's appeal with costs and set aside and vacated the High Court judgement with all consequential orders while allowing the cross appeal. The Court found that the suit in the High Court was wholly misconceived and further that the Petitioner had been lawfully retired on age basis, which was one of the basic terms and conditions of his service with the Kenya Armed Forces.
12. In J N Wafubwa v Attorney General and Minister for Finance [2009] eKLR, in an application dated 4.2.08, the Petitioner asked the Court to direct the Minister to assess his benefits for services rendered under military law. The Court noted that the issues raised in the application were determined in HCCC No 674 of 1993 and by the Court of Appeal in Civil Appeal No 278 of 2003. The Court found the application incompetent and misconceived and an abuse of the court process, declined jurisdiction and proceeded to dismissed the application with costs.
13. In Captain J N Wafubwa v General Julius Karangi & 2 others [2014] eKLR, the Petitioner by an application dated 16.7.13 sought an order of mandamus compelling the respondents therein to re-assess and pay him his compensation and terminal benefits under the laws that were used to remove him from office. He also sought that the re-assessment be done in consultation with him to avoid unacceptable final figures. The Application was dismissed on 21.1.14.



14. The Petitioner thereafter moved to the Employment and Labour Relations Court in *Captain JN Wafubwa v The Defence Council* [2016] eKLR. His claim was on 18.11.16 struck out on the ground of res judicata. Undeterred, the Petitioner filed an application dated 7.6.17 seeking orders directing the Attorney General and the Solicitor General to re-assess his terminal benefits. The Application met the same fate on 3.11.17 as the court upheld a preliminary objection on the ground of res judicata.

15. The doctrine of res judicata is set out in Section 7 of the *Civil Procedure Act* which provides:

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.

16. In *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR the Court of Appeal had this to say regarding *res judicata*:

The rationale behind *res judicata* is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. *Res judicata* ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without *res judicata*, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, *res judicata* being a fundamental principle of law may be raised as a valid defence.

17. For a party to succeed in an objection on ground of res judicata, such party must demonstrate each of the elements in Section 7 of the *Civil Procedure Act*. This requirement was set out by the Court of Appeal in the case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR, as follows:

Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms:

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

18. In the present case, the issues raised by the Petitioner in prayers (iv), (v), (vi) and (viii) have been directly and substantially in issue in several other suits. The parties have been the same or parties under whom they claim. The Petitioner has been the Applicant in all suits. The Petitioner has variously named as respondents the Attorney General, the Solicitor General, the Minister for Finance, the Permanent



Secretaries for Defence, the Defence Council, General Mohamoud Mohamed, Major General Wachira, general Julius Karangi, the National Treasury and Kenya Defence Forces. All these are the same parties or parties claiming under them and were litigating under the same title. In all these previous cases, the issues were heard and finally determined. Further, the Courts that heard and determined these matters, namely the High Court, the Court of Appeal and the Employment and Labour Relations Court are all competent to try this Petition.

19. Courts must be vigilant and guard against abuse of their process. In the case of *Kenya Commercial Bank Limited v Benjoh Amalgamated Limited* [2017] eKLR the Court of Appeal stated:

To allow Benjoh to relitigate, re-agitate and re-canvass any issues, no matter how crafted or the legal ingenuity and sophistry employed and in spite of the plethora of cases already conclusively determined by competent courts on the question of accounts, would be tantamount to throwing mud on the doctrine of res judicata and allow a travesty of justice to be committed to a party. The specific issue the respondent raises of rendering true and proper accounts to a customer's accounts, has been or could have been raised before the High Court in the previous suits.

20. The Petitioner herein has filed a plethora of cases, and has moved from the Civil Court to the Court of Appeal, to the Judicial Review Court, to the Employment and Labour Relations Court and is now in the Constitutional Court. In the words of the Court of Appeal, to allow the Petitioner to relitigate, re-agitate and re-canvass issues, no matter how crafted or the legal ingenuity and sophistry employed and in spite of the plethora of cases already conclusively determined by competent courts on the question of his retirement and claim for retirement dues, would be tantamount to throwing mud on the doctrine of res judicata. This, the Court must guard against.

21. There is a long list of authorities in which our Courts have stated that there comes a time when litigation must come to an end. In the case of *William Koross (Legal personal Representative of Elijah CA Koross) v Hezekiah Kiptoo Komen & 4 others* [2015] eKLR, the Court of Appeal stated:

The philosophy behind the principle of res judicata is that there has to be finality; Litigation must come to an end. It is a rule to counter the all too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.

22. A party in whose favour a decision has been made must be protected from harassment by way of endless litigation. In *Kenya Commercial Bank Limited* case (*supra*), the Court of Appeal stated:

Public interest requires or demands that litigation must at some point come to an end. In the *Maina Kiai* case (*supra*), the Court quoted with approval the Indian Supreme Court in the case of Lal Chand v Radha Kishan, AIR 1977 SC 789 where it was stated;

“The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue.

23. The issues over which the Petitioner has litigated upon in the multiple cases cited herein relate to his retirement and the subsequent assessment of his retirement benefits. These are the same issues now before me in prayers (iv), (v), (vi) and (viii) of the amended Petition. These prayers are res judicata and



this Court lacks the jurisdiction to retry the same. The Petitioner, as indefatigable as he is must let this matter now rest.

24. Before I end, I must state that I agree with the 3rd Respondent that the Petitioner's counsel misguided the Petitioner in the Petition herein. The history of this matter suggests that the Petitioner's counsel may, for reasons other than the best interests of his client, filed this Petition seeking the impugned prayers.
25. In the end and in view of the foregoing, find that the Petition in so far as it seeks prayers (iv), (v), (vi) and (viii) is misconceived, incompetent and an abuse of the Court process. Accordingly, I uphold the preliminary objections dated 29.6.21 and 1.10.21, with the result that prayers (iv), (v), (vi) and (viii) of the Petition dated December 15, 2020 and amended on 30.9.22 are hereby struck out with costs to the Respondents. For the avoidance of doubt, the Court finds that it has jurisdiction to hear and determine all the other prayers in the amended Petition.

DATED AND DELIVERED IN NAIROBI THIS 17TH DAY OF MARCH, 2023.

M. THANDE

JUDGE

In the presence of: -

.....for the Petitioner

.....for the 1st – 2nd Respondents

.....for the 3rd Respondent

.....for the 4th Respondent

.....Court Assistant

