



**Njue v Attorney General (Employment and Labour Relations Petition
E095 of 2023) [2024] KEELRC 1887 (KLR) (12 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1887 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E095 OF 2023
AN MWAURE, J
JULY 12, 2024**

BETWEEN

BENJAMIN NJUE PETITIONER

AND

THE HON ATTORNEY GENERAL RESPONDENT

RULING

1. The Respondent filed a Notice of Preliminary Objection dated 16th February 2023 on grounds that:
 1. This Honourable Court lacks jurisdiction under the law to entertain integrate and determine the Petition as the same is time barred pursuant to Section 3(2) of the *Public Authorities Limitations Act*, Cap 39 Laws of Kenya, the substratum having been filed outside the provided time limit.
 2. The Petition lacks clarity and specificity given the blanket allegations of torture and does not meet the threshold of a Constitutional Petition.
 3. The Petition is bad in law, mala fides, frivolous, vexatious and amount to gross abuse of the court process.

Petitioner's Case

2. In opposition to the Notice of Preliminary Objection, the Petitioner filed Grounds of Opposition dated 12th March 2024 on grounds that:
 1. The Notice of Preliminary Objection as crafted and filed is unmeritorious, incompetent and utterly mischievous.



2. The Notice of Preliminary Objection is founded in misconception of law on which one is supreme, is it the [Constitution of Kenya](#) 2010 or the [Public Authorities Act](#), Cap 39 Laws of Kenya.
3. The Respondent allusion is misconceived, frivolous, vexatious and scandalous.
4. The grounds of Notice of Preliminary Objection is frivolous, tailored to delay expeditious conclusion of this matter.

Respondents' Submissions

3. The Respondent submitted that the Petitioner avers in the Petition dated 03/08/2022 that the alleged breach of constitutional rights and allegation he was subjected to torture, cruel, inhuman and degrading treatment by the Kenya Army in 1982 following the attempted coup d'état.
4. It is the Respondent's submission that the preliminary objection is a point of law and a plea of limitation of actions pursuant to Section 3(2) of the [Public Authorities Limitation Act](#). The present suit is brought against the government and its department of government thus falls within the confines of the [Public Authorities Limitation Act](#) and not the [Limitations of Actions Act](#).
5. The Respondent submitted that the alleged torture occurred in 1982 while the Petition is dated 03/08/2022. The claim ought to have been brought not later than 1985 hence caught by the statutory limitation period.
6. It is the Respondent's submission that the Petition is time barred and in violation of a mandatory provision of law.
7. The Respondents submitted that the Petition failed the test of precision required of a constitutional petition. The Petitioner cites constitutional provisions with a view of presenting a constitutional petition whereas the issues appear administrative and proper subject for judicial review requiring statutory interpretation.

Petitioner's Submissions

8. It is the Petitioner's submission that the issue of limitation raised is deeply rooted in the law of contracts. Section 3(2) of the [Public Authorities Act](#) requires proceedings on contracts made against the government be filed within 3 years from the date of the cause of action. Sections 4 and 5 of the [Act](#) allows for extension of a limitation period in claims based on tort.
9. The Petitioner submitted that as a general rule there is no limit of time set for filing constitutional petitions and claims arising from infringement of constitutional rights as held in the Supreme Court case of [Monica Wangu Wamwere & 6 Others v Attorney General](#) [2023] eKLR.
10. It is the Petitioner's submission that the Petition is not time barred and should be heard and determined to the end.

Analysis and Determination

11. The main issue for the court's determination is whether the notice of preliminary objection is merited.



12. The threshold to determine whether a preliminary objection is merited was aptly discussed in *Margaret Njeri Gitau v Julius Mburu Gitau & 2 others* [2022] eKLR as follows:

“A Preliminary Objection was described in the *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 to mean: -

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

Further Sir Charles Nebbold, JA stated that: -

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

It is not in doubt that a Preliminary Objection raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts has to be ascertained from elsewhere or if the court is called upon to exercise judicial discretion. The Court will also take into account that the Preliminary Objection must stem from the pleadings and raises pure point of law, and should not deal with disputed facts nor should it derive its foundation from factual information. See the case of *Oraro v Mbaja* (2005) 1 KLR 141, where it was held that:-

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence.”

13. In the above case it is filed under the ambit of *Employment and Labour Relations Act* and therefore should be filed within the given timelines as provided in section 89 of the revised citation of *Employment Act* 2024 which provides that a suit must be filed within 3 years next after the act, neglect or complaint.
14. In this case the claimant does not say when the act complained of took place except general pronouncements of torture he underwent after the 1982 coup de tat.
15. The Court finds the timelines herein are way beyond the mandatory timelines and it would be difficult to stretch any grace to admit the case.
16. The preliminary point raised therefore falls within the purview of the requirement in proving a preliminary objection. The same is found meritorious and is therefore allowed.
17. No orders as to the costs.
Orders accordingly.



DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 12TH DAY OF JULY, 2024.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with order 21 rule 1 of the [Civil Procedure Rules](#), which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the [Constitution](#) which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the [Constitution](#) and the provisions of Section 1B of the [Procedure Act](#) (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

