

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT
NAIROBI

ELRC PETITION NO. E200 OF 2024

(Before Hon. Lady Justice Hellen Wasilwa, J)

DR. MARGARET NYATORO MUCHUI
.....PETITIONER

VS

FRESH PRODUCE EXPORTERS ASSOCIATION
OF KENYA (FPEAK).....
RESPONDENT

JUDGMENT

1. By a Petition dated 3rd December 2024, the Petitioner sought for the following reliefs; -
 - a. THAT this Honourable Court be pleased to issue a declaratory order that the Respondent knowingly and intentionally deprived the Petitioner of her final dues and earnings illegally***
 - b. THAT the Petitioner is constitutionally entitled to her pay as admitted by the Respondent.***
 - c. THAT this Honourable Court be pleased to issue an order for specific performance as follows:***
ITEM (KSHS)
 - i. Pro rata Salary for November, 2016***
 - ii. 12 Working days out of a possible 22 days***
190,909.09/=

**iii. One-Month Remuneration in lieu of notice
350,000.00/=**

iv. STATUTORY DEDUCTIONS (UNPAID)

a) PAYE after personal relief (Nov, 2016)

51,145.13/=

b) NSSF 200.00/=

c) NHIF 1,700.00/=

v. 12.25 Annual Leave days 194,886.37/=

TOTAL 735,795.46/=

d. THAT this Honourable Court be pleased to issue an award of compensation for inflation on the monies owed as per (c) above in consequence of the Respondent's unfair labour practices of illegally, knowingly and intentionally depriving the Petitioner of her final dues;

e. THAT this Honourable Court be pleased to issue any other appropriate relief as the Court may deem fit to grant to safeguard the ends of justice.

f. THAT the costs of this Petition be borne by the Respondent.

g. THAT interest on prayers (c), (d), (e) & (f) above to accrue at Court rates from the last date of employment (16th November, 2016) until payment in full owing to the Respondent's unfair labour practices of illegally, knowingly and intentionally depriving the Petitioner of her final dues.

Petitioner's Case

2. The Petitioner avers that she was employed by the Respondent from 1st June 2016. She started off as the Respondent's General Manager whereby the position was on or about 29th August 2016 verbally translated from General Manager to Chief Executive Officer; which position she held until 16th November, 2016 when she resigned due to various reasons.
3. The Petitioner avers that she served the Respondent with a one-month resignation notice dated 16th November 2016 and received by the Respondent on even date. The Respondent waived the said one-month notice vide its Letter dated 21st November 2016.
4. Immediately thereafter, the Petitioner embarked on the clearing process having been cleared through the Employment Clearance Form dated 22nd November 2016. Subsequently, she handed over the Respondent's items; which were received on 20th December 2016.
5. The Petitioner avers that on 4th January 2017, the Respondent sent her a disclaimer letter via email wherein it outlined what it had assessed as her final dues. However, she objected to the Respondent's computation of her final dues vide her letter dated 9th January 2017 received by the Respondent on 12th January 2017.
6. The Petitioner avers that she attempted severally to reach out to the Respondent's Board of Directors (whom she was reporting to) up until July, 2021 all in futility; with verbal

promises of her payment being issued which remain unfulfilled to date. She eventually issued a formal Demand Letter dated 1st November, 2021 and Further Demand Letter dated 30th March, 2022.

7. The Petitioner avers that her employment and outstanding final dues are undisputed facts owing to the Respondent's Reply to Demand dated 11th November, 2021.
8. It is the Petitioner's case that despite her best efforts to amicably procure the payment of her final dues from the Respondent, the Respondent has to date illegally, knowingly and intentionally deprived her of her final dues thus necessitating the filing of this suit.
9. The Petitioner avers that Article 3(1) of the Constitution obligates every person to respect, uphold and defend the Constitution and hence her decision to institute this petition as the defender thereof and in exercise of the rights donated by Art. 22(1) as read together with Art. 165 (3) (a) & (b) of the Constitution.
10. The Petitioner avers that the Respondent's actions violate and are in contravention of Article 41 (1) and (2)(a) of the Constitution.

Respondent's Case

11. In opposition to the petition, the Respondent filed a replying affidavit dated 25th March 2025, sworn by its Chief Executive Officer, Hosea Machuki.
12. The Respondent submitted that in accordance with Section 89 of the Employment Act Cap 226 Laws of Kenya, no civil action or proceedings based or arising out of the Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained thereof.
13. The Respondent avers that the Petition having been filed outside the statutory timeline, the Petition and Application is incompetent, bad in law and constitutes an abuse of the Court process.
14. The Respondent avers that the Petitioner voluntarily resigned from its employment in November 2016, vide her resignation letter dated 16th November 2016 which was duly acknowledged and accepted by the Respondent vide its letter dated 21st November 2016.
15. The Respondent avers that in view of Section 89 of the Employment Act, the Petitioner having resigned in November 2016, ought to have commenced any action on or before November 2019. The Petition herein was instituted in December 2024 which is 8 years after she resigned.

16. The Respondent avers that the Petitioner has not attempted to explain the delay of more than 7 years before commencing action. Thus, the petition is time barred having been brought outside the statutory limitation period of 3 years as stipulated under Section 89 of the Employment Act and without leave of court.

17. The Respondent avers that its letter dated 11th November 2021 was a response to the Petitioner's demand letter dated 1st November 2021 which denied all the allegations as contained therein. Additionally, the Respondent reminded the Petitioner that any contemplated action would be statutorily time barred and that it was ready to strenuously defend any ill-conceived suit against it.

18. The Respondent avers that the petition should be struck out with costs for being incompetent, bad in law and an abuse of the court process which is only meant to waste the court's precious time as well as and harass the Respondent.

Petitioner's Submissions

19. The Petitioner submitted on six issues: whether the Respondent admits the Petition as pleaded; whether the Petition is time-barred; whether Petition herein is a Constitutional Petition properly so; Whether terminal dues are entitlements; whether the Petitioner is entitled to the prayers sought; and who should bear the costs.

20. On the first issue, the Petitioner submitted that the Respondent in its Notice of Preliminary Objection and Replying Affidavit both dated 25th March, 2025 admitted indebtedness by not disputing the chronology of events of the Petitioner's employment. On the basis of these express and unequivocal admissions of the said unpaid dues, it is of great urgency that this matter comes to its logical conclusion and that she be granted protection of the law and finally be paid her constitutionally entitled unpaid wages as prayed in the Petition.

21. The Petitioner submitted that there is a clear admission of indebtedness by the Respondent. The Respondent has even before the institution of this suit been admitting indebtedness in its correspondences attached in the petition and this application. This is a clear and unequivocal admission of indebtedness.

22. On the second issue, the Petitioner placed reliance in **Marwa v National Police Service Commission & 3 others [2024] KEELRC 2292 (KLR)** wherein the court stated: *"Guided and convinced of the sound jurisprudence that there is not time limit for filing constitutional petition, we find the ground that the trial court erred in failing to dismiss the Petition on account of delay, acquiescence and laches has no merit. Unless expressly stated in the Constitution, the period of limitation in the Limitation of Actions Act do not apply to violations of rights and freedoms guaranteed in the Constitution. The law concerning limitations of actions cannot*

be used to shield the State or any person from claims of enforcement of fundamental rights and freedoms protected under the Bill of Rights.”

23. The Petitioner submitted that she has exhibited her numerous efforts thereafter to procure payment of her hard-earned monies through the various correspondences with the Respondent's Chairman of the Board of Directors (whom she was reporting to) up until July, 2021 all in futility. Thereafter, she served the Respondent with demand letters dated 1st November 2021 and 30th March 2022.
24. It is the Petitioner's submission that all her attempts to utilize alternative dispute resolution mechanisms were in line with Art. 159 (2)(c) & (e) of the Constitution as well as Section 15(1) & (2) of the Employment and Labour Relations Court Act were futile. The Respondent has never communicated its decision to date contrary to the provisions of Article 35 (1)(b) & (2) of the Constitution which provides for the right of access to information.
25. The Petitioner submitted that the Respondent stringed her along with the initial computation followed by the responses from the Respondent's Chairman of the Board of Directors up until July, 2021 that he would be reaching out to her. The Respondent has been fully aware of the pending payment of dues owing to the numerous negotiation attempts.

26. It is the Petitioner's submission that the substance in the petition has never been litigated before and the Respondent being fully aware of the substance of the same; even producing evidence in its Replying Affidavit dated 25th March, 2025; the petition would not vex the Respondent's defence and/or prejudice the same as held in the case of **Marwa v National Police Service Commission & 3 others [2024] KEELRC 2292 (KLR)**.

27. The Petitioner submitted that the court has discretion to extend time *suo moto* in a bid to do justice having weighed all the facts as outlined herein; the Petitioner urges it to do as per Rule 30 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 as read together with Rule 80 of the Employment and Labour Relations Court (Procedure) Rules, 2024.

28. On the third issue, the Petitioner submitted that Constitutional Petition is a formal request to the High Court to address a situation where a person's constitutional rights or fundamental freedoms have been, or are being denied, violated, infringed, or threatened. They allow individuals to seek legal remedies for infringements of their rights.

29. The Petitioner submitted that constitutional petitions are based not only on the Constitution but also on various/other statutes. Therefore, reliance on national or county statutes does not make a constitutional petition to cease to be one.

30. The Petitioner cited ***Kenya National Commission on Human Rights & 2 others v Attorney General; Director of Public Prosecutions & 3 others (Interested Parties); Law Society of Kenya (Amicus Curiae) [2025] KEHC 6 (KLR)*** and stated that it is a Constitutional Petition that sought a declaration that Sec. 226 of the Penal Code was unconstitutional for violating articles 27, 28 and 43 of Constitution of Kenya.

31. On the fourth issue, the Petitioner submitted that the Respondent waived the notice period thus expressly opting to pay the Petitioner's dues in lieu of the notice period in line with Section 38 of the Employment Act which is couched in mandatory terms as follows: *"Waiver of notice by employer Where an employee gives notice of termination of employment and the employer waives the whole or any part of the notice, the employer shall pay to the employee remuneration equivalent to the period of notice not served by the employee as the case may be, unless the employer and the employee agree otherwise."*

32. The Petitioner submitted that the Respondent's singular defence is that this suit is time-barred being filed beyond the three (3) year limit. However, the Respondent failed to take cognizance of the fact that terminal dues for service rendered/work done by the Petitioner while she was employed by the Respondent are entitlements thus are not subject to contest.

33. The Petitioner placed reliance in the Court of Appeal case of ***Nation Media Group Limited v Munene [2025] KECA 114 (KLR)***: *“The remedy of compensation for unfair termination was separate and distinct from any terminal dues that were due to the respondent as a result of the termination, whether by redundancy or otherwise. The terminal dues compensated the employee in view of the service rendered until the date of termination, and were set down by law and the contract of employment. Compensation for unfair termination compensated an employee for wrongful loss of employment, and were mainly at the discretion of the court, after consideration of the guidelines set down in section 49 of the Employment Act. The remedy of compensation for unfair termination was introduced by the Employment Act.”*
34. The Petitioner submitted that her terminal dues are her entitlements and not at the discretion of any court thus not subject to being time-barred. This is in line with all the national and international legal provisions relied on including but not limited to the Constitution. She asserts that the Petitioner’s claim is a matter of right and is not up for debate thus squarely in the realm of a constitutional petition.
35. The Petitioner submitted that the miraged delay is explained through her attempts to embrace alternative dispute resolution mechanisms as outlined under Art. 159 (2)(c) of the Constitution to claim for her Constitutional entitlements including the formal demand issued to the Respondent.

36. The Petitioner submitted that the fact that the Respondent still neglected, failed and/or refused to pay her constitutionally safeguarded dues. This exhibits the extent which the Respondent is keen on going to infringe the Petitioner's dues as sought herein in exercise of their unfair labour practices.
37. The Petitioner submitted that upon resignation, the sole point of departure was computation of dues meaning that the Respondent was fully aware and cognizant that terminal dues were payable to the Petitioner and promptly so because it is they who sent their computation to the Petitioner for confirmation before the perceived payment. The Respondent thus cannot allege ignorance as ignorance is no defence of law.
38. It is the Petitioner's submission that she approached this court as a last resort, seeking her inherent constitutional protected and inalienable rights to be paid for work done.
39. On the fifth issue, the Petitioner submitted that Section 17 (1) and (10) of the Employment Act provides: *"Subject to this Act, an employer shall pay the entire amount of the wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service directly, in the currency of Kenya—*
- (a) in cash;*
 - (b) into an account at a bank, or building society, designated by the employee;*

- (c) *by cheque, postal order or money order in favour of the employee; or*
- (d) *in the absence of an employee, to a person other than the employee, if the person is duly authorised by the employee in writing to receive the wages on the employee's behalf.*

(10) *A person who—*

(a) subject to section 19, wilfully fails to make payment of or to tender the wages earned by or payable to an employee in accordance with subsection (1); or

(b) contravenes any of the provisions of subsections (2), (3), (4) and (5), commits an offence and shall on conviction be liable to fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding two years or to both."

40. The Petitioner further submitted that Section 18 of the Employment Act provides that in the case of an employee employed for a period exceeding one month, at the end of each month or part thereof; Upon the termination of a contract of service: by effluxion of time, it shall be the duty of the employer to ensure that the employee is paid the entire amount of the wages earned by or payable to the employee and of the allowances due to him as have not been paid.

41. The Petitioner submitted that this court is clothed with the requisite jurisdiction and that the Petitioner is entitled to the prayers sought. Consequently, the Petitioner seeks that the petition dated 3rd December 2024 be allowed as prayed.

42. On costs, the Petitioner submitted that costs in civil proceedings follow the cause. Therefore, having proven that the application and petition are merited, prays for costs of the petition to be awarded as prayed.

Respondent's Submissions

43. The Respondent submitted on five issues: whether the Petitioner's Petition is time barred; whether the Petitioner's Petition is seeking to circumvent the provisions of the Employment Act; whether the Petitioner is entitled to the orders sought in the Petition; whether the Petitioner's Application is merited; and who bears the costs

44. The Respondent submitted that the Petitioner voluntarily resigned from the Respondent's employment on 16th November 2016, and instituted the petition and application on 3rd December 2024. It is thus evident that the intervening period is about 8 years.

45. The Respondent submitted that pursuant to Section 89 of the Employment Act, the Court does not have the right or power to entertain any action arising out of the Employment Act or on a contract of service as the one herein, three years after the cause of action arose.

46. The Respondent submitted that there is no doubt that the cause of action herein arose in November 2016 when the

Petitioner voluntarily resigned from the Respondent's employment. She never took any action, she decided to sleep on her rights and only acted more than 8 years after the alleged default occurred. Upon realizing that her claim was time barred, she deliberately filed the employment claim under the disguise of a Constitutional Petition to evade the provisions of the Employment Act.

47. The Respondent submitted that section 89 of the Employment Act is couched in mandatory terms and prohibits filing of any suit arising from its provisions including Constitutional Petitions outside the statutory limitation period of 3 years. The petition herein was brought on 3rd December 2024, more than 8 years outside the statutory time barred.

48. It is the Respondent's submission that no cogent explanation has been given by the Petitioner to justify the inordinate delay in seeking the reliefs herein. Additionally, the Applicant/Petitioner herein did not seek leave to file the suit out of time.

49. On the second issue, the Respondent submitted that the Petitioner's employment claim couched as a constitutional petition is incompetent, barred in law, bad in law, offends the doctrine of constitutional avoidance and is an abuse of court process.

50. The Respondent submitted that the Petitioner slept on her rights for too long and now she proposes to prosecute an

employment claim camouflaged as a constitutional petition, a practice which should be detested as it trivializes constitutional issues and offends the doctrine of constitutional avoidance.

51. The Respondent submitted that the doctrine of constitutional avoidance requires that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. As a general principle, where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed. Therefore, it urged the court to hold that the proper forum for this suit would be to institute an employment claim rather than raising unripe constitutional issues. It placed reliance on the case of ***K KB v S C M & 5 others (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) (22 April 2022)***.

52. On reliefs, the Respondent submitted that it is common ground that the Petitioner voluntarily resigned from its employment vide her resignation letter dated 16th November 2016. The said resignation was duly acknowledged and accepted by the Respondent vide its letter dated 21st November 2016 which informed her that the Board had considered and accepted her resignation and out of abundance of consideration and goodwill, the Board informed her that she could leave the Association as from the date of resignation which was 16th November 2016. Consequently, the one-month notice was waived, and it was agreed that the Petitioner could leave

immediately without having to wait for the notice period to lapse.

53. The Respondent submitted that the Petitioner accepted the conditional waiver and went on with the clearances on 22nd November 2016, a day after the parties agreed on the conditional waiver. As such, the Petitioner's allegations and demand for payment in lieu of notice are unsubstantiated, baseless, unwarranted and a mere afterthought aimed at misleading and deceiving this Court.

54. The Respondent submitted that the Applicant declined to collect her dues and in turn vide a letter dated 9th January 2017, claimed that she had not been part and parcel of the waiver and therefore the Respondent owed her. Since then she frequently bullies, threatens and bombards the Respondent with random demand letters of varying, excessive, fanciful, inexplicable and unjustifiable tabulations of the dues owed to her as evidenced by the email of 9th July 2017, demand letters of 1st November 2021 and 30th March 2022.

55. On the fourth issue, the Respondent submitted that the principles for consideration in an application for judgment on admission were clearly captured by the Court of Appeal in the *locus classicus* case of **Choitram v Nazari [1984] eKLR**, where the court stated as follows: "*Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They*

must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt.... An admission is clear if the answer by a bystander to the question whether there was an admission of facts would be 'of course there was'"

56. The Respondent submitted that the said admission allegations are outrageous, imaginative and without any basis as there is nothing in the said the email of 4th January 2017 that constitutes an admission. The Petitioner further refuted it in her letter dated 9th January 2017. Additionally, the said response which the Petitioner alleges that was an admission is in its face not an admission as it denied all the allegations as contained in the demand letter dated 1st November 2021 and the Respondent further reminded the Petitioner that any contemplated action would be statutorily time barred and that it was ready to strenuously defend any ill-conceived suit against it.

57. It is the Respondent submitted that the said letters cannot be construed to amount into an admission for the reasons that they are not plain, obvious and do not depict anything that shows the Respondent's admission, furthermore, they have not met the principles set out in the **Choitram v Nazari**. On the contrary, the Respondent is very clear that it does not owe the Petitioner and that it is ready to defend any ill-conceived claim against it.

58. On the final issue, the Respondent submitted that it is a principle of law that costs follow the cause; in dismissing the petition, it should be awarded costs.

59. I have examined all the averments and submissions of the parties herein. The issues for this court's determination are as follows:-

1. Whether the petition herein is time barred.

2. Whether the petitioner's rights have been breached.

3. Whether the petitioner is entitled to the remedies sought.

ISSUE NO 1

60. The respondents submitted that the claim by the petitioner is time barred since she resigned in 2016 and so she should have filed this petition by 2019 within the 3 year period provided for under section 90 of the Employment Act 2007.

61. The petitioner submitted that she did not file a cause and that the petition is not time barred. She relied on **Marwa vs NPSC & 3 Others (2024) KEELRC 2292 (KLR)** cited herein where the court made a finding that petitions are not time barred and that the law on limitation cannot be used to shield anybody from breach of fundamental rights and freedoms protected under the constitution.

62. What the petitioner has prayed for in the petition is an order to compel the respondents to pay her terminal dues. She avers that the respondent breached her rights under the law but

from the prayers sought there is no indication that she seeks any damages for breach of her rights under the constitution.

63. The prayers sought fall squarely under the employment act and for which as submitted herein should be brought before court within 3 years. The petitioner has failed to explain the delay in filing the claim if at all and coming to court 9 years after the cause of action arose.

64. I do agree that the petition is time barred and cannot stand at this time. This court finds it unnecessary to consider the other issue. The petition is therefore dismissed accordingly. There shall be no order of costs.

Dated, Signed and Delivered Virtually at Nairobi this 18th Day of November 2025.

HELLEN WASILWA
JUDGE