

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

ELRC PETITION NO. E158 OF 2025
(Before Hon. Lady Justice Helen Wasilwa, J)

CASPER KINYUA NJUE & 39 OTHERS...
.....**PETITIONERS**

VS

TELKOM KENYA LIMITED.....
.....**RESPONDENT**

RULING

1 In opposition to the Petitioners’ petition dated 8th August 2025, the Respondent filed a Notice of Preliminary Objection dated 6th November 2025 on the following grounds:

1. *THAT this suit is time barred and offends the mandatory provisions of section 89 of the Employment Act, 2007 thus the Honourable Court has no jurisdiction to hear and determine the Petition.*
2. *THAT the Petitioners are guilty of laches and inexcusable delay since the cause of action arose in 2006, that is, nearly twenty (20) years prior to the filing of this Petition.*
3. *THAT the Petition is an abuse of the Court process as it offends the doctrine of constitutional avoidance, the issues raised being squarely governed by the*

Employment Act, which provides adequate and effective remedies.

Petitioners' Case

2 In opposition to the Respondent's Notice of Preliminary Objection, the Petitioners' filed grounds of opposition dated 19th November 2025 on the following grounds:

- 1) *Section 89 of the Employment Act has no bearing on this dispute. The Petition does not arise from breach of contract under the Employment Act. It is anchored on violations of constitutional rights under Articles 10, 27, 28 and 57, and is brought under Article 22, which imposes no limitation period.*
- 2) *It is settled law that limitation of time does not apply to claims alleging breach of fundamental rights and freedoms, and especially where the violation is ongoing. A constitutional claim does not take the character of an employment dispute merely because it arose from an employment relationship.*
- 3) *The Petitioners' cause of action is constitutional. Articles 22 and 23 allow the enforcement of rights without regard to statutory timelines, and vest this Honourable Court with jurisdiction to hear the Petition and grant an appropriate relief.*
- 4) *The violations complained of are continuing. The Petitioners are today still denied the equal severance*

benefits granted to their younger colleagues. Each passing day perpetuates the very inequality the Constitution prohibits.

- 5) It would be contrary to the spirit and purpose of the Constitution to permit a technical time bar to entrench a discrimination that the Constitution itself condemns. The Respondent's continued non-compliance, even after several judgments and rulings, underscores why limitation cannot apply here.*
- 6) Laches cannot defeat a claim brought under the Bill of Rights. The Petitioners are elderly and vulnerable. The discrimination they challenge has never ceased. It continues to this day.*
- 7) The Respondent mischaracterises the Petition as a stale employment grievance. It is not. It is a challenge to sustained and deliberate unequal treatment in violation of Articles 21, 27, 28 and 57.*
- 8) The exclusion of employees aged 50 and above from the full benefits has had lasting and ongoing effects. The Petitioners continue to live with the consequences of unequal treatment, financial strain, and humiliation. The discrimination is not historical. It is present and persistent.*
- 9) A party that has benefited from a continuing constitutional violation cannot rely on delay to escape scrutiny. Equity does not permit one to profit from his own wrongdoing.*

- 10) *The Petitioners' advanced age, the earlier confusion around representation in the numerous and several litigations, and their reasonable expectation that the Respondent would comply with the final court judgments weigh heavily against any suggestion of laches. It would be unjust and unconscionable to allow the Respondent to hide behind time while the harm continues unabated.*
- 11) *The doctrine of constitutional avoidance does not arise. Avoidance is only relevant where an alternative statutory remedy can fully and effectively resolve the dispute. There is no such remedy here.*
- 12) *The Employment Act cannot adjudicate or cure systemic discrimination based on age, violation of dignity, or the rights of older persons. These are constitutional issues requiring constitutional remedies.*
- 13) *Avoidance is a rule of prudence, not a bar to jurisdiction. Where the conduct complained of strikes at the core of equality, dignity and the protection of older members of society, this Honourable Court must address those questions under Articles 22 and 283.*
- 14) *The discrimination pleaded is class-based and targeted. Older employees were singled out as a group. No statutory process can remedy or even entertain such a claim. The dispute is constitutional in its nature and must be resolved as such.*
- 15) *Rule 10 of the Employment and Labour Relations Court (Procedure) Rules expressly provides for the*

filing, hearing and determination of Petitions for the enforcement of fundamental rights and freedoms. This Petition is properly before this Honourable Court.

16) The Preliminary Objection does not raise any pure point of law and fails the mandatory threshold test in Mukisa Biscuit. It rests on disputed facts and a mischaracterisation of the Petition. It is ill-conceived, frivolous, and an abuse of the court process, and ought to be dismissed with costs.

Respondent's Submissions

- 3 The Respondent submitted on two issues: Whether the Petitioner is guilty of laches and inexcusable delay; and whether the suit amounts to an abuse of the court process

- 4 On the first issue, the Respondent submitted that the Petition is fatally defective on account of inordinate, unexplained, and inexcusable delay, amounting to the doctrine of laches. The Petition challenges a staff rationalization exercise undertaken in 2006, yet the Petition was filed in 2025, almost twenty (20) years later. Such an extraordinary lapse of time, it is argued, renders the Petitioners culpable of laches and disentitles them to equitable relief.

- 5 It is the Respondent's submission that the delay is fundamentally incompatible with the right to a fair hearing, and violates its constitutional and statutory protections. The delay infringes Article 50 of the Constitution, which guarantees the right to a fair hearing, as well as Article 159(2)(b) which commands that "justice shall not be delayed." The Respondent argues that it is impossible to achieve a fair trial where it is required to defend events that occurred nearly two decades ago, especially where documents are voluminous, memories have faded, and records are difficult or impossible to trace, thereby occasioning real prejudice.
- 6 The Respondent relied heavily on binding appellate jurisprudence such as ***Mitei v National Social Security Fund Board of Trustees (Civil Appeal No. 310 of 2017) [2022] KECA 974 (KLR)***, the Court of Appeal upheld the dismissal of a Petition filed seven years after the cause of action arose, terming it borderline an abuse of court process. The Court cited with approval ***Daniel Kibet Mutai & 9 others v Attorney General [2019] eKLR***, where it was held that:

"Delay is an anathema to fair trial which is one of the key fundamental rights provided to all litigants under Article 50 of the Constitution... it would be an abuse of the court process and contrary to the constitutional principles espoused in Article 159... to

allow a party... to bring their action after undue inordinate delay, without any justifiable reason.”

- 7 The Respondent further cited ***Charity Wanjiru Ndegwa & 2 others v Attorney General & another [2018] eKLR***, and ***Kariuki v Attorney General [2014] KECA 713 (KLR)***.

- 8 The Respondent submitted that in the present case, the Petitioners had over 19 years to institute proceedings but failed to do so without any logical or evidentiary justification. The delay has resulted in scanty recollection of facts and the unavailability of witnesses, thereby causing manifest prejudice to the Respondent. Accordingly, the equitable maxims *“delay defeats equity”* and *“equity aids the vigilant and not the indolent”* squarely apply.

- 9 The Respondent submitted that the Petitioners’ purported explanations for delay, that they may have lacked means or knowledge to litigate, their names may have been removed by counsel in other cases, or that they were awaiting dues in good faith, are speculative and unsupported by evidence. The Petitioners are faulted for misquoting the law by asserting that laches cannot defeat a claim under the Bill of Rights, contrary to binding jurisprudence.

- 10 The Respondent cited the Supreme Court decision in ***Wamwere & 5 others v Attorney General [2023] KESC 26 (KLR)***, where the Court affirmed that courts are entitled to consider inordinate delay in constitutional claims and stated:

“Claims of violation of human rights must be filed in court within reasonable time. Where there is delay, a petitioner ought to explain the reasons for the delay to the satisfaction of the court.”

It is submitted that the Petitioners failed to meet this threshold.

- 11 Further reliance was placed on ***Wellington Nzioka Kioko v Attorney General [2018] KECA 858 (KLR)***, where the Court of Appeal held that reasons such as poverty or lack of means are not plausible explanations for inordinate delay, noting that a litigant could seek leave to sue as a pauper. The Court concluded that an unexplained delay of 30 years warranted dismissal of the claim.
- 12 On the second issue, the Respondent submitted that the Petition constitutes a clear abuse of the court process due to the egregious and unexplained delay. The Respondent reiterates that constitutional litigation, while not subject to strict statutory limitation periods, must nonetheless be commenced promptly or within a reasonable time.

- 13 The Respondent cited ***Kariuki v Attorney General [2014] KECA 713 (KLR)***, where the Court of Appeal cited ***Kamlesh Mansuklal Damji Pattni & Another v Republic***, affirming that although the Constitution sets no limitation period for enforcement of fundamental rights, applications brought after unreasonable delay may amount to an abuse of process, particularly where prejudice is occasioned to the respondent.

- 14 The Respondent further cited ***Moses Nyandusi Osoro v National Police Service Commission & another [2022] KEELRC 184 (KLR)***, where the Court held that a constitutional Petition filed eight years after the alleged violation was a classic example of abuse of the court process and was untenable by operation of the doctrine of laches. Additionally, in ***Mitei v National Social Security Fund Board of Trustees (supra)***, the Court of Appeal held that a delay of thirty (30) years was inimical to the right to a fair trial and amounted to an abuse of the court process.

- 15 The Respondent submitted that the Petitioners' failure to offer any explanation or material to justify the delay leaves the Court with no basis to exercise discretion in their favour. The Petition is therefore stale, prejudicial, and constitutes an abuse of the court process, warranting its striking out *in limine*.

- 16 I have examined all the averments and submissions of the parties herein. The preliminary objection raises substantive issues of limitation the cause of action having occurred nearly 20 years ago. The respondents on their part aver that the issue in question relates to a continuous injury where the respondent applicants have continued to deliberately sustain unequal treatment in violation of article 21, 27 28 and 57 of the Constitution. They aver that the discrimination is present and is persisting. The applicants on their part aver that the respondents are guilty of laches. It is apparent from the application that the issues in this application relate to certain factual issues not in the courts knowledge. They relate to certain benefits whose velocity can only be determined after consideration of some material facts.
- 17 The issues raised in the application cannot be determined without considering material facts which will then propel this court to go beyond the purview of **Mukisa Biscuit** case.
- 18 In the circumstances, I dismiss the preliminary objection and direct that the petition proceeds accordingly and the issue of limitation to be considered within the entire petition. Costs in the petition.

Dated, Signed and Delivered Virtually at Nairobi this 24th Day of February, 2026.

HELLEN WASILWA
JUDGE