



Alfred Asidaga Mulima & 2 others v Attorney General & 8 others [2017] eKLR

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Neutral citation: [2017] KECA 766 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 179 OF 2015
EM GITHINJI, W KARANJA & DK MUSINGA, JJA
FEBRUARY 24, 2017**

BETWEEN

**ALFRED ASIDAGA MULIMA 1ST APPELLANT
CHARLES MARARO NJOROGE 2ND APPELLANT
PETER KIIO KITUKU 3RD APPELLANT**

AND

**THE ATTORNEY GENERAL 1ST RESPONDENT
BARCLAYS BANK INTERNATIONAL LTD 2ND RESPONDENT
BARCLAYS BANK TRUST CO.LTD 3RD RESPONDENT
BARCLAYTRUST CHANNEL ISLAND LTD 4TH RESPONDENT
BARCLAYTRUST INTERNATIONAL LTD 5TH RESPONDENT
BARCLAYS BANK KENYA LTD 6TH RESPONDENT
MINISTRY OF FINANCE 7TH RESPONDENT
MINISTRY OF TRANSPORT 8TH RESPONDENT
THE REGISTRAR GENERAL 9TH RESPONDENT**

(Appeal from the judgment of the High Court of Kenya at Nairobi, (M. Ngugi, J.) dated 5th December, 2014 in HIGH COURT PETITION NO. 113 OF 2013)

JUDGMENT

1. The appellants were the petitioners in a petition filed in the High Court of Kenya at Nairobi. They filed the petition in their capacity as the Chairman, Secretary and Treasurer respectively of the Ex-



East African Airways Staff Welfare Association, (hereinafter the Association). The Association was registered on 12th June, 2012. The appellants also filed the petition for the benefit of the members of the Association and also in their representative capacity of all former Kenyan employees of the defunct East African Airways Corporation,(hereinafter “the Corporation”).

2. The appellants stated that on diverse dates indicated in their respective letters of employment, were employed by the Corporation. The Corporation ceased operations on 13th January, 1977 and the appellants were declared redundant on 15th February, 1977 and therefore became entitled to their provident fund, redundancy payments, unpaid leave and other cessation of service benefits which they set out as follows:

“(a) Provident Fund Scheme entitlements under the New Staff Provident Fund Scheme (NSPF);

- (b) Payment in lieu of notice;
- (c) 15 days’ pay for each completed month of service;
- (d) Accumulated leave days;
- (e) Repatriation expenses”.

3. The appellants averred that the respondents failed to pay them their terminal dues as aforesaid. They alleged violation of their constitutional rights under Articles 20 (1) 27, 28, 29 (f) 35, 40, 41, 43, 47, 48 and 57 of *the Constitution* of Kenya, 2010(*the Constitution*).

4. The appellants stated that the basis of their claim is discernable from the following documents:

“(i) The Petitioners „individual contracts;

- (ii) The then prevailing Employment law;
- (iii) The Collective Bargaining Agreement between Transport and Allied Workers Union and East African Airways Corporation;
- (iv) The East African Airways Corporation Staff Rules made pursuant to section 25 of the East African Airways Corporation Act, 1967 (Cap 16, Now repealed);
- (v) The Treaty of East African Co-operation executed in 1967;
- (vi) The Investment Management Agreement dated 12th February, 1975 between the trustees, Barclaytrust Channel Islands Ltd.(The 4th Respondent herein), Barclays Bank Trust Company Ltd(The 3rd Respondent herein), Barclaytrust International Ltd(The 5th
- (vii) The trust deed dated 16th August, 1974 between the East African Airways Corporation, the trustees and Barclays Bank Trust Company Ltd (The 3rd Respondent herein) establishing the provident fund;
- (viii) The supplemental Trust deed dated 12th February, 1975 between the East African Airways Corporation, the trustees and Barclaytrust Channel Islands Ltd (The 4th Respondent herein) amending the rules of the trust deed to the provident fund;
- (ix) The consolidated report of the Mediator of the East African Community (October, 1981);



- (x) Winding up cause No. 1 of 1977 (East African Airways in Liquidation);
 - (xi) The reports of the Official Receiver and Liquidator of the East African Airways Corporation;
 - (xii) The East African Community Mediation Agreement, 1984;
 - (xiii) The *East African Community Mediation Agreement Act* of 1984 (Cap 4 of the laws of Kenya)
 - (xiv) the brief by the Financial Secretary in October, 2010 to the Prime Minister and the 7th Respondent;
 - (xv) The report of the task force by the 7th
 - (xvi) The resolutions of the Management Committee/trustees of the
 - (xvii) Resolutions of the meeting of the Management Committee of the said provident fund on 16th February, 1977;
 - (xviii) Letters from the 9th Respondent to Ministry of Public Service in Uganda on how the petitioners were allegedly paid for loss of office dated 16th August, 1994 and 25th April, 2001;
 - (xix) The Parliamentary Hansard Reports of 5th August, 2009, 19th September, 2012 and 1st August, 2012.”
5. Regarding their claims for redundancy benefits, the appellants stated that the particulars of their individual files and the particulars of their dues are in the custody of the 9th respondent at the office of the 1st respondent. The appellants had however reconstructed their individual entitlements through a Forensic Scientist who prepared a report that was produced before the High Court. The appellants contended that they were entitled to their terminal benefits as preferential creditors.
 6. The appellants further averred that the official Receiver and Liquidator (from the 1st and 9th respondent’s office) of the defunct Corporation had allegedly, from records obtained from the Kenya National Archives, made a payment of only a portion of the entitlement of some of the appellants by way of dividend distribution of 12% in 1979 and 13% in 1980. The appellants had otherwise not received any payments from the respondents.
 7. The appellants told the trial court that there was no clarity as to the amount of money the Official Receiver and Liquidator deposited with the Government upon the winding up of the Corporation. The government had; however, through various correspondence and answers on the floor of Parliament, made admissions as to owing the appellants various unspecified sums.
 8. With regard to the claims for the provident fund payments, the averred that they were contributory members of the staff provident fund, whose funds were invested by the trustees of the said fund were invested by the trustees of the said fund with the 3rd, 4th and 5th respondents and in their sister companies by virtue of an Investment Management Agreement dated 12th February, 1975, a Trust Deed dated 16th August, 1974 and a supplemental Trust Deed dated 12th February, 1975 amending the rules of the Trust Deed to the provident fund.
 9. The appellants further stated that following the collapse of the Corporation, the trustees made a resolution on 16th February, 1977 to dissolve and wind up the provident fund; trustees appointed the 2nd and/or the 6th respondents to be the custodian trustees of the said funds and immediately pay



25% of the funds to the members of the fund in Kenya; but only some of the members were paid the said 25%; that the 2nd, 3rd, 4th, 5th and 6th respondents have to date failed to make any payments to the appellants; that the respondents had collectively and individually failed to disclose the whereabouts of the balance of the said funds; and that the Crown Agents who were the Managers of the assets of the defunct East African Community and the Corporation therein had denied receipt of any funds regarding the Provident Fund Scheme.

10. In view of the foregoing, the appellants' claim against the respondents in respect of the provident fund, jointly and severally, was for United Kingdom Pounds Sterling Two Billion Two Hundred and Sixty Seven Million One Hundred and Three Thousand Nine Hundred and Eight Six and Thirty Five Cents UK£2,267,103,986.35 which was then said to be equivalent to Kenya Shillings Three Hundred and Six Billion, Three Hundred and Sixty Seven Million, Eight Hundred and Forty Thousand Three Hundred and Ninety One Twenty Three Cents (Kshs.306,367,890,391.23) together with interest and costs.
11. The appellants' claim in respect of loss of office (redundancy) payments against the respondents, jointly and severally, was for the sum of Kenya Shillings Three Hundred and Two Billion, Six Hundred and Sixty Six Million, Five Hundred and Fifty Nine Thousand One Hundred Sixty Three and Seven Cents (Kshs.302,666,559,163.07) together with interest and costs. The aforesaid amounts were computed by a Forensic Scientist. The appellants said that they were not able to compute their outstanding leave, payment in lieu of notice and repatriation expenses due to absence of records being held by the 1st, 7th, 8th and 9th respondents.
12. The appellants set out in their petition the particulars of non-disclosure, misrepresentation, breach of various Articles of *the Constitution* and International conventions as aforesaid and supported the petition with affidavits sworn by Alfred Asidaga Mulima (the 1st appellant), K. S. Bhullar, Robert Gathigani Njagi and Adrian Gilbert Muteshi.
13. The appellants sought against the respondents, jointly and severally, the following orders:

“(1.A declaration that, the Respondents' conduct amounts to discrimination and to that extent, is discriminatory against the Petitioners under Article 27 of *the Constitution*;

2. A declaration that, the respondents' conduct, acts of commission and/or omission are unlawful, illegal and/or unfair and the same violates Petitioners' Fundamental Rights and Freedoms to human dignity, right to property and right to Fair Administrative Action as encapsulated under Articles 20 (1), 27, 28, 29 (f), 35, 40, 41, 43, 47, 48 and 57 of *the constitution* and that the said rights and freedoms have been violated, transgressed and trampled upon by the 1st Respondent;
3. A declaration that the process leading upto, including the decision, findings and recommendations of the 7th Respondent contained in his written brief to the parliament dated 19th September, 2012 and of his task force set up to inquire into the payments due to the former East African Community Employees dated 20th September, 2011, was unconstitutional, unprocedural, substantively unconstitutional, high handed, biased, lacking in independence, in breach of the rules of Natural Justice, in breach of the principles of separation of powers, judicial independence, ultra-vires thus null and void ab-initio;



4. A declaration that the Petitioners are entitled to and as such, have an indefeasible right of access to information from the 1st respondent in terms of Article 35;
5. An order compelling the Respondents to release and disclose the information necessary to know and access their entitlements for the provident fund scheme and also for redundancy/loss of office as specified in the Mediation Agreement, 1984;
6. An order that the Petitioners are entitled to compensation by way of damages for violations under Article 23, Article 27, Article 27 (2), Article 27 (4), Article 28, Article 29 (f), Article 35. (1) (a), Article 35. (1) (b), Article 40. (1), Article 41. (1), Article 41. (2) (a), Article 43. (1) (e), Article 47. (1), Article 48 and Article 57 (c) of *the Constitution*;
7. A declaration that the Petitioners are additionally entitled to the benefits enumerated in paragraphs 6 (a) 6 (b) and 6 (c) in this Petition;
8. An order directing the Respondents to pay up the sums due to the Petitioners from the provident fund and for loss of office as enumerated in paragraphs 6 (a), 6 (b) and 6 (c) in this Petition;
9. Special damages as pleaded in paragraphs 6 (a), 6 (b) and 6 (c) in this Petition;
10. Costs of this suit;
11. Interest at court rates from the date of filing until payment in full;
12. Such other further or better Orders as this Honourable Court shall deem just and fit to grant.”

The 1st, 7th, 8th and 9th Respondents? Opposition to the Petition.

14. The 1st, 7th, 8th and 9th respondents opposed the appellants’ claim. They averred, inter alia, that the office of the Official Receiver never kept any records allegedly received from the Crown Agents as claimed by the appellants. They however conceded that the advising Accountants released liquidation documents to the Official Receiver at the conclusion of the liquidation of the Corporation in 1988. However, some of those documents may have been destroyed or defaced or altogether lost due to the inordinate lapse of time prior to the filing of the petition, they added.
15. The said respondents further stated that on realization of the assets of the corporation, the Official Receiver, with the assistance of the advising Accountants, declared and paid out dividends to creditors, including former employees of the Corporation, seven times, that a number of the former employees have not collected their dividend cheques and their names are contained in the advising Accountants’ final report to the Official Receiver and Liquidator dated March, 1988; and that those monies are still in the Corporation’s liquidation account kept by the Official Receiver at the National Bank.
16. The 1st, 7th, 8th and 9th respondents averred that the trial court was bound by Kenya’s *East African Community Mediation Agreement Act*, 1987, which was an Act of Parliament to provide for the giving effect to certain provisions of the East African Community Mediation Agreement, 1984, (EACMAA) and for connected purposes. The objective of EACMAA was to facilitate the division of assets and liabilities of the defunct East African Community. The Kenyan Act fully addressed the issue of the provident fund, they contended.



17. The respondents further contended that the suit was res judicata, in view of other similar suits that had been decided involving more or less the same parties on the same issues. They cited Samuel Amugune & Others v The Attorney General, Nairobi Hccc No. 1879 of 2009. They also cited Reference No. 2 of 2010 that was filed by the appellants before the first Instance Division of the East Africa Court of Justice at Arusha, which was decided against the appellants. The appellants appealed to the appellate Division of the East African Court of Justice, being Appeal No. 4 of 2011, Emmanuel Mwakisha Mjawasi & 748 Others V The Attorney General of the Republic of Kenya. The appeal was equally dismissed.
18. The respondents further argued that the suit before the High Court was barred by limitation and cited Section 4 of the *Limitation of Actions Act*.
19. As regards the appellants' claim of constitutional violations, it was argued that neither *the Constitution* nor statutes apply retrospectively, (except where it is expressly so stated) and therefore the 2010 Constitution could not be relied up to found a claim that arose in 1977. They cited the Supreme Court decision in Samuel Kamau Macharia & Another V Kenya Commercial Bank Limited & 2 Others, e KLR [2011].

Response by the 2nd, 3rd, 4th, 5th & 6th Respondents

20. In their reply to the petition and written submissions, the 2nd, 3rd, 4th, 5th and 6th respondents also denied the appellants' claim. They argued that the suit was res judicata; that it was time barred; that the EACMAA comprehensively addressed all the issues that had been raised by the appellants in their petition; and that all the issues pertaining to the pension and provident funds were specifically addressed by Article 10.03 (c) of the EACMAA, where the funds were acknowledged to be in the custody of the Crown Agents.
21. The said respondents further stated it was impossible to have a fair trial when most of the documents that ought to have been relied upon had been lawfully destroyed. They cited section 4 of the *Records Disposal Act* Cap 4 Laws of Kenya under which they contended no suit or other proceeding could be instituted against any person in respect of disposal by destruction or otherwise of any records, books or papers in accordance with any rules made under the Act. They also submitted that the appellants' delay of almost 36 years before they filed the petition was prejudicial to them. They cited several authorities, among them Bliss V Lambeth, Southwark and Lewisham Health Authority [1978] 2 ALL ER 126 (CA).
22. The 2nd to 6th respondents also stated that the appellants had not raised any constitutional issues; that they had not proved their claims for special damages; and urged the court to dismiss the appellants' suit against them.
23. The trial court set out the following issues for determination:
 - “ 1. Whether the court is bound by the *East African Community Mediation Agreement Act* of 1984;
 2. Whether the *East African Community Mediation Agreement Act* of 1984 addressed the issue of Provident Funds that were due to the petitioners;
 3. Whether this suit is res judicata;
 4. Whether this suit is statutorily time barred and if a fair trial can be had on account of limitation;



5. Whether the new *Constitution of Kenya, 2010* applies retrospectively to upset accrued rights such as limitation of actions.”
24. Regarding the first issue, the trial court held that it was bound by the EACMAA. In reaching that conclusion, the learned judge observed that there was no dispute that the pensions and emoluments of employees of the defunct East African Community and its corporations were secured by the EACMAA and appropriate amendments to the *Pensions Act*.
- Kenya ratified the EACMAA in 1987 when it enacted the East African Community Mediation Agreement *Act, No. 7 of 1987* for purposes of giving effect to certain provisions of the EACMAA, albeit retrospectively.
25. On the second issue, that is, whether the EACMAA addressed the issue of provident funds that were due to the appellants, the court answered it in the affirmative. The court cited Article 10 of the first schedule to the EACMAA which is titled “Pension and Provident Funds”. Article 10.05 provides, inter alia, that each State shall pay its nationals, employed by the Corporations or General Fund Services (GFS) and retired from active service by the division date, pension and other benefits due to them.
26. As to whether the suit was res judicata, the learned judge agreed with the respondents that it was. The trial court cited the past decisions by the High Court of Kenya, the Industrial Court and the East African Court of Justice by more or less the same parties and on similar claims as were before it.
27. On the issue of limitation, the learned judge held that since the appellants’ claim was based on the provisions of the EACMAA, under section 4 (1) (d) of the *Limitation of Actions Act*, it was time barred. The section states as follows:
- “1. The following actions 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;
 - (b) actions to enforce a recognisance;
 - (c) actions to enforce an award;
 - (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture.”
28. As to whether *the Constitution* of Kenya, 2010 could be applied retrospectively in the circumstances of the case, the trial court held that in Samuel Kamau Macharia & Another V Kenya Commercial Bank Limited & 2 Others, the Supreme court found that the provisions of the 2010 Constitution do not have retrospective application.
29. However, the trial court found that the appellants were entitled to the right to information as provided for under Article 35 of *the Constitution*. In that regard, the court directed the office of the Attorney General, within 90 days of the date of delivery of the judgment, to publish in a newspaper with wide circulation nationally:
- “1. The names and addresses of former employees of the defunct East African Airways Corporation who received dividends seven times from the office of the Official Receiver;



2. The names and addresses of former employees of the defunct East African Airways Corporation who have not yet received/collected their monies from the Official Receiver;
 3. The total amount lying in the Official Receiver's account with National Bank in respect of such persons.”
30. The court was of the view that publication of the aforesaid information would assist the office of the official Receiver in performing its duties to the public by making payments to former employees or their beneficiaries who may not have collected their entitlements.
31. The petition was otherwise dismissed but each party was to bear their own costs.

Appeal to this Court

32. Being aggrieved by the said decision, the appellants preferred an appeal to this Court. They filed a prolix memorandum of appeal whose 10 grounds run upto 3 pages. The grounds may be summarized as follows: That the learned judge erred in law in finding that the EACMAA fully addressed the issue of provident funds; in holding that the suit is res judicata; in finding that the suit is time barred; in finding that *the Constitution* of Kenya 2010 does not apply retrospectively; in failing to determine all the issues in the suit; by disregarding the evidence tendered by the appellants in regard to non-payment of their redundancy dues, unpaid leave and other cessation of service benefits by the 1st, 7th, 8th & 9th respondents; by disregarding the evidence tendered by the appellants regarding payments of their counterparts in Tanzania and Uganda of their provident fund, redundancy payments, unpaid leave and other cessation of service benefits.
33. The appellants urged this Court to allow the appeal and order the respondents, jointly and severally, to pay out the provident and redundancy dues, unpaid leave and other cessation of service benefits to the appellants as well as costs of the appeal and of High Court matter.
34. We shall first consider whether the trial court was bound by the East African Community Mediation Agreement Act of 1984; (EACMAA) and whether the EACMAA addressed the issue of provident funds. We have already stated that the objective of the EACMAA was to give effect to certain provisions of the East African Community Mediation Agreement, 1984 that was signed by the Presidents of Kenya, Uganda and Tanzania. That Agreement was for the division of assets and liabilities of the defunct East African Community.
35. It is important to look at some of the provisions of the Agreement before we consider the provisions of the EACMAA. The Agreement covered the assets and liabilities of all the corporations that were operating under the East African Community, which were the East African Railways Corporation, the East Africa Posts & Telecommunications Corporation, the East African Harbours Corporation, the East African Airways Corporation and their subsidiaries. It also covered the General Fund Services (GFS).
36. Regarding Pensions and Provident Funds, Article 10 of the Agreement stated as follows:
- “ 10.01 The assets of the Pension and Provident Funds of the Corporations and GFS consist of the value of the pension and provident funds assets located in the States and those currently held and managed by the Crown Agents.
10. Pending the determination of the Pension assets and liabilities for each State:
- 03 (a) Pension and Provident Funds located in the States shall continue to be vested and managed by the States where they are located;



- (b)
 - (i) Pension and Provident Funds? assets of the Community currently held and administered by the Crown Agents shall vest in and be managed and administered by a Board of Trustees consisting of the Governors of the Central Bank of the States.
 - (ii) The Board shall sit not later than one month after the signing of the Mediation Agreement and shall thereafter meet quarterly and submit its reports to the ministers responsible for finance in the States;
 - (iii) The Board shall function in accordance with the rules of procedure set forth in Annex „F? to this Agreement. If any question of procedure arises which is not covered by the said Annex, the Board shall decide the question;
 - (iv) The Board shall cease to exist upon a final division of the Pension and Provident Funds assets and other assets and liabilities as provided for in sub Articles 10.01, 10.02 and 11.3 of this Agreement.
- (c) The Pension and Provident Fund Assets of the Community now held and managed by the Crown Agents consisted of the following as at 31st March, 1984:
 - (i) Pension Fund assets amounting to pounds sterling twenty million, five hundred and ninety two thousand; four hundred and fifty (£ 20,592,450/=)
 - (ii) Provident Fund asset amounting to pounds sterling one million two hundred forty-eight thousand, nine hundred and seventy-seven (£1,248,977).”

37. Article 10.05 stipulated that each State would pay its nationals who were employed by the various corporations or GFS and retired from active service by the division date their pensions and other benefits.

38. In their petition before the High Court, in setting out the legal foundation of their petition, the appellants cited, inter alia, the EACMAA, which they rightfully stated vested all the assets of the former East African Community allocated to Kenya under the Mediation Agreement to the Kenyan Government and gave the Kenyan Government an obligation to pay the terminal benefits of Kenyan nationals who were employed by the East African Community and the Corporations thereunder; among other responsibilities and obligations. It is therefore imperative that we consider what that Act provides in relation to the appellants’ claims.

39. Although the appellants argued that their claims for provident funds payments were not claims against the liquidator of the defunct East African Airways Corporation but against 2nd, 3rd, 4th, 5th and 6th respondents who were contracted by the Corporation to manage provident funds of their staff, Article 10 of the first schedule to the EACMAA deals with the assets of pension and provident funds of the



corporations that were under the East African Community and GFS. We must however, point out that the evidence on record showed that the only respondents with whom the Corporation had entered into contract with for management of that provident funds were the 3rd, 4th and 5th respondents.

40. Article 10.03 (c) gives the specific amounts of pension and provident funds of the Community that were held and managed by the Crown Agents.
41. After a careful analysis of the provisions of the EACMAA, the learned trial judge concluded:

“79A plain reading of the above provisions indicates that the Act addresses the issue of pensions and provident funds, for “members of staff formerly employed by the corporations or GFS” (General Fund Services) both located in the member States and those held and managed by the Crown agents. The Act further sets out specifically the amount of the Pension and Provident Funds assets of the community held and managed by the Crown agents as at 31st March, 1984.”

It is therefore evident that the EACMAA addressed the issue of Provident Fund.

42. Notwithstanding that finding, one of the documents that was relied upon by the appellants in their petition was a Report by a Taskforce on the defunct Ex-East African Community (Kenya) Employees dues that was established by the Ministry of Finance. The Report is dated 20th September, 2011. With regard to Provident Fund, the Report stated, inter alia, that all ex-East African Airways Corporation employees were paid 25% of their dues in Nairobi on 22nd February, 1977. The balance of 75% of the Provident fund was paid between July and October, 1977 by the Barclays Bank of Kenya as follows:

Kenya - Kshs.8,839,235.00

Uganda - Ushs.1,657,779.45

Tanzania - Tshs.3,217,769.30

Having paid 25% on 22nd February, 1977, the remaining amount was said to have been paid out in form of dividends in seven instalments by the Liquidator.

43. Although the appellants denied having received any payments, the Taskforce Report showed otherwise. The members of the Taskforce, who included senior officials from the Ministry of Finance, State Law Office, Ministry of East African Community, and 12 ex-employees of the East African Community, visited Uganda, Tanzania and the United Kingdom and reviewed a plethora of relevant documents before they compiled the Report.
44. In all those countries members of the Taskforce held consultations with key persons. The purpose and objectives of the trip to the United Kingdom included; to establish facts about Provident Fund Investment by Crown Agents in respect of members’ funds remitted to them before the breakup of the East African Community and to find out facts and documents pertaining to liquidation of investments purchased out of provident funds contributed by employees of the community prior to 30th June, 1977. The Taskforce did not find that any of the 2nd to 6th respondents were holding any provident funds entrusted to them by the Corporation.
45. The Taskforce Report made wide ranging findings concerning each and every claim raised by the appellants and other former employees of the defunct East African Community.
46. In conclusion, our finding on the first two issues is that while the EACMAA addressed the issue of Provident Funds, the trial court was not exclusively bound by it. The court was also bound to consider, which it did, other material and documents relating to the appellants’ claims against the 2nd to 6th respondents, including the Taskforce Report aforesaid.



47. We now turn to consider whether the suit that was before the trial court was res judicata. In determining this issue, the Court must consider the nature of other related suits that have been before various courts, the parties thereto and the orders made therein and relate all the above to the matter that was before the trial court. The Court must remind itself of its earlier pronouncement in *Pop-In (Kenya) Ltd & 3 Others V Habib Bank AG Zurich*, [1990] eKLR.

“The plea of res judicata applies not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have been brought forward at the time.”

48. Section 7 of the *Civil Procedure Act* states 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 parties, or between parties under whom they or any of them, 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.”

49. There have been at least three similar matters that are closely related to the one that was before the trial court. The first one was *Samuel Amugune & 7 Others V The Attorney General*, Nairobi High Court Civil Suit No. 1879 of 1997 that was consolidated with *Christopher Maloba & Others V Attorney General*, Nairobi High Court Civil Suit No. 743 of 2002. The Plaintiffs in the suits were former employees of the defunct East African Community and were claiming among other things their respective pensions, provident fund, severance allowances, gratuity, redundancy, payment in lieu of notice, repatriation expenses.

50. In that matter, after hearing all the parties, the High Court, (Lenaola, J; as he then was), found that the Government of Kenya had paid those who retired on the division date and the State had made provision for payment of those who remained in service.

51. The plaintiffs were not satisfied with that decision. They filed a similar suit in the East African Court of Justice (First Instance Division) in Reference No. 2 of 2010. The suit was struck out.

52. Undeterred, the plaintiffs preferred an appeal to the East African Court of Justice (Appellate Division). *Emmanuel Mwakisha Mjawasi & 748 Others V Attorney General of the Republic of Kenya* [2012] eKLR. The Court, dismissing the appeal, stated, inter alia:

“The appellants are Kenyan Citizens and former employees of the defunct East African Community (EAC) that collapsed in 1977. Subsequent to the dissolution of the defunct EAC in 1977, the Partner States executed a Mediation Agreement on 14th May, 1984, for the division of the assets and liabilities of the defunct community. Under that Mediation Agreement, each Partner State undertook the responsibility to pay out of its share of the defunct community’s assets, the pensions and other terminal benefits of its respective nationals who had been employed by the EAC and its institutions prior to the division date of the assets. The division dates were different for each of the existing institutions as indicated in article 1 (i) of the Mediation Agreement. However, the latest such division date was 30th June, 1977 ... Interestingly, the Kenyan Government devised a somewhat novel way of dealing with the situation which arose as the consequence of the mediation Agreement. In this regard, the ex-employees who were still in active service on the division



date were given the option to take their EAC pension directly; or to join the Kenyan Public Service, including its Parastatals and State Corporations. Through this latter option, many ex-employees of the defunct EAC were absorbed into the employ of the Kenyan Public Service. Conversely, those who took the option to retire were paid at once all their benefits, including additional pensions on the basis that their offices had been abolished in the EAC. It was the Appellants' case before us and in the Court below that even though they were absorbed into the Kenyan Public Service and other State agencies and were eventually paid their terminal dues by those organizations, they have not, however, been paid their corresponding dues for the services they rendered to the East African Community; yet they lost their employment at the EAC pursuant to the abolition of their offices. The Appellants, therefore, averred that they are entitled to be paid by the Kenyan Government their EAC terminal benefits in accordance with their individual records for the services they rendered to the defunct East African Community before the division date ... including their pensions, additional pensions, provident fund, severance allowances, gratuity, redundancy, payment in lieu of notice, repatriation expenses, loss of office, benefits outstanding, accumulated leave, salary in lieu of notice, real value and compound interest until full payment. It is common knowledge that the Appellants instituted two suits in the High Court of Kenya, which were later consolidated.”

The appeal was dismissed on 27th April, 2012.

53. On 14th August, 2012, the plaintiffs filed another suit before the Industrial Court of Kenya:
Emmanuel Mwakisha Mjawasi & Others V The Attorney General [2012] eKLR. The suit was filed for and on behalf of all members of former East African Community Beneficiaries Association, Kenya. The petitioners alleged violation of various constitutional rights and freedoms and sought appropriate declarations. They also sought payment of their terminal benefits, including but not limited to pension, gratuity, redundancy, payment in lieu of notice, etc.
54. The learned trial judge, (Maureen Onyango, J.) held that the petition was res judicata and struck it out. That was on 18th December, 2012.
55. The plaintiffs were not satisfied. On 28th January, 2013 they filed an application for review of the judgment delivered by Lenaola, J; on 8th October, 2004. The application was premised on the ground that they had since discovered new evidence that was not within their knowledge and could not have been produced at the time the earlier matter was being heard.
56. In a ruling delivered on 29th November, 2013, the court found the application lacking in merit and dismissed it. The court pointed out that the plaintiffs, who had unsuccessfully filed several suits in Kenyan Court, had not preferred any appeal to the Court of Appeal.
57. Having considered all the above decisions, Mumbi Ngugi, J. concluded that the petition before the court was res judicata, since the dispute had been the subject of consideration by several courts of competent jurisdiction.
58. In the appeal, Mr. Enonda, the appellants' learned counsel, argued that the petition that was before Mumbi Ngugi, J. was brought by former employees of East African Airways Corporation and not former employees of East African Community; that the issues in the matter before the trial court were not substantially and directly in issue in the previous suits; and that the matters in the previous suits were not fully and finally determined.



59. Miss Wambui, learned counsel for the 1st, 7th, 8th and 9th respondents and Mr. Gichuhi, learned counsel for the 2nd to 6th respondents, did not agree with Mr. Enonda's submissions. Mr. Gichuhi submitted that all the appellants were former employees of the defunct East African Community which had many corporations under it. As earlier stated, the EACMAA related to all the Corporations, including the East African Airways Corporation. The reliefs sought in the former suits were not substantially different from the ones sought in the subsequent suit. The appellants were or ought to have been aware of those earlier suits. Counsel cited *North West Water Ltd V Binnie & Partners* [1990] 3 all E.R.547, where the court held:

“Where an issue had been decided in a court of competent jurisdiction, the court would not allow that issue to be raised in a separate proceeding between different parties arising out of identical facts and dependent on the same evidence since, not only was the party seeking to re-litigate the issue prevented from doing so, by virtue of issue estoppel but it would also be an abuse of process to all, for the issue to be re-litigated.”

With respect, we agree that is a proper rendition of the law as appertains to the doctrine of res judicata. Explanation number 6 of Section 7 of the Civil Procedure Act provides:

“Where persons litigate bona fide in respect of public right or of private right claimed in common for themselves and others all persons interested in that right, shall for the purposes of this section, be deemed to claim under the persons so litigating.”

60. We agree with the learned trial judge that the matter before her was res judicata, in view of the decision that had been pronounced by Lenaola, J; after hearing evidence and submissions from all the parties and other subsequent findings by various courts thereafter.

61. We shall now consider whether the petition before the trial court was statutorily time barred. The cause of action arose sometimes in 1977 when the appellants were declared redundant. The petition in issue was filed in 2014, a period of almost 37 years. The claim was based on alleged violation of various Articles of *the Constitution* and the EACMAA.

62. Under EACMAA, any claim thereunder ought to have been instituted within six years from the date on which the cause of action accrued, in terms of section 4 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya.

However, the appellants' counsel argued that the *Limitation of Actions Act* cannot override Constitutional Provisions, which have no bar to the validity, lodging and addressing of constitutional violations.

63. He cited *Wachira Waihere V The Attorney General* [2003] eKLR where the Court held:

“We find that although there is a need to bring proceedings to court as early as possible in order that reliable evidence can be brought to court for proper adjudication ... there is no limitation period for seeking redress for violation of the fundamental rights and freedoms for the individual under *the Constitution*.”

64. It is doubtful whether there was violation of any constitutional right as was alleged by the appellants as the appellant's claim arose from contract of employment. But even if there was, in the absence of a good explanation, the court cannot totally close its eyes to the fact that there was inordinate delay in filing of the petition. In *Attorney General of the Republic of Uganda V Omar Awadh & 6 Others* [2013]



eKLR; the East African Court of Justice in responding to the issue of delay to litigate on constitutional rights had this to say:

“As regards the doctrine of continuing violations as a civil (not criminal) concept, the principle of legal certainty is equally upheld in the courts where issues of human rights are litigated. The courts have underscored the necessity even in human rights litigation, for litigants in any society to canvass their rights promptly, at the earliest possible opportunity thereby, to assure non-derogation of the accrued rights and relationships of other members of society ...

65. In our view, even in cases where undisputedly there was violation of a party’s constitutional rights where there has been inordinate delay in instituting a claim, the court should always consider whether the delay was unreasonable and whether it is prejudicial to the respondent. In addition, the principle, of constitutional avoidance must also be borne in mind. The principle entails that a court will not determine a constitutional issue when a matter may properly be decided on another basis. See the Supreme Court decision in *Communication Commission of Kenya v Royal Media Services & 5 Others* [2014] eKLR. We think that the trial court came to the right conclusion that the petition before it was statute barred.
66. Related to the issue of limitation, Mr. Gichuhi also submitted that his clients could not get a fair trial in the face of such a long delay by the appellants in instituting their suit. It was inconceivable to expect the 2nd to 6th respondents to keep records for more than 36 years, without which they were unable to mount a watertight defence. He cited the *Records Disposal Act, Cap 14 Laws of Kenya* and the Rules made thereunder. Counsel also sought to rely on several decisions from other jurisdictions that address the issue of prejudice to defendants for lack of witnesses and vital documents occasioned by long delay in instituting suits.
67. The appellants had exhibited a letter dated 21st December, 2012 addressed to them by the 9th respondent stating that the staff of the department of the Registrar General and members of the *Ex-East African Airways Staff Welfare Association* had unsuccessfully sought for payroll and Provident Fund tabulations.

It is also important to point out that Silvanus Ndisya, the Deputy Registrar General and Deputy Official Receiver, had stated in his affidavit in reply to the appellants’ petition that the advising Accountants released liquidation documents to the Official receiver at the conclusion of the liquidation in 1988, but some of those documents might have been destroyed or defaced or lost due to the inordinate lapse of time.

68. In view of the foregoing, we agree that the inordinate delay on the part of the appellants in instituting their claim against the 2nd to 6th respondents caused those respondents serious prejudice and they could not therefore get a fair trial.
69. The last issue that we wish to consider is whether *the Constitution* of Kenya, 2010 applies retrospectively. In *Samuel Kamau Macharia v Kenya Commercial Bank Limited* (supra) the Supreme Court held:

“A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting *the Constitution* to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due



regard to the language of *the Constitution*. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of *the Constitution*. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately occurred before the commencement of *the Constitution*.”

70. Looking at the constitutional rights which the trial court was being urged to enforce, it is evident that most of them were conferred under the 2010 Constitution; they were not recognized under the repealed Constitution when the cause of action arose. In our view, the new rights were not enforceable. We adopt the finding by the High Court in Charles Murigu Muriithi & 2 Others V Attorney General [2015] eKLR that:

“... this Court cannot enforce new rights created under the new Constitution unless those rights were recognized and protected under the previous Constitution.”

Consequently, we uphold the trial court’s findings on the issue.

Conclusion

71. Although the appellants faulted the learned trial judge for failing to determine all the issues raised in their petition, in view of her findings on the issues of res judicata, time limitation and non-retrospective applicability of *the Constitution*, it was not necessary to make findings on the rest of the issues. Likewise, we shall not do so.

72. We shall not disturb the learned judge’s order that was directed at the Attorney General requiring him to publish names of former employees of the Corporation who had been paid and who had not been paid their dues and the total amount of money lying in the Official Receiver’s account at the National Bank of Kenya.

73. All in all, we find this appeal lacking in merit and dismiss it in its entirety. Each party shall bear its own costs of the appeal.

DATED AND DELIVERED IN NAIROBI THIS 24TH DAY OF FEBRUARY, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

D. K. MUSINGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Deputy Registrar

