



William (Suing in his Behalf and on Behalf of 186 Former Employees of the Defunct Intercontinental Hotel, Mombasa) v Rao & 3 others (Petition E001 of 2025) [2025] KEELRC 1232 (KLR) (30 April 2025) (Ruling)

Neutral citation: [2025] KEELRC 1232 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
PETITION E001 OF 2025**

**M MBARŪ, J
APRIL 30, 2025**

BETWEEN

**KAI WILLIAM PETITIONER
SUING IN HIS BEHALF AND ON BEHALF OF 186 FORMER EMPLOYEES OF
THE DEFUNCT INTERCONTINENTAL HOTEL, MOMBASA**

AND

**PONANGIPALLI RAMAANA RAO 1ST RESPONDENT
THE DEFUNCT INTER-CONTINENTAL HOTEL, MOMBASA (SUED UNDER
ITS DIRECTORS AND/OR MANAGERS: DUNCAN NDERITU NDEGWA,
IBRAHIM S ZAKHEM & FRANCIS KIVULI) 2ND RESPONDENT
MARIO JULLANE 3RD RESPONDENT
THE DEFUNCT EQUITORIAL BEACH PROPERTIES LIMITED 4TH
RESPONDENT**

RULING

1. The petitioners filed this petition seeking to enforce their constitutional rights and freedoms against the respondent on the basis that they are entitled to damages for the violation of their rights, they should be paid damages with interests from April 2001 when the 3rd respondent went into receivership, payment of accumulated salary arrears with interests from April 2001. They petition that the petitioners are the former employees of the 3rd respondent, while the 1st and 2nd respondents were appointed Receiver Managers of the 3rd and 4th respondents. The petitioners worked for the 3rd respondent, and in 2000, it went into receivership. The Receivers' Managers have discriminated against them regarding payment of terminal dues that accrued from 1 October 2000 to 19 April 2001.



2. The petition states that the Labour Officer charged the 3rd respondents with willfully failing to pay salaries contrary to Section 4(8) (a) and 48 of the *Employment Act* through Mombasa Criminal Case No.1444 of 2001.
3. In response, the 1st, 2nd and 3rd respondents filed Notice of Preliminary Objections dated 20 February 2025, 2 April 2025, and 17 March 2025, respectively.
4. The 1st respondent's objections are that;
The petition is bad in law because;
 1. Fundamental Rights and Freedoms set out in the Bill of Rights in *the Constitution* can only be enforced by a private individual through a constitutional petition against the State and state organs, not by a private individual against another private individual, as sought by the petitioners.
 2. The petition is time-barred under Section 90 of the *Employment Act*.
 3. The employer was dissolved in accordance with the law, and the entire petition is an abuse of the court's process.
5. The 2nd respondent's objections are that;
 1. By enjoining him (Francis Kivuli) as a respondent in this petition, the petitioners run afoul of the express provisions of Rule 5 (c) and (d) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, in that he is not a proper party hereto.
 2. The entire petition as drawn is misconceived, bad in law and an abuse of court process.
6. The 3rd respondent's objections are that;
 1. This court lacks jurisdiction to admit, hear, and determine this petition because it is time-barred, having been filed outside the mandatory statutory limitation period prescribed under section 90 of the *Employment Act*.
 2. The 3rd respondent is not a legal entity capable of suing and/or being sued in its name or the names of its alleged managers.
 3. The 4th respondent, cited as the petitioners' former employer, was dissolved, wound up, and/or liquidated and is no longer a legal entity capable of being sued.
 4. The petition dated 1 January 2025 ought to be dismissed in limine with costs to the 3rd respondent.
7. The parties attended and agreed to address the objections through written submissions.
8. The 1st respondent submitted that a constitutional petition cannot be lodged between private persons. Article 21 of *the constitution* provides for implementing constitutional rights against state organs. In *Uhuru Muigai Kenyatta v National Star Publications Limited* [2013] eKLR, the court held that the state and its organs must observe, protect, promote and fulfil the rights and freedoms under the Bill of Rights. No such obligations are imposed on an individual, including a company. In *Kenya Bus Service Limited & 2 others v the Attorney General & 2 others* [2005] eKLR, the court held that fundamental rights and freedoms are enforceable by private persons by way of a constitutional petition only as against the state and its organs.



9. In this case, the petition against the first respondent, which was made against a private person and a company, is defective and should be dismissed.
10. The petition is time-barred and filed contrary to Section 90 of the *Employment Act* (the Act). In *John Njiiri v University of Nairobi* [2021] eKLR, the court held that Section 90 of the Act is framed in mandatory terms. An employment claim must be filed within 3 years from the date the cause of action arose. The court is denied jurisdiction to extend time outside the Act. In *Butali Sugar Mills v Shari & Another ELRCA E029 of 2022* [2023] eKLR, the court held that Order 8 rule 3(2) of the Civil Procedure Rules was that leave was required to file the amended statement of claim at the magistrates court time having lapsed—the power to extend time is discretionary.
11. In this case, the cause of action arose in 2000. A court order dissolved the employer company, so suing the Receiver Managers in performing their statutory duty would not be proper.
12. The 2nd respondent reiterated the submissions by the 1st respondent and said that under Rule 5 (c) and (d) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, this is not a proper petition. He is not a proper party hereto. From the pleadings, the entity of Equatorial Beach Properties limited (in receivership) trading as Mombasa International Resort, previously the petitioners' employer, cannot sue such a party as herein done. In the alleged criminal proceedings before the magistrates' court in 2001, Francis Kivuli was one of the accused. Still, there is nothing to demonstrate that he was a proprietor of the company to justify the petition against him. The petitioners have not tried to lift the corporate veil to file claims against the company directors as held in *Ansari v Capcom Limited & another* [2014] eKLR. The petition should be dismissed with costs to the 2d respondent.
13. The 3rd respondent submitted that the 4th respondent, the employer, ceased to exist as a legal entity in 2000 after undergoing receivership through Gazette Notice No. 1969. In this event, the company directors ceased their roles, which were bestowed upon the receiver manager. Any unpaid salary arrears would arise against the receiver manager at the time.
14. The petition admits that the fourth respondent underwent challenges and could not pay salaries, necessitating the Labour Officer to charge the directors in Mombasa Criminal Case No. 444 of 2001. A ruling delivered on 19 December 2001 confirmed that the 3rd respondent was placed under receivership on 4 April 2000, and salary arrears should be referred to the official receiver. The petitioners did not cause a claim to be filed as directed.
15. Filing the petition over a matter that arose in 2000 is time-barred. The relationship between the petitioners and 3rd respondent was that of an employer-employee. They had 3 years to file their claim under section 90 of the Act. Even in a case regulated under section 4(1) of the *Limitation of Actions Act*, a claim that is 25 years old is filed out of time. It should have been filed within 6 years based on the employment contract or upon the petitioners seeking time to extend the time to file their claim out of time.
16. A claim or petition filed out of time denies the court jurisdiction. The petition must be dismissed with costs.
17. The petitioners submitted that the Respondents have grossly misinterpreted the provisions of Section 90 of the *Employment Act*, which limits the time to commence a normal claim for compensation brought by way of Statement of Claim. However, this is not the case in the current suit. This is a constitutional petition addressing infringement of fundamental rights and freedoms.



18. The right to file a suit for infringement of Constitutional labour rights is in addition to any other remedies available to such a complainant under the law. A complainant can pursue both remedies for breach of Constitutional rights and compensation under the *Employment Act*. In *Law Society of Kenya v Betty Sungura Nyabuto & 2 Others* (2012) eKLR, the court held that the right to lodge the petition under section 84(1) of *the Constitution* is without prejudice to any other cause of action available to a party. Articles 20 (1) & (2), as read together with Article 260, empower any aggrieved person to institute a claim for breach of fundamental freedoms and rights against government and private persons.
19. In *Mike Rubia & another v Moses Mwangi & 2 others* [2014] eKLR, the court held that breach of constitutional freedoms and rights is also enforceable against private persons. The Bill of Rights applies to all persons and binds everybody. However, the nature and extent of a particular right may be limited in scope to apply to the state and not a private individual.
20. Under Rule 5 (b) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, a petition cannot be lost due to a party's misjoinder or non-joinder. Upon the dissolution of the third respondent company, as the employer, the court dealing with the issue in dispute can remedy the situation. In the case of *Football Kenya Federation v Kenyan Premier League Limited & 4 others* [2015] eKLR, a suit filed against an unincorporated entity was later amended to include the names of its Directors, with the unincorporated entity being added as the final party. The court was content that the amendment regularised the suit.

Determination

21. On the objections by the respondents, the issues which emerge for determination are;
 - a. Whether this is a proper petition;
 - b. Whether a petition can be filed against private persons;
 - c. Who should pay costs?
 22. The application and enforcement of the Bill of Rights against private persons and companies, of Article 2 (1) of *the Constitution*, states that *the Constitution* is the supreme law of the Republic and binds all persons and all State organs at both levels of government. Further, Article 20 of *the Constitution* states that: (ol style="list-style-type: none;"> - 1) The Bill of Rights applies to all law and binds all State organs and all persons.
 - 2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.
23. In the *Rose Wangui Mambo and 2 Others vs Limuru Country Club*, the court held that;

To accede to the respondents' proposition that private entities are insulated from the constitutional duty to respect and uphold fundamental rights, to hold that private entities are completely shrouded by their private cloak from this Court's scrutiny is we believe, to reverse the intention of the framers of *the Constitution*. It is to strip individual Kenyans of the very constitutional protection that *the Constitution* of Kenya 2010 meant to jealously guard and leave them exposed and vulnerable in private dealings. This would effectively render the constitutional protections of little or no practical value to the very persons designed to enjoy its protections and would, in our view, amount to abdication of this Court's primary responsibility conferred upon it by the people of Kenya.



24. This position is addressed at length in the case of Baobab Beach Resort and Spa Limited v Duncan Muriuki Kaguuru & another [2017] KECA 192 (KLR). The court held that the issue(s) at hand in a given case should be ascertained when and in what circumstances the provisions of *the Constitution* should be invoked horizontally against private citizens or companies.
25. Therefore, if a civil or criminal matter can be decided on the basis of existing legislation or an alternative remedy without invoking the constitutional provisions as the foundation of the suit, then such an alternative course of action should be adopted instead.
26. In employment claims, the court in Sumayya Athmani Hassan v Paul Masinde Simidi & another [2019] KECA 107 (KLR), held that the claim from the employment relationship premised on the violation of constitutional rights and alleged unfair labour practices is addressed under the *Employment Act* or the *Labour Relations Act*. A claimant cannot rely directly on *the Constitution* without challenging the *Employment Act* or the *Labour Relations Act*, which had been enacted to give effect to the right of fair labour practices. A proper petition would therefore only arise where the applicable law was not sufficiently provided in the given case. See Judicial Service Commission v Ndururi [2021] KECA 365 (KLR).
27. The petitioners claim to be former employees of the 4th respondent and claim to be owed unpaid salaries from 2000. The cause of action arose then, and any claim(s) were regulated under the repealed *Employment Act*. Under the contract of service, section 4(1) of the *Limitation of Actions Act* allowed them 6 years to file their claims, and where they found themselves out of time to file suit, the applicable law allowed them to seek leave for a time extension.
28. This is 25 years later. The petitioners did not file any claim against any of the respondents within 6 years, and no leave was obtained to file suit out of time.
- The petition cannot be urged as couched.
29. On whether this is a proper petition, the 1st respondent relied on the case of Butali Sugar Mills v Shari & Another ELRCA E029 of 2022 [2023] eKLR, to assert that under Order 8 rule 3(2) of the Civil Procedure Rules, leave was required to file the amended statement of claim at the magistrates court to extend time to file a claim. However, employment claims filed before this court and the magistrates' courts are governed under the *Employment and Labour Relations Court Act* and the Rules thereto, the Employment and Labour Relations Court (Procedure) Rules (the Rules). Section 89 of the Act (previously section 90) is couched in mandatory terms. Employment claims must be lodged with the court or the magistrate's court within 3 years from the date the cause of action arose. There is no discretion to extend time. This position in the case of Mitei v National Social Security Fund Board of Trustees [2022] KECA 974 (KLR) that;
- ... in the case of actions based on breach of contract of service or arising out of the *Employment Act*, no court may or shall have the right or power to entertain what cannot be done, namely, an action that is brought in contract, six years after the cause of action arose or any application to extend such time for the bringing of the action.
30. In the case of Maria Machocho v Total Kenya Limited [2013] KEELRC 577 (KLR), the court appreciated that, unlike commercial disputes, employment claims are premised under the *Employment Act*, under which a claim must be lodged within 3 years from the date the cause of action arose. See Kazungu v Kenya Ports Authority [2025] KEELRC 982 (KLR). And in the case of Kenya Plantation & Agricultural Workers Union v Kensalt Limited & Salt Manufacturers (K) Ltd [2015] KEELRC 936



(KLR), the court reiterated that under Section 89 of the Act the Court has no jurisdiction to extend time or grant leave to commence action outside the prescribed limitation time.

31. The time to file an employment claim has passed and cannot be extended by filing a petition. Under section 89 of the Act, a claim seeking to assert employment and labour relations claims must be addressed within 3 years from the date the cause of action arose. Even in a case where the petition was proper, which is not the case here, filing a petition and not a Memorandum of Claim cannot cure the time limit, as held in *Thuita Mwangi v Attorney General & 2 others* [2021] KEELRC 1467 (KLR).
32. This is not a proper petition. The petition was filed out of time, and the orders sought cannot be issued. This denies the court jurisdiction to hear and determine the matter. Without jurisdiction, addressing the issues outlined would be purely academic.
33. Without jurisdiction, the court must put down its tools. The petition is fatally defective and hence dismissed with costs to the respondents.

DELIVERED IN OPEN COURT AT MOMBASA THIS 30TH DAY OF APRIL 2025

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

