



REPUBLIC OF KENYA



**Musau v Attorney General & 3 others (Petition E027 of 2022)  
[2024] KEELRC 304 (KLR) (20 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 304 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E027 OF 2022  
JK GAKERI, J  
FEBRUARY 20, 2024**

**BETWEEN**

**JOSEPH MULWA MUSAU ..... CLAIMANT**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**DEFENCE COUNCIL OF KENYA DEFENCE FORCES ..... 2<sup>ND</sup> RESPONDENT**

**COMMISSIONER GENERAL OF PRISONS ..... 3<sup>RD</sup> RESPONDENT**

**PUBLIC SERVICE COMMISSION ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. Before the court for determination is the 2<sup>nd</sup> Respondent's Notice of Preliminary Objection dated 14<sup>th</sup> November, 2023 praying for dismissal of the instant Petition on the premises that;
  1. The Honourable Court lacks jurisdiction under the law to hear and determine the petition as it is time barred pursuant to Section 3(2) of the *Public Authorities Limitations Act* Cap 39 Laws of Kenya the substratum thereof having been filed outside the provided time limit.
  2. The Honourable Court lacks jurisdiction to hear and determine the petition as filed as the subject matter of the case does not fall within its jurisdiction.
  3. The Petitioner is attempting to circumvent the law on Limitation of Actions by relying on constitutional provisions having realized that the matter is statute barred under the Parent Acts which give effect to constitutional rights.
  4. The petition herein as filed does not meet the threshold of a constitutional petition.



5. The petition is bad in law, malafides, frivolous, vexatious and amounts to gross abuse of court process.
2. The Petitioner did not respond to the Notice of Preliminary Objection by way of grounds of opposition or otherwise.

## **2<sup>nd</sup> Respondent's written submissions**

3. Counsel submitted on whether the Petitioner's petition is statute barred under the *Public Authorities Limitation Act*.
4. Reliance was made on Section 3(2) of the *Public Authorities Limitations Act* which prohibits actions based on contract against the Government or Local Authority after 3 years from date of accrual of the cause of action.
5. Counsel submitted that limitation of actions was a jurisdictional issue and as the Petitioner's action is statute barred and the court lacks jurisdiction to entertain it.
6. Reliance was made on the sentiments of the court in *Bosire Ogero v Royal Media Services* (2015) eKLR underscoring the essence of the law of limitation of actions.
7. Counsel urged that as the cause of action arose in 1982, and the suit was filed over 40 years ago, the doctrine of laches is a relevant consideration in determining whether the court has jurisdiction to hear the case.
8. Further, reliance was made on the sentiments of the court in *Edward Akong'o Oyugi & 2 others v Attorney General* (2019) eKLR, where the court considered whether a delay of 5 years after the 2010 Constitution was unreasonable and found that the delay had been sufficiently explained.
9. Counsel urged that in the instant suit, the Petitioner had not provided any reason for the delay in the petition in the Supporting Affidavit.
10. Counsel invited the court to take judicial notice of the fact that the petition herein will be prejudicial to the Respondent's on account of the long delay as the actors who would have been relied upon as witnesses have since left service and thus unavailable as witnesses.
11. Reliance was made on the Court of Appeal decision in *Wellington Nzioka Kioko v Attorney General* (2018) eKLR, where the Court of Appeal upheld the High Court decision of dismissing the petition on account of unexplained 30 years delay in filing the suit.
12. In *Daniel Kibet Mutai & 9 others v Attorney General* (2019) eKLR, the Court of Appeal upheld the dismissal of a petition on account of inordinate delay.
13. Finally, counsel urged that the Petitioner had not explained the reason(s) for the 40 year delay in filing the petition.
14. That the Petitioner's claim is one of unfair termination and is only using the petition route to breath life into an otherwise statute barred suit.
15. Counsel invited the court to find that the petition herein is statute barred and the inordinate delay would occasion miscarriage of justice and ought to be struck out.



## Petitioner's submissions

16. By 26<sup>th</sup> January, 2024 when the court retired to prepare this ruling, the Petitioner had not filed submissions.

## Determination

17. The issues for determination are;
- i. Whether the 2<sup>nd</sup> Respondent has a competent Preliminary Objection and
  - ii. Whether the 2<sup>nd</sup> Respondent's Preliminary Objection is merited.
18. On the competency of the Notice of Preliminary Objection, the 2<sup>nd</sup> Respondent cites 5 issues, with the 1<sup>st</sup> two touching on the jurisdiction of the court while the 3<sup>rd</sup> faults the route taken by the Petitioner.
19. The locus classicus exposition of what constitutes a Preliminary Objection is that of the Court of Appeal in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 where Law JA stated;
- “... a Preliminary Objection consists of a pure point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer dispute to arbitration.”
20. According to Sir Charles Newbold V. P;
- “A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”
21. The foregoing sentiments capture the basis of the 2<sup>nd</sup> Respondent's Preliminary Objection namely; jurisdiction of the court to hear and determine the suit.
22. It requires no gainsaying that limitation of actions is a jurisdictional issue as a court of law has no jurisdiction to hear and determine a statute barred suit.
23. Similarly, jurisdiction is one of the three examples provided by Law JA in the *Mukisa Biscuits Manufacturing case (Supra)*.
24. In the circumstances, the court is satisfied that the 2<sup>nd</sup> Respondent's Notice of Preliminary Objection meets the threshold of a Preliminary Objection.
25. It is common ground that a Preliminary Objection raises a threshold issue which must be determined before the hearing and determination of the suit as it has the potential to dispose of the suit at that stage.
26. The 2<sup>nd</sup> Respondent argues that as the Petitioner's case is essentially an employment matter, the court has no jurisdiction on account of the [Public Authorities Limitation Act](#), 1974 whose Section 3(2) provides that;

No proceedings founded on contract shall be brought against the Government or a Local Authority after the end of three years from the date on which the cause of action accrued.



27. Similarly, Section 2(2) of the Act provides;  
For purposes of this Act –
- a. Proceedings against the Government includes proceedings against the Attorney General or any Government department or any public officers as such.
28. It is not in dispute that the cause of action herein arose in 1982 and the instant petition was filed in early 2022, about 40 years later.
29. The operative legal framework at the time was the Constitution of Kenya No. 5 of 1969, Limitation of Actions Act and the Public Authorities Limitation of Actions, 1974.
30. Judicial authority is unambiguous that limitation of time does not apply to the enforcement of fundamental rights and freedoms unless the court finds the delay inordinate and unexplained.
31. The Petitioner is essentially challenging his dismissal from the armed forces.
32. The Petitioner alleges that he was released on 12<sup>th</sup> March, 1983 and was not paid from 1<sup>st</sup> August, 1982 to 14<sup>th</sup> March, 1983.
33. Other than the averments and the Supporting Affidavit, the Petitioner has not attached any other document save for the national identity card.
34. The documents identified on the list of documents dated 15<sup>th</sup> February, 2022 were not filed.
35. More significantly, the Petitioner makes no reference as to why the instant petition was filed almost 40 years after the cause of action accrued and about 14 years after the Constitution of Kenya, 2010 was promulgated.
36. Relatedly, the Employment and Labour Relations Court did not exist in 1982.
37. As explained in Bosire Ogero v Royal Media Services (Supra),
- “The law of limitation of action is intended to bar the plaintiffs from instituting claims that are stale and aimed at protecting defendants against unreasonable delay in bringing of suits against them. The issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same. And even if the issue of limitation is not raised by a party to the proceedings, since it is a jurisdictional issue, the court cannot entertain a suit which it has no jurisdiction over. See the case of Pauline Wanjiru Thuo v David Mutegi Njuru CA 2778 of 1998. It is for this reason that the issue of jurisdiction must be raised at the earliest opportunity. As has been severally held, jurisdiction is everything, without which, a court of law downs its tools in respect of a matter before it the moment it holds the opinion that it is without it. (See Owners of Motor Vessel “Lillian S” V Caltex Oil (Kenya) Ltd (1989) KLI per Nyarangi JA) . . .”
38. The 2<sup>nd</sup> Respondent submitted that this petition will be prejudicial to it owing to the Petitioner’s inordinate delay and in particular in relation to the evidence to rebut the Petitioner’s allegations.
39. In Akong’o Oyugi & 2 others v Attorney General (Supra), the court was categorical that;
- “To invoke laches, the delay by the opposing party in initiating the lawsuit must be unreasonable and the unreasonable delay must prejudice the defendant. Examples of such prejudice; evidence favourable to the defendant becoming lost or degraded, witness



favourable to the defendant dying or losing their memories, the defendant making economic decisions that it would not have done had the lawsuit been filed earlier. . .”

40. Relatedly, although the decisions in *Wamabiu Kiboro Wambugu v Attorney General* Petition No. 468 of 2014, *Mugo Theuri v Attorney General*, *Ochieng Kenneth Kogutu v Kenyatta University & 2 others* Petition No. 306 of 2012 and others held that there is no time limitation of constitutional petitions, the delay in filing the same must not be inordinate and must be explained plausibly.
41. The Petitioner herein has neither annexed any document nor explained the inordinate delay of about 40 years since the cause of action arose.
42. As held in *James Kanyita Nderitu v Attorney General & another*, Pet No. 180 of 2011;

“ . . . Just as a Petitioner is entitled to enforce its fundamental rights and freedoms, a Respondent must have reasonable expectation that such claims are prosecuted within a reasonable time.”
43. It would nothing less than overstretching imagination to deem or consider 4 decades reasonable time.
44. The foregoing notwithstanding, the 2<sup>nd</sup> Respondent’s Preliminary Objection seeks the exercise of this court’s jurisdiction based on the long delay which ought not be exercised at this stage.
45. Finally, as regards the route employed by the Petitioner, the 2<sup>nd</sup> Respondent urges that the petition herein does not meet the threshold of a constitution petition.
46. The threshold of a constitutional petition was laid down in *Anarita Karimi Njeru v Republic* (1979) eKLR, where Trevelyn and Hancox JJ stated as follows;

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.”
47. (See also *Kiambu County Tenants Welfare Association v Attorney General & another* (2017) eKLR).
48. The Petitioner mentions Section 74(1) and 72(3) of the *Constitution* of Kenya, 1969 without setting out the nature of the alleged infringement and the extent as required by the rule in Anarita’s case (*Supra*).
49. Flowing from the foregoing, the court is persuaded that it has jurisdiction to hear and determine the instant petition.
50. Parties shall bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20<sup>TH</sup> DAY OF FEBRUARY 2024**

**DR. JACOB GAKERI**

**JUDGE**

**Order**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions



of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

