



**Makungu & another v National Police Service Commission & 4 others; Chairperson
the Commission on Administrative of Justice (Interested Party) (Petition
E043 of 2024) [2024] KEELRC 13446 (KLR) (18 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13446 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E043 OF 2024**

JK GAKERI, J

DECEMBER 18, 2024

**IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 25, 28, 41(1),
47(1&2), 48, 50, 162(A) AND 258 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLES 25, 28, 41(1&2),
47(1&2) AND 50(1) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF RULES 4, 10, 11, 13 AND 20 OF THE CONSTITUTION
OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL)
HIGH COURT PRACTICE AND PROCEDURE RULES 2013**

AND

**IN THE MATTER OF SECTIONS 4(6) OF THE NATIONAL POLICE SERVICE
COMMISSION ACT NO. 30 OF 2011 (SUBSIDIARY LEGISLATIONS)**

AND

IN THE MATTER OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF SECTION 41 AND 45 OF EMPLOYMENT ACT

BETWEEN

RASHID S MAKUNGU 1ST PETITIONER

ARNOLD MUDI LUVUTSE 2ND PETITIONER

AND



NATIONAL POLICE SERVICE COMMISSION 1ST RESPONDENT
INSPECTOR GENERAL OF NATIONAL POLICE SERVICE . 2ND RESPONDENT
DEPUTY INSPECTOR GENERAL OF ADMINISTRATION POLICE
SERVICE 3RD RESPONDENT
COUNTY COMMANDER GARISSA COUNTY 4TH RESPONDENT
ATTORNEY GENERAL 5TH RESPONDENT

AND

THE CHAIRPERSON THE COMMISSION ON ADMINISTRATIVE OF
JUSTICE INTERESTED PARTY

RULING

1. The Petitioners herein filed a petition of 16th September, 2024 challenging their dismissal by the respondents vide letters dated 28th April, 2007 on account of having been found guilty of failing to prevent a felony in Criminal Case No. 115 of 2007 on 28th April, 2008 and were fined Kshs.20,000.00 or one (1) year jail term.
2. The Petitioners case is that their appeal to the High Court was successful on 14th October, 2012 when their conviction was set aside.
3. It is their case that attempts to be reinstated have fallen through. The Petitioners seek a myriad of reliefs not less than thirteen (13) in number including reinstatement, mandamus, certiorari, compensation and general damages among others.
4. This is the petition being objected to by the 1st, 2nd, 3rd, 4th and 5th respondents vide Notices of Preliminary Objection dated 11th November and 24th October, respectively.
5. Whereas the 2nd, 3rd, 4th and 5th respondents argue that the Petition offends Section 4(1) of the *Limitation of Actions Act* and Section 90 of the *Employment Act*, the 1st respondent argues that the suit is statute barred and reinstatement cannot issue after 3 years, and the Petitioners were dismissed before the 1st respondent was established, institutionalized and operationalised and had not demonstrated how the 1st respondent violated their rights.
6. As both notices challenge the Petition on limitation as the cardinal basis of the objection, they will be dealt with simultaneously.

1st Respondent's submission

7. Counsel argues that since the Petitioners were dismissed on 28th April, 2008 it was the date of accrual of the cause of action as held in *James Mugeria Igati V Public Service Commission* [2014] eKLR.
8. Reliance was made on the provisions of Section 3(2) of the Public Authorities Limitations Act on the 3 years rule and the decisions in *Gathoni V Kenya Co-operative Creameries Ltd* [1982] KLR 104, *Analect Kalia Musau V Attorney General & 2 Others* [2020] eKLR, *Iga V Makerere University* [1972] EA 65, *Johnstone Ogechi Mose V National Police Service Commission* [2017] eKLR among others, to submit that the instant petition is statute barred as it was filed 16 years after the cause of action accrued.



9. As to whether the 1st respondent violated the Petitioner's rights, counsel cited the decision in Susan Waithera Kariuki & 4 Others V Town Clerk Nairobi City Council & 3 Others [2013] eKLR on the essentials of a constitutional petition alleging violation of rights or fundamental freedoms.
10. Counsel urges that the Petitioners were disguising an employment claim as a constitutional issue to by-pass the limitation period.
11. Concerning the suit being bad in law and lacking in merit, counsel cited the sentiments of the Court in Johstone Ogechi Mose (Supra) and Paul Ng'ang'a Nyaga & 2 Others V Attorney General & 3 Others [2013] eKLR among others to urge that suit herein is frivolous, bad in law and an abuse of the court process and lacks merit.

2nd, 3rd, 4th and 5th Respondents' submissions

12. As to whether the suit is time barred, counsel submits that the suit offends the provisions of Section 90 of the *Employment Act* and no leave to extend time had been sought prior to its filing as the dismissal took place more than 15 years and 11 months ago and cites the decision in Banking Insurance & Finance Union V Bank of India Cause No. 1201 of 2012 as well as the sentiments of the Court in Director Ltd V Samani [1995-1998] IEA 48, Fredrick Otieno Onono V Attorney General ELRC Misc. App. No. 99 of 2015 and the Court of Appeal decision in Attorney General & Another V Andrew Maina Githinji & Another [2016] eKLR.
13. The latter two decisions addressed the effect of a criminal case instituted before dismissal or thereafter.
14. Counsel submits that the criminal charges did not bar the Petitioners from filing a suit within the prescribed duration and the Court has no discretion to entertain the suit.

Petitioners submissions

15. On limitation, counsel submits that the Court should be guided by the sentiments of Onguto J in Telkom Kenya Ltd V Kenya Railways Corporation [2018] eKLR on acknowledgment of a statute barred debt and further cites Section 39 of the *Limitation of Actions Act* where time does not run on account of a contractual term or estoppel to urge that since the Petitioners' appeals are being heard by the 1st respondent, the Limitations of Actions Act or to other laws on limitation do not apply.
16. That the refusal to reinstate them was unconstitutional that the 1st Respondent breached the Petitioners right to fair administrative action as the Petitioner had a legitimate expectation that their appeals would be heard citing Kenya Revenue Authority V Export Trading Co. Ltd [2022] KESC 31(KLR) Kharey V Nothern Water Works Development Agency & Another [2024] eKLR to argue that exhaustion required the employee or other party to pursue all available means of redress before seeking the Courts intervention as held in William Odhiambo Ramogi & 3 Others V Attorney General & 4 Others [2020] eKLR.
17. Counsel urges that before the 1st respondent was established, the powers of appeal were vested in the Commissioner of Police and the function is now exercisable by the 1st respondent and cited the sentiments of Wasilwa J in Eric Sangura Nasoko V National Police Service Commission & 4 Others [2018] eKLR as well as Joseph Sitonik V Attorney General & Another [2012] eKLR.
18. Counsel further invited the Court to appreciate Article 25 of *the Constitution* of Kenya that the right to fair trial is a fundamental right that shall not be limited.
19. Finally, counsel urges that since the 1st respondent acknowledged the issue, limitation of time does not apply.



Analysis and determination

20. Having perused and considered the two Notices of Preliminary Objection and submissions by the parties, the only issue for determination is whether the two notices of Preliminary Objection are merited.
21. Since the two notices raise the issue of limitation of time which implicates the Courts jurisdiction to entertain the suit before it, and “jurisdiction is everything” as exquisitely captured by Nyarangi J A in Owners of the Motor Vessel “Lillian S” V Caltex Oil (Kenya) Ltd [1989], it is common ground that the two Notices of Preliminary Objection meet the threshold in Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd [1969] EA 696.
22. It is not in dispute that the Petitioners were employed as constables in the Administration Police effective 5th day of March, 2005 and were dismissed from employment effective 28th April, 2007 and took no steps until after their appeal was allowed on 14th October, 2012 and had indeed moved on as the 2nd Petitioner had even secured employment as an Assistant Chief but the Public Service Commission declined to formalise the employment as he had not disclosed the fact of having been an Administration Police Officer as both are employees of the government.
23. Even assuming that the dismissal took place on the date of conclusion of the criminal case, the provisions of Section 89 of the Employment Act which became operational on 2nd June, 2008 would not be applicable.
24. The only applicable statutory provisions at that time were those of the Limitation of Actions Act, Cap 22, Laws of Kenya and the Public Authorities Limitation Act, Cap 39, Laws of Kenya.
25. Section 3 of the Public Authorities Limitation Act provides that;
 1. No proceedings founded on tort shall be brought against the Government or a Local Authority after the end of twelve months from the date on which the cause of action accrued.
 2. 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.Section 4(a) of the Limitation of Actions Act provides that
 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

- 26 The Petitioners Counsel relied on the provisions of Section 39 of the Limitation of Actions Act to urge that on account of the 1st respondent’s acknowledgment, the limitation of time begun de novo.

However, it is unclear as to which provision of Section 39 of the Act counsel is relying on as none is specifically cited as the basis of the argument.

Be that as it may, counsel makes reference to the equitable doctrine of promissory estoppel which is based on conduct of one party where parties have a contractual relationship.

The doctrine was aptly captured by Lord Denning L. J. in *Combe V Combe* [1951] 2 K. B. 215 and applied in *Central London Property Trust Ltd V High Trees House Ltd* [1947] 1 K.B. 130 where parties had a tenancy or lease agreement at £2500 per annum, but during the downturn in the rental market in 1940 the lessor agreed in writing to lower the rent to £2500 per year but the duration was not agreed.



Thereafter, the lessors' demand for full rent in 1945 from 1940 failed on account of the doctrine of promissory estoppel.

In *Combe V Combe* (Supra) the parties were married and the promise to pay annual maintenance was made during the subsistence of the marriage but Mr. Combe refused to pay any maintenance after divorce.

Denning L.J. held that the doctrine of promissory estoppel could not apply as there was no consideration to support the promise.

Clearly, the doctrine of promissory estoppel does not apply outside a contractual relationship as it essentially qualifies the requirement of consideration in a contract as the party relying on it can only cite the promise or representation as no consideration has been provided.

The doctrine is defensive not offensive and can only be used as a shield not as a sword.

The petitioners' have not stated when any promise was made and by whom let alone the existence of a contractual relationship between them and the alleged promisor.

Even assuming that the provisions of the *Limitation of Actions Act* was the applicable law, in the Court's view, the doctrine of equitable or promissory estoppel cannot salvage the Petitioners case.

Noteworthy, while the *Limitation of Actions Act* was assented to on 19th April, 1968, the Public Authorities Limitation Act was assented to on 2nd May, 1974 and became operational on 1st July, 1974 and being the latter statute, its provisions are accorded more weight as they are intended to qualify the former.

- 27 The foregoing is fortified by the provisions of Section 6 of the Act on the application of the *Limitation of Actions Act* Cap 22.

Counsel for the Petitioner also raised the issue of exhaustion of internal mechanisms before invocation of the Court's jurisdiction.

It is trite law that neither internal dispute resolution processes nor alternative dispute resolution nor alternative justice systems can stop the running of time to seek judicial redress in a Court of law for the simple reason these are distinct dispute resolution processes governed by different parameters.

Be that as it may, counsel's argument that constitutional petitions are not subject to limitation of time to which other claims are subject to is significant as that is the legal position. See *Wamahiu Kihoro V Attorney General* Petition No. 468 of 2014, *Mugo Theuri V Attorney General* [2013] eKLR, *Ochieng Kenneth Kogutu V Kenyatta University & 2 Others* Petition No. 306 of 2012.

However, counsel for the 1st respondent submitted that the petitioners were using the petition route to avoid the fact that the action is statute barred as it is an employment dispute to all intents and purposes.

A cursory reading of the six (6) page Petition reveals that the only provision of *the Constitution* of Kenya cited as infringed is Article 47, right to fair administrative action. The instant Petition has no segment on its constitutional grounding which is typical in cases filed as Petitions.

- 28 There is no dispute that the Petitioners filed the instant Petition late in the day having been dismissed more than 15 years ago and took no steps even after their conviction was quashed in 2012 and have not explained the inordinate delay in seeking judicial redress.

The purpose of the law of limitations is to ensure that court cases are heard and determined as and when they arise when memories of witnesses is still fresh, documentary evidence still available or traceable as are witnesses to testify in the case. Inordinate delays such as the one in this instance prejudices the



respondents and complicates administration, as held in *Akongo Oyugi & 2 Others V Attorney General* [2019] eKLR, where Court stated thus;

To invoke laches, the delay by the opposing party in initiating the law suit must be unreasonable and the unreasonable delay must prejudice the defendant. Examples of such prejudice include, 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...”

In *James Kanyita Nderitu V Attorney General*, Petition No. 180 of 2011 the Court expressed itself as follows:

Just as the 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”.

Similarly, in *Daniel Kibet Mutai & 90 Others V Attorney General* [2019] eKLR the Court of Appeal held that as the inordinate delay had not been explained, the suit had been properly dismissed.

The Court stated inter alia:

Delay is an anathema to fair trial which is one of the key fundamental rights to all litigants under Article 50 of *the Constitution*. Further, it would be an abuse of the court process and contrary to the constitutional principle espoused in Article 159: that requires justice to be administered without undue delay, to allow a party who alleges violation of constitutional rights, to bring their action after undue inordinate delay without any justifiable reason. For this reason, we find that the appellant’s action was properly dismissed”.

29 Finally, in *Bosire Ogero V Royal Media Service Ltd* [2015] eKLR the Court stated thus:

The law of limitation of actions is intended to bar the plaintiffs from instituting claims that are stale and aimed at protecting defendants against unreasonable delay in the bringing of suits against them. The issue of limitation goes to the jurisdiction of 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 vs David Mutegi Njuru CA 2778 of 1998*. It is for that 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 jurisdiction (see *Owners of Motor Vessel “Lillian S” vs Caltex Oil (k) Ltd (1989) KLR 1 Per Nyarangi JA...*”

30 In the instant case it is common ground the Petitioner’s dismissal from employment was communicated to them in April 2008 which may be taken as the date on which the cause action accrued.

31 Nothing prevented the Petitioners from filing a suit at any time after April 2008 notwithstanding the fact that they had an appeal before the High Court.

32 In any case, it is trite law that criminal proceedings is not a bar to the commencement of civil proceedings. See *Alex Odhiambo Omiti V Magnate Ventures Ltd* [2015] eKLR as well as the Court of Appeal decision in *Attorney General & Another V Andrew Maina Githinji & Another* [2016] eKLR as to when a cause of action arises.



- 33 Significantly, even in constitutional Petitions the Court must be satisfied that the undue and inordinate delay is justifiably explained failing which petition will be dismissed for want of jurisdiction.
- 34 In the instant case it would be nothing short of overstretching imagination to consider or deem more than 16 years anything but undue and inordinate delay.
- 35 Relatedly, and as adverted to elsewhere in this ruling, a reading of the instant Petition, which is exclusively an action challenging the dismissal of an employee leaves no space but to agree with the 1st Respondents' advocate that the Petition was instituted in an attempt to circuitously circumvent the law of limitation of actions, but in the court's view, the attempt is unsuccessful in this instance as the dispute before the court ought to have been instituted as a claim.
- 36 Moreover, as currently filed, the undue and inordinate delay has not been explained by both Petitioners.
- 37 The upshot of the foregoing is that the Court is satisfied that the 1st Respondent and the 2nd, 3rd, 4th and 5th respondent's Notices of Preliminary Objection that the instant petition is statute barred are merited.
- 38 Consequently, the Court hereby downs its tools and strikes out the Petition dated 25th April, 2024 for want of jurisdiction with no Orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 18TH DAY OF DECEMBER, 2024.

DR. JACOB GAKERI
JUDGE.

