



**Akinyi & 2 others (Suing on Behalf of 147 Retirees and Retrenchees of Kisumu County Council & Nyando County Council) v County Government of Kisumu (Petition E018 of 2022) [2023] KEELRC 298 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 298 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**  
**PETITION E018 OF 2022**  
**CN BAARI, J**  
**FEBRUARY 9, 2023**

**BETWEEN**

**GRACE OMONGE AKINYI ..... 1<sup>ST</sup> PETITIONER**

**TITUS OTIENDE ..... 2<sup>ND</sup> PETITIONER**

**MARCLIUD ODHIAMBO ..... 3<sup>RD</sup> PETITIONER**

**SUING ON BEHALF OF 147 RETIREES AND RETRENCHES OF KISUMU COUNTY COUNCIL & NYANDO COUNTY COUNCIL**

**AND**

**COUNTY GOVERNMENT OF KISUMU ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. Before court is a petition dated April 27, 2022, and filed on even date. The petition was lodged by three petitioners in form of a representative suit, on behalf of one hundred and forty-seven (147) other petitioners, seeking the following reliefs: -
  - a. A declaration that the respondent refusing and failing to pay the petitioners their dues upon retirement and respective retrenchments, is unlawful inhuman and cruel deprivation of the petitioners' means to a meaningful livelihood in violation of their fundamental right to life, human dignity and freedom from cruel and inhuman treatment and/or punishment guaranteed by sections 70(a), 71(1) and 74(1) of the former *Constitution* (now articles 26(1) and (3), 28 and 29(f) of the *Constitution* of Kenya, 2010) and article 6(1) of the *ICCPR* and article 11(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).



- b. A declaration that the conduct and actions of the respondent of failing to pay the petitioners their dues is unlawful and illegal in violation of the petitioners' fundamental rights to inherent human dignity, equal protection and benefit of the law, cruel, inhuman and/or degrading treatment or punishment contrary to sections 70(a), 73(1), 74(1) and 77 of the former Constitution (now articles 27(1), 28, 29(c) and (d) and 30(1) of the Constitution of Kenya, 2010).
  - c. A declaration that the respondents are in violation of article 47(1) and (2) of the Constitution of Kenya entitling the petitioner to a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
  - d. An order to do issue compelling the respondents to pay the petitioners the arrears and the dues owed.
  - e. An order for compensation and/or damages do issue against the respondent in lieu of arrears of layover allowances, unpaid salary, bonus and other benefits of which the petitioners are entitled to upon such retirement.
  - f. General damages for pain and suffering and loss of amenities.
  - g. In the alternative to (6) above, an order for the assessment of the quantum of damages and compensation to be paid by the respondent.
  - h. Cost of the petition.
2. The respondent entered appearance through the Office of the County Attorney, Kisumu. The respondent filed a notice of preliminary objection seeking to have the petition struck out on the ground that it is res judicata having raised issues which were substantially in contention in previous proceedings between the same parties being Industrial Court Cause No 6 of 2016 and Kisumu ELRC Cause No 46 of 2014, and which issues were determined by a court of competent jurisdiction.
  3. Parties sought to canvass the petition through written submissions. Both parties filed their submissions.

### **The Petitioners' Case**

3. The petitioners' case is that they were employees of Kisumu County Council and Nyando County Council which were created under the repealed provisions of the Local Government Act.
4. It is their case that upon repeal of the Local Government Act, and the promulgation of the new constitution, the claimants former employers were dissolved and their functions, liabilities and assets taken over by the respondent.
5. The petitioners' state that they worked for Kisumu County Council and Nyando County Council until they were either retired and/or retrenched. It is their case that at the time of their retirement and/or retrenchment, the petitioners were owed various sums of money and unpaid terminal dues.
6. The petitioners further states that prior to the retirement and retrenchment, they served their employers with dedication, loyalty and diligence.
7. The petitioners state that they have been negotiating with the respondent out of court to pay their dues and that on April 9, 2010, a special finance meeting was held where a resolution was passed that the Council budget for 2010/11 with revenue of Kshs 80,029,120, was approved by finance and general-purpose committee and adopted vide min 17/10, indicated that the petitioners were to be paid their money which was part of the 2010/2011 budget.



8. It is the petitioners' case that on the 6<sup>th</sup> day of December, 2010, the respondents sent out a notice that the petitioners forward their bank accounts for purposes of receiving the claimed dues, but which was never given to the petitioners even after forwarding their bank accounts.
9. The petitioners state that the respondents accepted liability and showed commitment to pay through various letters and correspondences but never paid the petitioners the dues owed to them.
10. The petitioners further case is that on the 1<sup>st</sup> day of March, 2013, the then Permanent Secretary, Ministry of Local Government, professor Karega Mutahi wrote a letter to the then clerk of the defunct county councils of Kisumu and Nyando, on behalf of the Central Government, acknowledged that the arrears owed to staff by the then County Council of Kisumu as arrears due to the retirees and retrenches were payable to them.
11. The petitioner avers that the respondent engaged them on an out of court settlement and agreed to pay them their dues but never paid them and the out of court negotiations failed.
12. The petitioners state that they filed miscellaneous application No 6 of 2015, at the Industrial Court at Kisumu praying for leave to file a suit out of time and that the unopposed application was dismissed.
13. The petitioners aver that the respondent is in blatant breach of the rules of natural justice for not according the petitioners respect of their natural rights and this relates to the petitioners averments that they worked for the respondent and their owed dues have never been paid denying them an opportunity to live a dignified life after retirement.
14. The petitioners aver that they will stand to suffer irreparable loss and great inconvenience if the respondent are not ordered to perform their constitutional and legal obligation.

### **The Petitioners' Submissions**

3. The petitioners submit that their petition is anchored on articles 26(1) & (3), 27, 28, 29 30 and 47 of the Constitution.
4. The petitioners submit that the actions of the respondent complained of contravened the right to protection from torture, inhuman and degrading treatment enshrined in article 28 and 29 of the Constitution.
5. The petitioners further submit that article 23 (3) of the Constitution provides for the jurisdiction of the High court to enforce fundamental rights and freedoms and that article 165(3)(a)(b)(d)(i)(ii) gives this court vast jurisdiction.

### **The Respondent's Submissions**

3. The respondent submits that matter raised in this petition are *res judicata* and this court lacks jurisdiction to revisit and determine the issues. It is the respondent's further submission that the petitioners have been on a fishing expedition as they have filed several class suits involving the same parties and the same issues for determination since 2009.
4. It is the respondent's submission that the petitioners filed the case of Titus Otiende & 2 others (suing on behalf of retirees & retrenches of Kisumu County Council & Nyando County Council) v County Government of Kisumu [2021] eKLR, where the same parties litigated under the same title and the same issues raised as those in this petition.
5. The respondent submits that again in the case of Joram Sire Malit & 199 others v Municipal Council of Kisumu & another [2015] EKLRC, a section of the petitioners herein moved court seeking for the same



orders as the ones sought for in the petition herein, Lady Justice Maureen Onyango gave a ruling on the same on March 19, 2015. Judgment was again issued in the matter on June 23, 2016, wherein the entire cause was dismissed save for an order that the respondents issue the claimants with certificate(s) of service. This was well noted by Justice Radido in *Joram Sire Malit & 199 others v Municipal Council of Kisumu & Kisumu Water & Sewerage Co Ltd* [2021] eKLR.

6. The respondents submit that the doctrine of res judicata ousts the jurisdiction of a court to try any suit or issue which has been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title.
7. The respondent urge the court to dismiss this suit with costs and to deter the petitioners from instituting the same suit by the same parties in future.

### Analysis and Determination

3. The issues that arise for determination are: -
  - i. Whether the petition violates the principle of Constitutional avoidance
  - ii. Whether the petition is res judicata
  - iii. Whether the petitioners are entitled to the remedies sought.

Whether the petition violates the principle of constitutional avoidance

3. The relief sought under this petition is an order for payment of terminal dues for retirees and persons who were retrenched from the service of the defunct county council of Kisumu and the County Council of Nyando, succeeded in title by the respondent herein.
4. In my view, a remedy such as that sought herein, would better be brought under a normal cause and not by way of a petition. An ordinary claim would allow the petitioners opportunity to produce documents and to testify in support of their case unlike when presented in form of a petition. In *Re Application by Babadur* [1986] LRC 297, the court had this to say on the doctrine of constitutional avoidance: -

“.....The Constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can found a claim under substantive law, the proper cause is to bring the claim under that and not under the Constitution.”

3. The Court of Appeal has also held severally that where a fundamental right is regulated by legislation, such legislation, and not the underlying constitutional right, becomes the primary means for giving effect to the constitutional rights. In *Daniel N. Mugendi v Kenyatta University & 3 others* [2013] eKLR, the court opined:

“.....Citing the case of *Alphonse Mwangemi Munga & others v African Safari Club Ltd* [2008] eKLR, the learned judge was persuaded that the Constitution had to be read together with other laws made by Parliament. It should not be so construed as to be disruptive of other laws in the administration of justice and that accordingly, parties should make use of the normal procedures under the various laws to pursue their remedies instead of all of them moving to the constitutional court and making constitutional issues of what is not. With all the foregoing, the learned judge concluded that the claim placed before her by the appellant was based on employment - a matter that should have instead been taken to the Industrial



Court which had constitutional and statutory jurisdiction over such matters and not the High Court in the form of a constitutional reference....”

3. It is my considered view that the remedies sought by the petitioners would have been sought under the Employment Act, 2007, and not the Constitution. In Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another [2016] eKLR the Court of Appeal emphasized that: -

“In employment matters, such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except to the extent that the terms are contrary to the law; or have been superseded by statute. Certainly, invoking the constitutional route in the circumstances of this case was misguided. The Constitution should not be turned into a thoroughfare for resolution of every kind of common grievance.”

3. I hold that the petition offends the doctrine of constitutional avoidance.

### **Whether the Petition is res judicata.**

3. The respondent’s contention is that the petition is *res judicata* for reason that the petitioners have filed several class suits involving the same parties and the same issues for determination since 2009.
4. The respondent cites the cases of Titus Otiende & 2 others (suing on behalf of retirees & retrenches of Kisumu County Council & Nyando County Council) v County Government of Kisumu [2021] eKLR and Joram Sire Malit & 199 others v Municipal Council of Kisumu & another [2015] EKLK as some of the cases filed by the petitioners on similar issues as those raised in this petition.
5. As correctly submitted by the respondent, judgment was rendered in Joram Sire Malit & 199 others v Municipal Council of Kisumu & another [2015] EKLK on June 23, 2016, where the entire cause was dismissed. A subsequent miscellaneous application seeking leave to file suit out of time on similar facts by same parties was also dismissed.
6. The petitioners now before this court, have dressed their claim in the form of a constitutional petition, which I strongly believe is only intended to escape the perils of the statute of limitation.
7. The principle of *res judicata* ousts the court’s jurisdiction to try any suit or issue which has been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title.
8. Substantively, the issues raised in this petition were in issue in the suits cited above, the suits were between the same parties as those in this petition, and the issues therein were heard and finally determined in the former suits by courts of competent jurisdiction.
9. Accordingly, I hold that the petition herein is res judicata.
10. In whole, I find the petition incompetent and is for dismissal. It is dismissed in its entirety.
11. Parties shall bear their own costs of the petition.
12. It is so ordered.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**CHRISTINE N. BAARI**  
**JUDGE**



**Appearance:**

**Ms. Aketch Present for the Petitioners**

**Mr. M.M. Omondi present for the Respondent**

**Christine Omollo- C/A**

