



**MCCarthy v Niras Africa Limited (Petition E062 of 2023)  
[2023] KEELRC 1787 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1787 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E062 OF 2023**

**B ONGAYA, J**

**JULY 24, 2023**

**IN THE MATTER OF ARTICLES 19, 20, 22, 23, 28, 30, 41, 43,  
47, 48, AND 259 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF THE VIOLATION OF THE RIGHT TO FAIR  
LABOUR PRACTICES AND ALL OTHER ATTENDANT RIGHTS AND  
THE DENIAL OF THE RIGHT TO FAIR ADMINISTRATIVE ACTION**

**BETWEEN**

**GERALD MCCARTHY ..... PETITIONER**

**AND**

**NIRAS AFRICA LIMITED ..... RESPONDENT**

**RULING**

1. The respondent has filed a notice of preliminary objection to the petition herein. The objection was filed through Jane Gachiga & Associates and is upon the following grounds:
  - a. The Court lacks jurisdiction to entertain, interrogate and determine the petition as the same is time barred the substratum thereof having been filed outside the provided time of limitation.
  - b. The petition does not meet the constitutional petition threshold because there are other remedies available.
  - c. The dispute is purely an employer-employee dispute and provisions of [Employment Act, 2007](#) are sufficient remedy.
  - d. The petition is filed outside the time of limitation in section 90 of the [Employment Act, 2007](#) and therefore the Court lacks jurisdiction.
  - e. The petition is bad in law, frivolous, vexatious and amounts to gross abuse of the court process.



2. Parties filed their respective submissions on the petition. It is submitted that the petition is based on a contract of employment which is pleaded for the petitioner to have been terminated on November 5, 2019 per exhibit GM-4. The three years of limitation therefore lapsed on November 5, 2022. The petition was filed belatedly on April 6, 2023 in a move to carefully circumvent section 90 of the Act. The petitioner does not deny the timelines as submitted for the respondent. It is submitted for the petitioner that instead the Court should consider, hear and determine the petition because it raises constitutional issues. The Court returns that while there may be no limitation of time to petition the Court to enforce a right or freedom, where the cause of action would be otherwise barred by reason of statutory time barring or inordinate delay like in the instant case, the petitioner must of necessity justify the belated filing of proceedings. That has not been done in the instant case which is clearly based on a contract of employment and the remedies prayed for in the petition relate to and are attached to the contract of service namely leave days and overtime, pay in lieu of notice, PAYE, NSSF, and NHIF deducted and not remitted, unfair termination per section 45 of the Act, and costs. It appears to the Court that while alleged constitutional violation of rights runs into the alleged unfairness of manner of implementation and the termination of the contract of service, such are matters that must be pursued by ordinary action and if belated by petition like in the instant case, the delay must be explained. The explanation was not made and the Court finds that indeed the cause of action in the petition is time barred. In other words, the Court returns that nothing stopped the petitioner from pursuing the blended constitutional and statutory remedies prior to the lapsing of the time of limitation under section 90 of the Act. To that extent the preliminary objection will succeed.
3. The objection that the petition misses to meet a threshold for a constitutional petition must fail. The petitioner has pleaded the facts and the violations and in absence of any other thing, there would be no basis to direct or require him to file an ordinary suit having opted to file the petition. In any event that would be a point requiring evidence to establish and therefore falling short of the threshold for a proper preliminary objection.
4. The Court returns that the petition is clearly circumventing or avoiding the time of limitation in section 90 of the Act and without justifiable cause in that regard and is liable to dismissal. In absence of a replying affidavit to rebut the petitioner's facts of the petition per his affidavit, he appears otherwise injured as per material on record and each party to bear own costs of the proceedings.

In conclusion the petition is hereby struck out with orders each party to bear own costs of the petition.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS MONDAY 24<sup>TH</sup> JULY, 2023.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

