



**Kwonyike v Chief of Defence Forces & 2 others (Employment and Labour Relations
Petition 52 of 2021) [2023] KEELRC 2708 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2708 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION 52 OF 2021
AN MWAURE, J
OCTOBER 27, 2023**

BETWEEN

MOSES MELIL KWONYIKE PETITIONER

AND

CHIEF OF DEFENCE FORCES 1ST RESPONDENT

KENYA ARMY COMMANDER 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. The Petitioner filed the petition herein dated 18th March 2021.

Petitioner's Case

2. The Petitioner avers that he is a former colonel of the Kenya Army working for the Kenya Defence Forces.
3. The Petitioner avers that on 15th March 2017 he was sent on assignment to the Republic of Sudan under movement instruction number DOD/pers/300/127/8 as a staff officer of African Union Mission-Sudan.
4. The Petitioner avers that the assignment was for a period of one year and was listed as unaccompanied meaning he would leave his family in Kenya while on assignment.
5. The Petitioner avers that upon departure, he was un procedurally removed from the payroll and all monies payable to him including salary and allowances were not paid from 26th December 2008 to February 2012.



6. The Petitioner avers that being a widower, his children were entitled to receive all allowances including housing allowances during the period which the Petitioner was on assignment as there was no other person to take care of the children in his absence.
7. The Petitioner avers that he initially served under the United Nations Hybrid Mission to Darfur and later spearheaded the Darfur Rebel factions peace negotiations in Sirte Libya as senior military advisor to the Joint Mediation Support Team (JMST) in Sirte, Libya and while there he was identified by the AU leadership to pioneer the Military Advisory liaison office in Juba, Sudan.
8. The Petitioner avers he was not given any housing by the AU Missions during his assignment as it had been listed as a non-family missions meaning he had to cater for his own housing while on the mission as well as his children back in Kenya while other persons on assignment on such missions received their full salaries while in Darfur and Juba.
9. The Petitioner avers that he was greatly inconvenienced by the actions of Kenya Defence Forces (KDF) and was unfairly treated and not compensated from his duty and subjected to degrading and discriminatory treatment.
10. The Petitioner avers that he was seconded to the AU Mission in Sudan as a KDF officer and was entitled to his salary and allowances as an officer of KDF also due to the fact that the assignment was only for one year and later increased to 37 months.
11. The Petitioner avers that despite informing the Respondent that his children would not be travelling with him and would be schooling in Nairobi, the Respondents failed, refused and/or neglected to pay his allowances.
12. The Petitioner avers that his children were discriminated upon as they were denied the right to housing and adequate provisions and their education was severely affected.
13. The Petitioner avers that the Armed Forces Pay and Allowances Regulations 2007 offends the provisions of the laws of Kenya that forbids changing an employee's terms of employment to his detriment.
14. The Petitioner avers that he had a right to legitimate expectation to be paid his salaries and allowances as provided in his contract since he was in active service.

Respondents' Case

15. In opposition, the Respondents filed a Replying Affidavit dated 27th March 2023 sworn by Major Daniel Mutunga Mutua, a Staff Officer II at the Defence Headquarters in charge of all records of KDF.
16. The Respondents aver that the Petitioner is misleading the court as the letter referenced in the petition is not instructive of the terms of his secondment to the AU for the period which he claims non-payment of salaries and allowances.
17. The Respondents aver that the aforesaid letter, Movement Instructions provided the terms of a one-year tour to Sudan which began on 8th May 2007 to 8th May 2008. The Petitioner was paid 2 days full rate subsistence allowance for staff officers as applicable to Sudan and 1-month reimbursement allowance in advance and AU reimbursement rate for the duration of the tour; which constituted salaries and allowances payable to the Petitioner and was duly paid to the Petitioner by the Ministry of Defence for the entire term of the tour.



18. The Respondents aver that upon his return in May 2008, the Petitioner received an offer for appointment to AU in August 2008 and he wrote to the 1st and 2nd Respondent seeking secondment.
19. The Respondents aver that it issued secondment instructions applicable to the period referenced by the Petitioner for which he claims non-payment of salaries and allowances that is 26th December 2008 to February 2012.
20. The Respondents aver that paragraph 3(b) of the secondment instructions provides that the Petitioner would be entitled to 1-day full rate subsistence allowance and 10 days ¼ rate subsistence allowance as applicable in Sudan and the instructions provides for cessation of the Petitioner's salaries and allowances with effect from 26th December 2008.
21. The Respondents aver that the aforesaid terms of payment are lawful and were made pursuant to the Armed Forces Pay and Allowances Regulations, 2007 ("the Regulations 2007") and the Armed Forces Standing Instructions on Subsistence Allowance for the Armed Forces Personnel, 2005 ("the Instructions 2005") which stipulate that military personnel on secondment to other organizations will not receive any salary and/or allowances from the Ministry of Defence.
22. The Respondents aver that as per AU contract, the Petitioner was entitled to a monthly lumpsum of USD 5,957.04 to be administered by the AU.
23. The Respondents aver that the payslips produced correspond with the dates prior to the Petitioner's secondment in the AU thus in tandem with the Defence Forces laws and regulations.
24. The Respondents aver that the Petitioner was seconded to the AU on his own request and sought several approvals for the renewal of the AU contract and extension of the date of his retirement all of which were graciously granted by the Respondent.
25. The Respondents aver that the Petitioner was a senior officer with knowledge on the terms governing his employment and was in receipt of the Secondment Instructions providing for cessation of his salary and allowances.
26. The Respondents denied it made changes to the Petitioner's terms of employment as the Instructions, 2005 and Regulations, 2007 were promulgated prior to his secondment and pursuant to Section 227 (e) of the Armed Forces Act (repealed) to govern all members of the Defence Forces and is currently in practice.
27. The Respondents aver that the Petitioner has not produced any evidence of any previous contracts and regimes guaranteed entitlement to payment of salaries and allowances while on secondment and he can neither claim legitimate expectation nor change of terms.
28. The Respondents aver that the Petitioner's averments in relation to his status as a widower and his children left in Kenya and their entitlement to housing is deceptive and lacks a legal basis as the Petitioner undertook secondment voluntarily, repeatedly and in full knowledge that the secondment was unaccompanied due to the nature of the task and he was not entitled to salaries and allowances.

Petitioner's Submissions

29. The Petitioner submitted that the Instructions, 2005 and Regulations, 2007 were made before the enactment of the [*Kenya Defence Forces Act*, 2012](#) which repealed the Armed Forces Act, 2009. The new Act does not recognize the two documents the same are null and void and have no legal validity.



30. The Petitioner submitted that the Respondent has not tendered any evidence to demonstrate existence of the regulations and there is no gazette notice in place pointing to its existence.
31. The Petitioner submitted that the provisions of the Armed Forces Pay and Allowances were contravened and the Petitioner and his children were discriminated upon contrary to the constitution as they were denied the right to housing and adequate provisions by listing him as non-family knowing he had a family.
32. The Petitioner submitted that the regulations were offensive to the provisions of the laws of Kenya that forbids changing terms of employment to his detriment and is discriminatory to officers who are single including the Petitioner who is a widower.

Respondent's Submissions

33. The Respondents submitted that the Petition emanates from a contractual obligation and there is no law, current or past requiring publication of the Regulations and Instructions or guaranteeing payment during secondment of KDF personnel.
34. The Respondents submitted that there was a change in regime governing secondment under the Kenya Defence Forces Act, 2012, the retroactive application of the same would have been unconstitutional as it impairs the obligations under contracts and divests vested rights.
35. The Respondents submitted that they complied with section 65 of the Evidence Act in relation to production of primary evidence by producing the original text of the Regulations and Instructions for inspection of the court and they are admissible in law.
36. The Respondents submitted that the petition and supporting documents contain allegations that are jumbled up with no evidence to back it up thus lacks the precision required in constitutional petitions, therefore, the Petitioner has not met the standard required for constitutional petitions.
37. The Respondents submitted the Petitioner failed to provide an explanation on the delay in the institution of its petition 10 years post occurrence of the alleged human rights contravention and the petitioner is guilty of inordinate delay under section 3 of the Public Authorities Act (Cap 39) which provides no proceedings founded on contract shall be brought against the government or local authority after the end of 3 years from the date on which the cause of action accrued.

Analysis and Determination

38. The issues for determination are:
 - a. Whether there was inordinate delay in filing the Petition and is the same time barred.
 - b. Whether the Petitioner and his children were discriminated upon by the Respondent?
 - c. Whether the Petitioner is entitled to the reliefs sought.
39. In *James Kanyita Nderitu vs. A.G and another*, Petition No. 180 of 2011 Majanja, J. expressed that:

“ Although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under section 84 of the constitution, is entitled to consider whether there has been inordinate delay in lodging the claim. The Court is obliged to consider whether justice will be served by permitting a respondent, whether an individual or the State in any of its manifestations, should be vexed by an otherwise stale claim. Just as a petitioner is entitled to enforce its fundamental



rights and freedoms, a respondent must have a reasonable expectation that such claims are prosecuted within a reasonable time.”

40. Section 90 of the *Employment Act*, 2007 provides thus;

“Notwithstanding the provisions section 4(1) of (cap.22) no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage with twelve months next after the cessation thereof.”

41. In *John Miriti Mbarire v Attorney General* [2014] eKLR the court observed and held:

“It is the Petitioner’s case that his claim is not founded on contract and cannot therefore be subject to limitation under the *Public Authorities Limitation Act*. Section 3 (1) and (2) of the Act provides as follows:

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.

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.

The Petitioner argues that because his claim is brought by way of a petition under *the Constitution*, then he is not bound by the provisions of limitation. In the submissions filed on his behalf, the Court was referred to several authorities on the point that actions for breach of fundamental rights and freedoms are not bound by limitation of time. While I fully agree with these authorities, I do not think that every action that is brought by way of a petition falls under this insulation.

In the case of *Kemrajh Harrikissoon Vs the Attorney General of Trinidad and Tobago* [1979] UKPC 3 the Court held that the value of the right for redress for breach of fundamental rights and freedoms is diminished when it is misused as a general substitute for the normal procedures for invoking judicial control of administrative action. I am persuaded that this is the correct interpretation of our jurisprudence even against the backdrop of the current Constitution which elevates labour rights to the Bill of Rights. I do not think that this elevation jettisons the applicable substantive and procedural law on employment and labour relations.

In view of the foregoing, the Court finds that the Petitioner’s claim is founded on contract and is therefore subject to limitation. According to the pleadings filed in Court, the Petitioner’s commission was terminated effective 5th August 1995 giving rise to the cause of action herein. Even taking the six year limitation period provided under the *Limitation of Actions Act*, the Petitioner’s claim is way out of time.”

42. This petition is based on the alleged non-payment of salaries and allowances from 26th December 2008 to February 2012. And the petition was filed 9 years later on 18th March 2021 without any reasonable explanation as to why the petition was not filed within the time frame provided under Section 90 of the *Employment Act* and Section 3 (1) and (2) of the *Public Authorities Limitation Act*.

43. Accordingly, this court holds that the petition is time barred and the Petitioner is guilty of inordinate delay.



44. On the second issue, the Petitioner submitted the Respondent's non-payment of his salary and allowances from December 2008 to 2012 was discriminatory.
45. It is the Respondent's submission that the Petitioner was procedurally and legally removed from KDF's payroll in accordance with movement instructions issued to the Petitioner which provided for cessation of the same from December 2008.
46. In the case of Rev. John Mugania versus Kenya Methodist university & Prof. Mutuma Mugambi, Cause No.133 of 2013 the court held that;

“... secondment refers to temporary leave of absence from service of the principal employer to serve any other employer as the parties may agree or may grant permission for such temporary absence. During the secondment, the person proceeding on secondment must conclude a valid contract of employment with such other employer. The employer during secondment is responsible, within the terms of the contract of employment, to meet the salary and other benefits of the person so seconded. The person on secondment is obligated to work for such employer and pay loyalty to the employer, within the terms of the contract, throughout the secondment period. The secondment transaction does not, in absence of an agreement to that effect, transfer to the employer, liabilities for pension of the person on secondment, unless this is expressly so stated prior to the secondment.”

47. The court is also persuaded by the case of David Barasa vs British Peace Support Team & Another [2016] eKLR that;

“A Secondment in its nature is where a principal employer with the consent of the employee concerned, second the employee to another department/agency or as the executing authority determines, accepting the employee in the same service for a particular service or for a period of time. Such an employee remains subject to the terms and conditions of any contract entered into with his consent including that of the principal employer as well as the rules and regulations of the employer where he is so placed.”

48. In view of the foregoing, the Petitioner clearly requested his employer herein to second him to the AU and accepted the terms of contract with the AU which had provided for his salary/compensation. The letter from the Respondents releasing him for secondment clearly provided he would receive an allowance and he would cease to pay the Petitioner's salary from December 2008 and the Petitioner accepted these terms wilfully as he has not demonstrated that he was forced and/or coerced to do so.
49. The letter of appointment dated 15th August 2008 clearly sets out the conditions of employment in Sudan and clearly he accepted the terms and did not raise any concerns. In October 2008 he applied for another opportunity to take challenge of being in the Juba secretariat. In other words, the petitioner was aware he was on secondment, he took the role willingly and without any coercion. In fact, he even requested for a subsequent secondment.
50. It is long after his secondment came to an end that he now raised these issues. This was a whole nine years later. The court finds there was no evidence at all and no proof that the respondent withheld the petitioner's salary or even discriminated against him. In any event the petitioner filed his petition way after the time limit ousting the jurisdiction of this court. The court finds the petition herein is not merited and is dismissed accordingly.
51. The parties will meet their respective costs of this petition.
Orders accordingly.



DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27TH DAY OF OCTOBER, 2023.

ANNA NGIBUINI MWAURE

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 15th March 2020 and subsequent directions of 21st 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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

