



**Ondunga v Kenya Defence Forces & another (Petition E70 of 2023)  
[2023] KEELRC 2952 (KLR) (20 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2952 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E70 OF 2023**

**B ONGAYA, J**

**NOVEMBER 20, 2023**

**(FORMERLY HIGH COURT PETITION NO. E87 OF 2023 AT MILIMANI)**

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS  
AND FREEDOMS UNDER ARTICLE 2(1), 3(1), 10, 19, 20, 22, 23(3), 24,25,  
29(D), 31,40,41,43, 47 AND 48 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION  
OF FUNDAMENTAL RIGHTS AND FREEDOMS) PRACTICE AND  
PROCEDURE RULES UNDER RULES 4,8,10,11,13,14,15,16,19,20,21,24 AND 26**

**AND**

**IN THE MATTER OF THE SECTION 52 OF THE ARMED  
FORCES ACT AND THE KENYA DEFENCE FORCES ACT**

**-AND-**

**IN THE MATTER OF SECTION 7(2)(C) AND (F) OF  
THE FAIR ADMINISTRATIVE OF ACTIONS ACT 2015**

**BETWEEN**

**ERICK OTIENO ONDUNGA ..... PETITIONER**

**AND**

**KENYA DEFENCE FORCES ..... 1<sup>ST</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**



## RULING

1. The petitioner filed the petition dated March 22, 2023 through Odera and Associates Advocates seeking the following orders:
  - a. A declaration that the petitioner's fundamental rights and freedoms as enshrined under articles 26,27, 28, 35, 43 and 47 of the Constitution of Kenya, 2010 have been contravened and infringed upon by the respondent and that the petitioner is entitled to payment of damages as compensation to be assessed by the court;
  - b. A declaration that the petitioner was maliciously prosecuted and damages for malicious prosecution are payable;
  - c. A declaration that the termination of the claimant's contract of employment was, unlawful, unprocedural and unfair for want of a valid reason and damages for unfair termination of employment are payable
  - d. An order compelling the 1<sup>st</sup> respondent amend the petitioner's green book with regards to the reason for leaving since his dismissal was unfair, unprocedural and unlawful;
  - e. Be paid a one (1) month's salary in lieu of notice, 12 months' pay for unlawful termination and payment of all outstanding dues and benefits from the date of unlawful termination thereof as follows or as the court deems fit and just in the circumstances;  
Basic salary at termination 20,459/- \* 12 months \* 11 years = Kshs 2,700, 588/- Leaf allowance Kshs 40,000/= \* 11 years = 440,000/= Total Amount claimed 2,700,599/= + 440,000/- 265,967/- = Kshs 3,406,555/- orAs at 2009 basic pay Kshs 34,897/= \* 12 months \* 11 years = Kshs 4,606,404 Leaf allowance of Kshs 40,000 \* 11 years = 440,000/= Total amount claimed 4,606,404/= + 440,000/= + 453,664/= Kshs 5,500,068/= orCurrent pay basic salary 45,000/=\*12 months \* 11 years = Kshs 5,940,000/- Leaf allowance 45,000/= \* 11 years = 450,000/= total amount claimed Kshs 5,940,000 + 495,000/= + 585,000/= Kshs 7,020,000/=
  - f. The respondent pays the petitioner's pension.
  - g. Costs of petition and interest at court rates until payment in full.
  - h. Any other relief that the honourable court may deem just to grant in the circumstances.
2. The respondent has in reply filed a Replying Affidavit of Major Edwin Kibiru Muta sworn on May 9, 2023 and through Special State counsel S.M Njoka for the office of the Attorney General.
3. The petitioner has since filed a Notice of Motion dated July 7, 2023 seeking the following orders;
  - a. That the applicant be granted leave to amend its petition as set out in the draft amended petitioner/applicant annexed thereto.
  - b. That the draft amended petition attached to the application be deemed as duly filed and served upon payment of requisite court fees.
  - c. Costs be in the cause.
4. The respondent/applicant has in reply filed a Preliminary Objection dated October 25, 2023.
5. The Preliminary Objection was made upon the following grounds:



- a. The honourable court lacks jurisdiction to hear and determine the petition by virtue of the claim being time-barred pursuant to section 3(2) of the *Public Authorities Limitations Act*, cap 39, Laws of Kenya.
  - b. That the petitioner is attempting to circumvent the law on limitation of actions by relying on the constitutional provisions having realized that the matter is statute barred under the parent Acts which give effect to constitutional rights.
  - c. That the petition is an abuse of court process
  - d. That the petition is incompetent, bad in law, *mala fides* and ought to be struck out with costs.
6. The court has considered the parties' respective cases and makes finding as follows.
7. The petitioner was terminated from the 1<sup>st</sup> respondent's service on February 8, 2011. He had been charged in criminal case No 434 of 2011 and acquitted on July 3, 2015 and he says he instructed Ombeta & Associates to file suit for malicious prosecution and unfair termination but failed to afford the legal fees for the services. It appears that the only reason the petitioner is moving the court belatedly is because he did not have fees to pursue the matter. The court considers the reason advanced not to be plausible especially that the said instructions to counsel appear to have been at a time when the time of limitation as urged for the respondent had long lapsed. The court finds that the cause of action is time barred as urged for the respondent and the petition is an abuse of court Process.

In conclusion the Notice of Preliminary Objection dated October 25, 2023 is hereby upheld and the petition herein dismissed with no orders on costs.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS MONDAY 20<sup>TH</sup> NOVEMBER, 2023.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

