



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO 102 OF 2016**

**IN THE MATTER OF ARTICLES 1,2,10,22,23,27,28,41,47,48,159 & 165 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 41 AND 47 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTION 22 OF THE LIMITATION OF ACTIONS ACT, LAWS OF KENYA**

**ELIUD MALENYA TSISICHE.....1<sup>ST</sup> PETITIONER**

**WYCLIFFE KHABELWA.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**KENYA RAILWAYS CORPORATION.....RESPONDENT**

**RULING**

1. This ruling relates to the Respondent's Preliminary Objection raised by notice dated 20<sup>th</sup> September 2021. The substance of the objection is that this suit is time barred and offends the statutory provisions of Section 90 of the Employment Act as well as Sections 4, 22 and 27 of the Limitation of Actions Act.
2. The Respondent therefore states that the Court lacks jurisdiction to entertain the suit.
3. The Petitioners filed their own objection to the Preliminary Objection dated 25<sup>th</sup> September 2021. They state that the Preliminary Objection is misconceived as it does not pass the test defined by the Court of Appeal in *Mukisa Biscuit Manufacturing Co. Limited v West End Distributors Limited [1969] EA, 696*.
4. The Petitioners further state that an objection based on the Limitation of Actions Act, Cap 22 of the Laws of Kenya must be pleaded in the defence. They add that the Respondent in this case has not pleaded the Limitation of Actions Act or Section 90 of the Employment Act and is therefore prevented from raising the Preliminary Objection.
5. The Petitioners contend that the Preliminary Objection raised by the Respondent does not go to the jurisdiction of the Court but rather to the competence of the suit and as such it can be dealt with during the hearing.
6. The Petitioners urge the Court to do justice to the parties, without resorting to technical objections that are merely intended to drive them from the seat of justice.
7. The Preliminary Objection was urged by way of written submissions. In their submissions dated 20<sup>th</sup> December 2021, the Petitioners refer to the decision in *George Ochieng Ododa & 173 others v Kenya Railways Corporation & another [2021] eKLR* where **Onyango J** held that unpaid terminal dues sought by the Claimants constituted a continuing injury, that had been acknowledged by the Respondent, and which was not time barred.

8. In its submissions dated 19<sup>th</sup> November 2021, the Respondent reiterates the following holding in **Mukisa Biscuit** (supra):

*“A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”*

9. The Respondent submits that the Petitioners have filed a Petition rather than a Statement of Claim, to escape the law on limitation.

10. Although the Petitioners’ plea is fashioned as a constitutional petition, a reading of the pleadings reveals that the Petitioners’ claims are for balance of severance pay and damages for wrongful loss of employment. These claims stem from the Petitioners’ early retirement in 2002. These claims are contractual in nature and ought to have been pursued through an ordinary claim.

11. In **Bernard Murage v Fineserve Africa Limited & 3 others [2015] eKLR Lenaola J** (as he then was) held as follows:

*“...not each and every violation of the law must be raised.....as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such statutory remedy should be pursued first.”*

12. In similar fashion **Mutungu J** in **Grays Jepkemoi Kiplagat v Zakayo Chepkonga Cheruiyot [2021] eKLR** stated thus:

*“...I agree that matters that do not call for the Court’s Constitutional interpretative mandate under the Bill of Rights provisions of the Constitution should not be disguised as Constitutional Petitions seeking enforcement of the Bill of Rights. There ought to be a clear delineation of constitutional matters and ordinary civil suits.”*

13. The Petitioners made no effort to demonstrate the constitutional underpinning of their Petition. I therefore find and hold that their claim was a straightforward employment matter that ought to have been brought under statute and the respective employment contracts.

14. The next question to ask is whether this claim is statute barred as submitted by the Respondent. According to the pleadings on record, the Petitioners’ claim arises from their retirement in 2002 and this is when the cause of action arose. The applicable limitation law is therefore Section 4(1) of the Limitation of Actions Act, which sets the time limit at six (6) years. Applying this law, the Petitioners’ claim filed in 2016, is way out time.

15. The Petitioners suggest that the issue of limitation is a technicality that is not fatal to their case. This notion has been debunked by the courts. In **Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR Kiage JA** stated the following:

*“... I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules.*

*I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned...”*

16. Limitation of time goes to the core of the matter and ousts the jurisdiction of the Court. It follows that the Petitioners’ claim filed in 2016 is statute barred and the Court has no jurisdiction to entertain it. The Petition is consequently struck out.

17. Each party will bear their own costs.

18. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 24<sup>TH</sup> DAY OF MARCH 2022**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Njiru for the Petitioners

Miss Aluoch for the Respondent