



Bwonda & 11 Others v Lake Basin Development Authority (Petition E050 of 2021) [2022] KEELRC 1523 (KLR) (16 June 2022) (Ruling)

Neutral citation: [2022] KEELRC 1523 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E050 OF 2021
CN BAARI, J
JUNE 16, 2022

BETWEEN
JUSTUS MATARA BWONDA & 11 OTHERS PETITIONER
AND
LAKE BASIN DEVELOPMENT AUTHORITY RESPONDENT

RULING

1. At the heart of this ruling is the Respondent's Preliminary Objection dated 11th February, 2022. The Respondent's objection to the petition is premised on the grounds that;
 - i. The pleadings as filed are fatally defective for reason that they offend the Provisions of Order 1 Rule 13(1) and (2) of the *Civil Procedure Rules*.
 - ii. That the Petition does not meet the threshold set out in *Anarita Karimi Njeru v Republic* [1979] b1 KLR 154 reiterated by the Court of Appeal in *Mumo Matemu v Trusted Society of Human rights Alliance*, Civil Appeal No. 290 of 2012, for having failed to specifically demonstrate with reasonable precision the manner in which the Respondents has violated their Constitutional rights.
 - iii. That the claim by the Petitioners arises from a contractual relationship between an employer and employees, and as such the limitation of Actions Act provides that one may not bring forth a claim arising from a contract after the lapse of six years.
2. The Objection was heard on 29th March 2022.
3. It is the Respondent's position that the petition offends Order 1 Rule 13(1) & (2) of the Civil Procedure Rules, as the 1st Petitioner has not annexed written authority from the other Petitioners allowing him to file the petition on their behalf. Order 1 Rule 13 of the Civil Procedure Rules makes it a



mandatory requirement for any party appearing, acting or pleading for any other party in a proceeding to have written authority from the said party to appear, act or plead for them.

4. The Respondent avers that no authority has been filed in this respect to enable 1st Petitioner file the petition on behalf of his Co-Petitioners rendering the suit fatally defective. The Respondent had reliance in the case of *Kahindi Katana Mwambo & Another vs Canon Assurance (K) Ltd* – Paragraph 6, 8, 17, 19 and 20 -20 – for the holding that “in the absence of authority, suit is null and void”.
5. The Respondent’s further assertion is that the petition does not meet the principles set out in *Anarita Karimi Njeru v Republic* [1979] b1 KLR 154 and *Mumo Matemu v Trusted Society of Human rights Alliance*, Civil Appeal No. 290 of 2012 for reason that the Petitioners have failed to specifically demonstrate with reasonable precision the manner in which the Respondent has violated their Constitutional rights. The Respondent contend that no single recital of the respective Constitutional provisions said to have been violated has been given.
6. It is the Respondent’s further assertion that the Petition herein is res judicata by the Petitioners’ own admission that they had filled an earlier claim wherein, a judgment had been delivered concerning the same subject matter (pension) as in the instant petition. It is the Respondent’s case that the parties in that earlier suit are the same, and so is the subject matter, and which matter was substantively adjudicated by a court of competent jurisdiction and that no appeal was filed against the decision of the court.
7. The Respondent avers that the awards resulting from the previous suits were all satisfied by them, and that the retrenchment packages given to the Petitioners were never challenged. The Respondent sought to rely on the decision in the case of *Accredo Ltd vs Stefano* (2018) eKLR where the Court of Appeal indicated that for a matter to be brought within the purview of Res Judicata, it must be established that: the suit in issue was directly in issue in the current suit; the former suit was between the same parties; that parties were litigating under same title and that the issue was heard and finally determined in the former suit. The Respondent contend that the Petitioners have admitted this being the case
8. The Respondent finally submits that the issue between the parties herein arises from a contractual relationship, which is an employment contract. The Respondent further submits that the Petitioners were retrenched between the years 2002 and 2007 and hence their petition is barred by the Limitation of Actions Act.
9. The Petitioners returned by submitting that the Preliminary Objection is misconceived and unfounded. They argue that although it is true that there is no signed authority allowing the 1st Petitioner to plead on behalf of his Co-Petitioners, the issue of locus standi does not apply in Constitutional matters.
10. It is submitted for the Petitioners that Article 22(1) of *the Constitution* entitles every person the right to institute court process. It is further submitted that Article 22(6) allows the 1st Petitioner the right to institute court process acting as a member of a group like he has in the instant petition. It is argued that the Petitioners herein constitute such group or class of persons, all former employees of the Respondent who are aggrieved by their terminal benefits package. It is their case that issues of locus cannot stand in the way of justice.
11. The Petitioners submits that the issue of res judicata was equally raised in Miscellaneous Application No. 6 of 2018 and No. 7 of 2018, which objection was dismissed on the premise that the Judge was exercising supervisory jurisdiction under Article 165(6) of *the Constitution*. It is their further submission that this court is likewise being called upon to exercise supervisory jurisdiction, and hence the instant petition cannot be said to res judicata.



12. The Petitioners’ further submit that the Anarita Karimi case is not relevant to this petition and that the basis of the petition herein is violation of Article 27 of the Constitution.
13. It is submitted for the Petitioners that the limitation period in the matter subject of this petition is 12 years and therefore the limitation in this petition will fall in the year 2040. It is the Petitioners’ further submission that time does not start running from the time of the transgression but when it was remedied.
14. The Petitioner prays that the Preliminary Objection be dismissed with costs.

Analysis and Determination

15. I have considered the Preliminary Objection and the parties’ oral submissions. I will proceed to address each of the four grounds subject of the objection.

Whether the Petition offends Order 1 Rule 13(1) and (2) of the Civil Procedure Rules.

16. Order 1 Rule 13(1) and (2) of the Civil Procedure Rules states:

“(1)	Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.
(2)	The authority shall be in writing signed by the party giving it and shall be filed in the case.”

17. The Petitioners admitted that the 1st Petitioner did not file written authority from his Co-Petitioners authorizing him to file the petition on their behalf. The Petitioners further submitted that the lack of written authority is not fatal to the petition as this being a constitutional petition, it is the provisions of the Article 22(2) of the Constitution that apply and not the Civil Procedure Rules.
18. The question then become whether the Civil Procedure Rules are applicable to Constitutional Petitions. This question has largely been settled in various courts decisions. In Kitty Njiru v Nature & Style Fun Day Events & another; Rebecca Muriuki t/a Kabaari (Proposed third Party) [2020] eKLR, Justice Makau held that the provisions of Civil Procedure Rules are applicable to Constitutional Petitions.
19. Likewise, the Court of Appeal in Meme vs. Republic [2014] 1 EA 124; [2004] 1 KLR 637 held that at a very basic level the Court is empowered to draw from the Civil Procedure Rules in its exercise of powers under the Constitution of Kenya (Protection of Fundamental right and Freedoms of the Individual) Practice and Procedure Rules and by virtue of Order 1 Rule 10(2). Yet again in Karl Webner Claassen v Commissioner of Lands & 4 others [2019] eKLR, the Court of Appeal stated thus:

“ that there was nothing wrong in relying on the enabling provisions of the Civil Procedure Rules and the Civil Procedure Act”



20. It is my conclusion that contrary to the Petitioners’ assertions, the Civil Procedure Rules and the Civil Procedure Act are applicable to Constitutional petitions.
21. The next issue is whether the absence of the written authority is fatal to the petition herein.
22. Article 159(2)(d) of *the Constitution* calls upon this court to do justice to all, and do so without undue regard to procedural technicalities. Rule 5(a) of Mutunga Rules is clear that for the purposes of furthering the overriding objective under Rule 3 of the Mutunga Rules, the Court is required to handle all matters presented before it to achieve just determination of the proceedings.
23. In my view, the purpose of the Civil Procedure rules in Constitutional petitions is to bridge a gap and to pursue the ends of justice. In the instant petition, the provisions of Article 159(2)(d) and (e) of *the Constitution* supersede the provisions of Order 1 Rule 13. Consequently, I hold that the absence of the written authority is not fatal to the petition herein, and this ground of the Preliminary Objection fails.

The Principles in the Anarita Karimi Njeru Case

24. The Respondent seeks that the court strikes out the instant petition on the ground that it offends the principle of Constitutional avoidance for not setting out with a reasonable degree of precision the provisions infringed. The Petitioners’ only response in this regard, is that the principles set out in the Anarita Karimi case are not applicable to this petition on the basis that the petition has spelt out the constitutional violations upon which the petition is premised.
25. The only Constitutional provision said to have been infringed in the petition is Article 40, where the Petitioners state that the award made in Kisumu HCCC No. 156 of 2004, which they say also applied to them, constitutes property that had vested and which they stand to lose if not awarded. It is the Petitioners’ position that a similar award was also made in Kisumu CMCC No. 122 of 2007.
26. The award referred to by the Petitioners and which were awarded by the court in a final decision, was itemized and includes: severance pay, pay in lieu of notice, leave allowance, NSSF contribution, medical allowance, house allowances, leave allowances amongst others.
27. A look at the issues in the petition shows without a doubt that they are all employment issues that would have been resolved through a normal cause under the *Employment Act*. In the case of *Ministry of Health and another vs New Clicks SA PTY Limited & others* 2006 [L] JA 311 (CC) Ndolo, J. stated at paragraphs 437;

“Whereas *the Constitution* required Parliament to enact legislation to give effect to constitutional rights guaranteed under *the Constitution* and Parliament enacts such legislation, it will ordinarily be impermissible for a litigant to found a cause of action directly on *the Constitution* without alleging that the statute in question is deficient in the remedies that it provides. Legislation enacted by Parliament to give effect to a constitutional right ought not to be ignored. And where a litigant founds a cause of action on such legislation it is equally impermissible for a court to bypass the legislation and to decide the matter on the basis of the constitutional provision that is being given effect to by the legislation in question.”
28. The Court of Appeal also addressed the principle in the case of *Communications Commission of Kenya & others vs Royal Media Services Limited & 5 others* [2014] eKLR where it held that the principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis.



29. For the reasons foregone, I find and hold that the petition herein does not disclose a cause of action anchored on *the Constitution*. Consequently, the Preliminary Objection succeeds on this ground.

Res Judicata

30. The Respondent's assertion is that the Petition herein is res judicata by the Petitioners' own admission that they had filled earlier claims wherein, a judgment had been delivered concerning the same subject matter (pension) as in the instant petition. It is the Respondent's case that the parties in that earlier suit are the same, and so is the subject matter of the suit. It is the Respondent's further assertion that the case was determined by a court of competent jurisdiction and that no appeal was filed against the decision of the court.
31. The Petitioners in paragraph 23 of their petition state:
- “That the judgment and rulings of Justices Warsame, Nambuye and Chemitei in KisumuHCCC No. 156 of 2004, delivered in the same suit and therefore formed part of the same final decision and decree in determining the true and correct amount payable to the applicant thereunder.”
32. In paragraph 30 of the petition, the Petitioners states:
- “That this is the exact same prayer that all the humble petitioners herein had prayed for in their respective original plaint against the Respondent aforesaid.”
33. From the foregoing, it is clear that the issues in question in the previous suit were directly in issue in the current suit; the former suit was between the same parties, and that the issue was heard and finally determined in the former suit.
34. I find and hold that the petition herein is res judicata.

Limitation of Time

35. The Respondents position is that the petition herein is time barred on the basis that the issue between the parties herein arises from a contractual relationship, which is an employment contract. The Respondent further submits that the Petitioners were retrenched between the years 2002 and 2007 and hence their petition is barred by the Limitation of Actions Act.
36. The Petitioners' position is that the limitation period in the matter subject of this petition is 12 years, and therefore the limitation in this petition will fall in the year 2040. It is the Petitioners' further submission that time does not start running from the time of the transgression but when it was remedied.
37. The issues subject of this petition is retrenchment and payment of terminal benefits, which are issues arising out of an employment contract. The time limitation in employment contracts is governed under the provisions of Section 90 of the Employment, 2007. Contrary to the Respondent's submission that the time limit is six years, the limitation period in employment matter is three years.
38. It has now been settled that time starts running on the date of termination. In *Elinathan Kitiro Mwamburi v Telkom Kenya Limited* [2014] eKLR it was held that termination occurs once and



immediately it does, time starts running. Further, in *Peris Maina v Nairobi City Water & Sewerage Company Limited* [2018] eKLR Byram Ongaya J stated:

“As submitted for the Respondent, the administrative appeal proceedings did not postpone or adjourn the running of the time of limitation after the dismissal...”

39. The Petitioners were retrenched on various dates between the year 2002 and 2007. Further, the decision of the court pronouncing a retirement package for former employees of the Respondent’s and which the Petitioners are seeking that it applies to them, was delivered on 16th May, 2012. This petition was filed on 13th August, 2021, nine years after the decision was made and twenty (20) years after the retrenchment.
40. Whichever way the court looks at it, and irrespective of whether the time started running on the date the Petitioners were retrenched or on the date the court decision was made, the petition cannot be salvaged. It is grossly out of time.
41. The petitioners slept on their rights, and as it were, they just have to continue sleeping. Litigation must finally come to the end in this matter.
42. I find the Petition Statute barred by Section 90 of the *Employment Act*, 2007.
43. In whole the Respondent’s Preliminary Objection dated 11th February, 2022, is upheld, with the result that the petition herein is dismissed with no orders as to costs.
44. Orders of the court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 16TH DAY OF JUNE, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

N/A for the Petitioners

Mr. Muganda present for the Respondent

Ms. Christine -C/A

