



**Cherono v Teachers Service Commission & 2 others (Employment and Labour Relations
Petition 26 of 2021) [2022] KEELRC 12853 (KLR) (13 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12853 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS PETITION 26 OF 2021
DN NDERITU, J
OCTOBER 13, 2022**

BETWEEN

MICHAEL CHEROGONY CHERONO PETITIONER

AND

TEACHERS SERVICE COMMISSION 1ST RESPONDENT

DIRECTOR OF PENSIONS 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

RULING

I. Introduction

1. In a petition dated October 4, 2021 filed through Chepkilot, Kiptoo & Co Advocates, the Petitioner seeks for the following –
 1. A declaration that the Respondents violated the Petitioner’s fundamental rights and freedom enshrined in the bill of rights of the Constitution 2010.
 2. A declaration that the Respondent is bound to recognize the Petitioner as a permanent employee having worked for the Respondent continuously for over 19 years.
 3. A declaration that the Temporary contract of employment for 19 years is null and void, irregular and is in contravention of the Petitioner’s rights as enshrined under Article 41(1) and (2) of the Constitution and Employment Act, 2007.
 4. The Court do make an order compelling the 1st Respondent to compute and remit the Petitioner’s Retirement benefits to the 2nd Respondent backdated to the last 19 years upon retirement of the Petitioner and the same be transmitted to the Petitioner.



5. Compensation and damage incurred including punitive for the sufferings and loss occasioned to the Petitioner.
 - a) The Honourable Court do issue such other orders and give such further directions as it may deem fit to meet the ends of justice.
 - b) The cost of the Petition be awarded to the Petitioners.
2. The petition is based on a statutory statement filed along with the petition and the grounds set out therein. There are several annexures to the Petition attached to the supporting affidavit sworn by the Petitioner on October 4, 2021.
3. The petition is opposed and on February 16, 2022 Counsel for the 1st Respondent, Flora Manyasa, Advocate, filed a Notice of Preliminary objection (PO) dated February 15, 2022 raising the following points of law –
 - a. The suit is time barred and offends mandatory provisions of Section 90 of the Employment Act, 2007 and Section 4(1) of the Limitation of Actions Act, thus the Honourable Court has no jurisdiction to hear and determine the petition.
 - b. The Petitioner, having realized the matter is statute barred, seeks to circumvent the Employment Act and the Limitations of Actions Act which give effect to the constitutional rights.
 - c. That the suit is an abuse of the Court process.
 - d. That the suit is bad in law, frivolous and amounts to gross abuse of the Court process thus ought to be struck out with costs to the Respondent.
4. The 3rd Respondent filed a response to the petition dated February 28, 2022 and filed in court on March 1, 2022 by Nyambura Kiringu, Litigation State Counsel.
5. Further, the 1st Respondent filed a replying affidavit sworn by Julius Olayo, the Director of Human Resource Management and Development, sworn on March 24, 2022 and filed in court on March 28, 2022.
6. No pleadings were received from the 2nd Respondent this far.
7. On March 30, 2022 with the concurrence from Counsel for the Petitioner and the 1st Respondent, this court directed that the preliminary objection be heard and be disposed of first by way of written submissions.
8. Counsel for the 1st Respondent filed her written submissions on April 22, 2022 while Counsel for the Petitioner filed in reply on April 25, 2022.
9. This ruling is in respect of the said preliminary objection.

II. Issues for determination

10. The issues for the determination by this court are those raised by the 1st Respondent in the notice of the preliminary objection as reproduced above. However, the grounds in the preliminary objection can be condensed into one broad issue – Is the claim by the Petitioner time barred?
11. I wish to make a quick comment on the header in the petition and some of the other pleadings filed herein. The Employment and Labour Relations Court (ELRC) is not a division of the High Court. It



is a court of equal status to the High Court established under Article 162(1) and (2)(a) and (3) of the Constitution as operationalized by the *Employment and Labour Relations Court Act* No 20 of 2011. Further, ELRC has no divisions within it.

12. In the circumstances, a party who intends to file a matter in the ELRC must be very clear that it should be headed “Republic of Kenya. In the Employment and Labour Relations Court at – (Nakuru).” I have taken the liberty to comment on this issue for avoidance of doubts and for clarity in future in the mind of a litigant who wishes to approach this court (ELRC) for any remedy as provided for in the law.
13. The header in this petition reads “Republic of Kenya. In the High Court of Kenya at Nakuru, Employment and Labour Relations Court, Petition No.....” The petition is addressed to “The High Court of Kenya at Nakuru, In the Constitutional Employment Relations Court, Nakuru.” This header is wrong and confusing. However, to avoid dwelling on technicalities, this court shall nonetheless proceed to determine the preliminary objection on merits as the subject matter is clearly one concerning employment.
14. The Petitioner alleges that his rights and freedoms have been infringed under various Articles in the *Constitution*. He has cited Articles 22, 23, 27, 41, and 47 as the foundation for his petition and further alleged that his rights and freedoms under Articles 3, 10, 19, 20, 23, 27, 28, 29, 30, 41, 47, and 48 have been infringed by the Respondent.

III. Petitioner’s Case

15. Vide a letter of temporary appointment dated April 19, 1988 the 1st Respondent offered the Petitioner temporary appointment as untrained graduate teacher with effect from May 1, 1988. He was allocated Teachers Service Commission (TSC) No 274397. A copy of the said letter of temporary appointment has been exhibited by the Petitioner.
16. Clause 4 of the said letter provides as follows –

“This appointment is purely temporary and carries with it no guarantee of permanent employment; it can be terminated by either party giving to the other party one month’s notice in writing or by paying to the other party an amount equal to one month’s gross salary in lieu of notice.”
17. It is not in dispute that the Petitioner accepted the offer and worked until August 31, 2007 when he retired upon attainment of the official age of retirement, then 55 years.
18. It is also not in dispute that, and the Petitioner has stated as much in the supporting affidavit, for the entire period of employment the letter mentioned above formed the basis of the employment relationship between the Petitioner and the 1st Respondent and that the terms of employment were not formally made permanent for the entire period of about 19 years during which the Petitioner served.
19. The Petitioner deposes that upon retirement he was not paid pension because the 1st Respondent maintained that having worked as a temporary employee the Petitioner was not entitled to pension. The Petitioner further argues that the 1st Respondent failed to remit monthly deductions to National Social Security fund (NSSF) and that the 1st Respondent only made the said remittances in lumpsum after the Petitioner retired and demanded to access the funds from NSSF.
20. In paragraph 9 of the supporting affidavit the Petitioner deposes that he has filed this petition in pursuance of his retirement benefits.



IV. 1st respondents' case

21. In the replying affidavit of Julius Olayo on behalf of the 1st Respondent, the deponent states that the claim by the Petitioner is time barred hence this court lacks jurisdiction to entertain the same.
22. The deponent states that the Petitioner was for the entire period that he worked for the 1st Respondent, between May 1, 1988 and August 31, 2007, on temporary employment. He deposes that at the time of employment the Petitioner was untrained and that he was engaged on temporary basis in accordance with the Code of Regulations of Teachers (1986), now repealed.
23. The deponent states that Regulation 17 of the said repealed Code specifically provided that an employee on temporary employment was not entitled to pension and only teachers in permanent employment were entitled to pension. In any event, the deponent states that the Petitioner, being a temporary employee, was not eligible for pension under the Pensions Act (Cap 189).
24. The deponent states that the Petitioner accepted the temporary employment which carried no guarantee for permanent employment and in any event the Petitioner never acquired the qualifications for permanent employment during the entire period of his employment.
25. The deponent confirms that the 1st Respondent remitted all the deductions and Petitioner's contributions to NSSF and he has attached payment vouchers to the effect that the said remittance was made in 2012.
26. The deponent has annexed correspondences between the 1st Respondent and the Petitioner explaining to him why pension is not payable to him as analysed in the foregoing paragraphs.
27. The deponent states that the Petitioner has filed this petition, instead of filing an ordinary employment cause, to circumvent limitation of time which expired within six (6) years of Petitioner's retirement.

V. Analysis

28. A party to a cause is bound by the pleadings filed. The prayers sought by the Petitioner have been set out verbatim in Part I of this ruling.
29. For one to fully appreciate the nature of this petition and the remedies/prayers that the Petitioner is seeking, one has to go back to where it all started. Basically, the relationship between the Petitioner and the 1st Respondent was that of an employer and an employee. It all began when the 1st Respondent offered the Petitioner temporary employment as untrained teacher with effect from May 1, 1988 and which relationship ended on August 31, 2007 upon the Petitioner attaining the then mandatory retirement age of 55 years.
30. In prayer 1 of the petition, the Petitioner prays for a declaration that the Respondents have violated his various fundamental rights and freedoms as enshrined in the Bill of Rights in the Constitution. These rights and freedoms that were allegedly violated and based or founded on the employment relationship that subsisted between the Petitioner and the 1st Respondent as alluded to in the foregoing paragraphs.
31. The basis and foundation of employment and labour rights is Article 41 of the Constitution which provides as follows –
 - (1) Every person has the right to fair labour practices.
 - (2) Every worker has the right—
 - (a) to fair remuneration;



- (b) to reasonable working conditions;
 - (c) to form, join or participate in the activities and programmes of a trade union; and
 - (d) to go on strike.
- (3) Every employer has the right—
- (e) to form and join an employers organisation; and
 - (f) to participate in the activities and programmes of an employers organisation.
- (4) Every trade union and every employers’ organisation has the right—
- (a) to determine its own administration, programmes and activities;
 - (b) to organise; and
 - (c) to form and join a federation.
- (5) Every trade union, employers’ organisation and employer has the right to engage in collective bargaining.
32. The Labour rights in Article 41 of the Constitution are further clarified, delineated, expounded, and explained in various labour laws such as the *Employment Act*, *Labour Institutions Act*, the *Employment and Labour Relations Court Act*, *Labour Relations Act*, *Public Service Commission Act*, *National Employment Authority Act*, *Retirement Benefits Authority Act*, *Pensions Act*, *Work Injury Benefits Act*, *Occupational Safety and Health Act*, among many others.
33. While the Constitution, as the grund norm, in Article 41 provides for the basis and foundation of labour rights, the said rights are specifically broken-down in the various laws as passed by the Legislature, among them those cited above.
34. Any party whose labour rights are violated in Kenya is generously provided for in a variety of laws on which to base his or her claim. Article 41 is primarily the umbrella that provides the shade under which all the labour laws are founded and shielded.
35. It therefore follows that unless a party is making a claim in court which is not provided for in the statutes or it is challenging the constitutionality of the relevant Act of Parliament; the Constitution cannot and should not be the first port of call. Nowadays, it is not uncommon to find all manner of constitutional petitions in court alleging all sorts of constitutional rights violations or threats, yet the concerned party fails to recognize and appreciate that there are specific laws that specifically deal with the alleged wrong. This trend cannot and should not be encouraged.
36. There is now a multitude of decided cases on the threshold that a matter should muster to be presented in court as a constitutional petition rather than as an ordinary suit or cause. The leading authority on this issue is the *Anarita Karimi Njeru v Republic* (1979) KLR 154. The other popular decision that followed the same reasoning is *Mumo Matemu v Trusted Society of Human Rights Alliance* (2014) eKLR.
37. In the understanding of this court based on the above decisions a party who approaches a court with a constitutional petition has to plead the specific provisions or Articles of the Constitution that are under threat, breached, or violated and also provide evidence of the said threat, breach, or violation. A party who files a constitutional petition must prove the same to succeed in obtaining the relief(s) sought.



38. Where there is a law that specifically provides for a remedy to a wrong, and the validity of such law has not been challenged or the same declared unconstitutional, it would amount to abuse of the court process for a party to file a constitutional petition to ask for a remedy that is clearly and evidently provided for in the statute law. The mischief is that a party who by-passes the remedies that are provided for in the statute law to launch a Constitutional petition could be trying to evade and circumvent statutory conditions and limitations that such a party deems unfavourable to its claim. Such limitations and or conditions may be based on time, jurisdictional barriers (pecuniary or territorial), or even evading tariffs or fees payable in filing an ordinary cause.
39. The foregoing concerns call upon this court to be cautious in evaluating the preliminary objection herein which may only be viewed and weighed through the lenses of the prayers set out in the petition.
40. I have gone through the pleadings filed by the Petitioner and I have not come across any specific threat, breach, or violation of his constitutional rights which may not be remedied under the provisions of the statutes cited elsewhere in this ruling in an ordinary employment and labour relations cause.
41. The Petitioner has cited various provisions of the Constitution but there are no specifics on the threat, breach, or violation of the purported rights and no evidence has been availed so far for prove thereof.
42. In regard to remedies for breach of employment and labour rights this court has cited some of the many statutes that provide for remedies for wrongs thereunder. In regard to Article 47 of the Constitution, the rules of natural justice and the Fair Administrative Action Act provide for the same.
43. In view of all the above, it is in the considered opinion of this court that, prima facie, there is nothing peculiar about the claim by the Petitioner herein and the remedies sought to have warranted the Petitioner to file this Constitutional Petition as opposed to filing an ordinary employment and labour relations cause. This petition does not muster the threshold set out in the Anarita Karimi Njeru Case (Supra) as affirmed in many other subsequent decisions including the Mumo Matemu Case (Supra).
44. In prayer 2 of the petition the Petitioner is seeking that the Respondent(s) be “bound” to recognize the Petitioner as a permanent employee having been in the employment of the 1st Respondent for over 19 years.
45. Clearly, the above prayer is seeking that this court interprets and reviews the terms of the employment relationship between the Petitioner and the 1st Respondent and declare that although the Petitioner was engaged as a temporary employee for the entire period of 19 years, the said contract ought to have been converted and or deemed as a permanent employment.
46. The above issue is not one that would require invoking of the provisions of the Constitution as the same is adequately provided for under the Employment Act and other laws which provisions have not been declared unconstitutional. The Petitioner has acknowledged in his own pleadings that the Employment Act as an Act operationalising Article 41(1) and (2) of the Constitution provides for all answers to this issue. Yet the Petitioner still went ahead to file a constitutional petition instead of an ordinary cause. The foregoing argument holds for prayers 2 and 3 in the petition as well.
47. Prayer 4 asks for this court to issue an order compelling the 1st Respondent to compute and remit the Petitioner’s retirement benefits to the 2nd Respondent. Again, this is an issue that is provided for under the Pensions Act, the Retirement Benefits Authority Act, and other laws. It is not an issue that would call for invocation of the Constitution by way of a constitutional petition.



48. In prayer 5 the Petitioner is seeking for alleged damages occasioned to the Petitioner as a result of alleged unlawful conduct on the part of the Respondents. Again, this is not a prayer that may not be pleaded and ventilated in an ordinary cause. It does not warrant the filing of a constitutional petition.

VI. Submissions by counsel for 1st respondent

49. The 1st Respondent's Counsel has argued that the only reason why the Petitioner filed a constitutional petition rather than an ordinary cause is because the claim is time barred under Section 90 of the *Employment Act* and or Section 4(1) of the *Limitation of Actions Act*.
50. Counsel has passionately argued that since the Petitioner lawfully retired on 31st August, 2007 he had six (6) years within which to file any claim for any remedy based on the temporary contract of employment. Counsel therefore argues that any claim filed after six (6) years to remedy any wrong based on the said contract is null and void under Section 4(1) of the *Limitation of Actions Act*. Six (6) years after August 31, 2007 expired in or about August, 2013.
51. Counsel argues that this court has no powers to enlarge the six (6) years period provided for in Section 4(1) of the *Limitation of Actions Act* and that once the Petitioner failed to file his claim within that period the same became time barred and that the Petitioner cannot circumvent that time limitation by way of filing a constitutional petition as that amounts to abuse of the court process.
52. Counsel for the 1st Respondent has relied on the decision of the Court of Appeal in the *Divecon Limited v ShirinKhanu Sadrudin Samani* Civil Appeal No. 142 of 1997 to the effect that Section 4(1) of the *Limitation of Actions Act* is couched in mandatory terms and hence "no court may or shall have the right or power to entertain what cannot be done namely, an action brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action."
53. Counsel vehemently argues that although disguised as a constitutional petition what the Petitioner has brought to court is a cause based on his employment contract and his employment relationship with the 1st Respondent. Counsel has also cited the Court of Appeal in *Sumayya Athmani Hassan v Paul Masinde Simidi & Another* (2019) eKLR where the court affirmed the position that where there is an Act of Parliament to provide for and operationalize a constitutional provision, a party cannot file a petition relying directly on the Constitutional provisions without challenging the validity or constitutionality of the said law or proving that the said law is inadequate.
54. Counsel has also cited *Joseph Muturi Mbaria & Another v JKUAT* (2013) eKLR, *Peter Obiero v Kenya Ports Authority* (2016) eKLR, and *Clement Ernest Murengo v Principal Secretary Treasury & Another* (2016) eKLR to re-emphasize that it is not open to every matter or wrong to be remedied by way of a constitutional petition where there are other clear provisions of the law that provide for the remedies.
55. Counsel argues that the only reason why the Petitioner approached this court by way of a constitutional petition and not by way of an ordinary cause is to circumvent the time limitation and that this court should not entertain such blatant abuse of the court process.

VII. Submissions by petitioner's counsel

56. Counsel for the Petitioner in response has submitted as follows in part "the Petition herein is not a labour dispute, the Petitioner retired honourably in 2007 and did not challenge his retirement, he was contended. The root course(Sic!) of the Petition is the illegal acts of the 1st Respondent not to refund the Petitioner his dues having contributed through it, it was tasked to deduct the employees pay (the Petitioner herein) and remit it (statutory contribution) to NSSF. This was done, unfortunately



the Petitioner was surprised to later on learn that the 1st Respondent did not carry out its mandate as expected.”

57. The above submission by the Counsel for the Petitioner is contradictory and self defeating. Was it not a term of the contract that the 1st Respondent was to remit the deductions to NSSF? Has the 1st Respondent not availed evidence that the said deductions were remitted to NSSF in 2012? Why has the Petitioner simply not approached NSSF for release of his dues? Are there issues in all this that need the filing of a constitutional petition?
58. It is in the considered view of this court that what the Petitioner is complaining about as amplified by his Counsel are employment matters that are adequately provided for in the employment and labour relations laws cited elsewhere in this ruling which do not merit or warrant the filing of a constitutional petition. Counsel has not demonstrated why NSSF is not a party to this petition if it is indeed the NSSF that has failed and or refused to release the dues to the Petitioner.
59. Further, unlike what Counsel for the Petitioner alleges in the submissions this petition is not based on the provisions of the National Social Security Fund Act (Cap 250) so as to bring it under the umbrella created by Section 42(h) of the Limitation of Actions Act.

VIII. Determination

60. A preliminary objection consists of a point(s) of law which when raised, and it should be raised at the earliest opportunity, and if successful, should dispose of the matter before a court – See *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696.
61. The 1st Respondent filed a notice of preliminary objection as soon as it was served with the petition and the points on which the preliminary objection is based are also ventilated in the replying affidavit of Julius Olayo.
62. This court has analysed at length the positions taken by both sides in the foregoing paragraphs of this ruling and there is no doubt in my mind that the petition herein or the issues in dispute between the Petitioner and the Respondents relate exclusively to the employment relationship between the Petitioner and the 1st Respondent.
63. There are sound legal and logical reasons why the law provides for limitation of time within which claims shall be filed in court. Litigation must come to an end. While there is no wrong without a remedy in law, the wronged party should not hold the perceived wrong-doer at ransom with an eternal threat of legal action hanging over the head. Equity does not aid the indolent and a party who takes a slumber beyond the limited period provided for in the law shall not be aided by court in filing a claim that is stale – See *Anadet Kalia Musau v The Attorney General & 2 Others* (2020) eKLR.
64. Prior to June 2, 2008, the date of commencement of the Employment Act No 11 of 2007, the applicable law on limitation in filing employment and labour relations matters was Section 4(1) of the Limitation of Actions Act which gave the wronged party a period of six(6) years within which to file a cause. The repealed Employment Act (Cap 266) did not contain a provision similar to Section 90 of Employment Act No.11 of 2007 which now provides for three (3) years to a party within which to file a claim based on a contract of service or employment generally.
65. The Petitioner herein retired in 2007 and hence he had six (6) years within which to file his claim(s) related to the contract of service between himself and the 1st Respondent. This court has found in an earlier part of this ruling that all the prayers by the Petitioner are based on the said contract of employment.



66. If the avenue that the Petitioner has taken in filing this petition is opened there would be no end to litigation. The Petitioner appears to suggest that since he failed to file his claim within six (6) years that he has an alternative of filing the claim by way of the constitutional petition which has no time limitation. This is a misconceived argument that holds no water.
67. In the first place this petition does not raise any constitutional issue(s). As stated in an earlier part of this ruling there are numerous statutory provisions that adequately provide for remedy to the issues raised by the Petitioner. The petition has not challenged the validity or constitutionality of those provisions or their inadequacy.
68. It is in the considered view of this court that the sole purpose why the Petitioner has approached the court by way of a constitutional petition rather than an ordinary cause is to beat the time limitation for a claim that is clearly time barred. This court shall not countenance such blatant abuse of the court process.
69. Once a matter is limited in time a court lacks jurisdiction to entertain the same through effluxion of time. Once a court discovers that it has no jurisdiction it has to down its tools and take no more step – See the *Owners of the Motor Vessel Lilian "S" v Caltex Oil (Kenya) Ltd* (1989)e KLR.
70. This court is persuaded by the holdings in *Reuben Ngila Kitonyu v Central Bank of Kenya* (2011) eKLR, *Jackson Kabingu Gachobi v The Hon Attorney General* (2020) eKLR, and *Samson Loteipa Ole Kimongo v Inspector General of Police and 2 Others* (2022) eKLR, all to the effect that filing a constitutional petition to evade limitation of time amounts to abuse of the process of court.
71. I dare say that as much as there is no time limitation in filing of constitutional petitions, such petitions should not be entertained where there is a clear provision in law providing for limitation of time in the subject matter. Holding otherwise would create an absurdity whereby claims that are time barred are sneaked in through the back door in disguise as constitutional petitions. That would amount to blatant abuse of court process.
72. This court has so far said enough to demonstrate that this petition is an abuse of the court process as there is no constitutional issue(s) raised which cannot be remedied under statute laws had the claim been filed within the statutory period. The sole reason why the Petitioner opted for a constitutional petition is to beat the time limitation.

IX. Orders

73. The upshot in all the above is that the preliminary objection raised by the 1st Respondent has merits and this petition is thus struck out with costs to the 1st and 3rd Respondents.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 13TH DAY OF OCTOBER, 2022.

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DAVID NDERITU

JUDGE

ELRC PETITION NO. 26 OF 2021 PAGE 17

