



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**PETITION NO. 38 OF 2019**

**IN THE MATTER OF ARTICLES 22, 25, 27, 28, 35, 47 AND 50 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF KENYA RAILWAYS STAFF AND GENERAL NOTICE NO. 3 OF 2002**

**BETWEEN**

**AGGREY AJWANG JUMA.....PETITIONER**

**VERSUS**

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

**RULING**

1. The applicant filed a Notice of Motion Application dated 9/1/2020 seeking the following Orders: -

(i) **That the petition be dismissed and or struck out with costs to the Respondent for being *resjudicata*.**

(ii) That the petition herein is statute time-barred, incompetent, fatally defective and an abuse of Court process as the same offends provisions of Section 90 of the Employment Act, 2007, laws of Kenya.

(iii) That the Petition herein be struck out with costs to the Respondents for failure to comply with the provisions of Section – 87 of the Kenya Railways Corporation Act.

2. The application is premised on grounds set out in paragraphs 1 to 10 of the Notice of Motion the gravamen of which is that the Petitioner was interdicted and or dismissed by the Respondent on the 18/10/2002 on grounds of misconduct.

3. The Petitioner thereafter filed Nakuru CMCC No. 2685 of 2003, Aggrey Ajwang Juma –vs- Kenya Railways Corporation where the cause of action arose from alleged unlawful interdiction and unlawful dismissal.

4. That, Judgment in Nakuru CMCC No. 2085 of 2003 was delivered on the 12/6/2013 in favour of Kenya Railways Corporation to the effect that the petitioner's suit was dismissed on the basis that it was incompetent.

5. That the petitioner did not appeal against the decision of the subordinate Court but chose to file Nakuru Employment and Labour Relations Court Petition No. 2213 of 2016, Aggrey Ajwang Juma –vs- Kenya Railways which raised similar issues he had raised in Nakuru CMCC No. 2685 of 2003 and which issues the petitioner raises in this petition as well.

6. That on 18/11/2016, Justice Radido struck out the Nakuru Employment and Labour Relations Court Petition No. 2213 of 2016.

7. The Petitioner thereafter has instituted the current petition raising the same issues of statutory entitlement to pensions and retirement benefits in case of resignation and or dismissal under the Kenya Railways Corporation Act.

8. That the Petition is statute time- barred, incompetent, fatally defective and an abuse of the Court process.

9. That the Petition be struck out accordingly.

10. The application is buttressed by a supporting affidavit of Stanly Gitau, Senior Legal Officer of the applicant Corporation restating the issues raised in the Notice of Motion.

11. The petitioner/Respondent filed replying affidavit sworn by himself on 4/3/2020 denying that the petition is *resjudicata* since he has never filed a similar suit.
12. That the petition is not statute barred since it raises matters under the Bill of Rights pursuant to Article 2(1) (2) (3) and 25( c), 28 and 50(1) of the Constitution and under Section 3(2) and 12(1) of the Employment and Labour Relations Court Act, 2011 as amended.
13. The applicant states that he resigned from employment on 18/10/2002 and was not dismissed or interdicted for misconduct as alleged by the applicant.
14. That Nakuru CMCC No. 2685 of 2002 has a different cause of action to this petition.
15. That the application be dismissed for lack of merit and the petition proceed to hearing.
16. Both parties filed written submissions in support of their respective positions on the matter.

#### Determination

17. Justice Radido J. in a ruling delivered on 18/11/2016 weighed on the matter of *resjudicata* raised herein whilst dealing with Employment & Labour Relations Court at Nakuru, Petition No. 2213 of 2016 which the petitioner herein had filed against the same respondent as in this case, Kenya Railways Corporation. The judge stated *interalia*

“ The Court has perused the Amended Complaint filed before the subordinate Court in Nakuru CMCC No. 2685 of 2003, Aggrey Ajwang Juma –vs- Kenya Railways Corporation, where the cause of action arose from alleged unlawful interdiction and unlawful dismissal (*after petitioner had resigned*),.....”

18. In a judgment delivered on 16/6/2013, after hearing witnesses, the Court dismissed the suit on the basis that it was incompetent, having been commenced outside the 12 months allowed under Section 87 of the Kenya Railways Corporation Act.
19. In the present petition, the gravamen of the petitioner’s case is violation of the rights to fair labour practices and fair administrative action, and failure to pay pension and retirement benefits. In the Court’s considered view, the issue raised by the petitioner herein are the same issues he presented before the subordinate Court for determination, but repackaged as Constitutional issues. The present cause is therefore *resjudicata*. The petitioner ought to have appealed the decision of the learned magistrate.
20. The Court has perused the present petition and is satisfied that it involves the same parties; the Cause of action arising from the employment of the petitioner by the respondent from 21/4/1972 until 8/10/2002 when the petitioner left the employment of the respondent.
21. The petitioner is seeking the same reliefs as that sought before the subordinate Court in Nakuru CMCC No. 2685 of 2003 and subsequently before Radido, J. in Employment & Labour Relations Court, at Nakuru Petition No. 37 of 2014.
22. For the third time, the petitioner has raised the same issues for determination in a different suit.
23. The petitioner failed to appeal the decision of the subordinate Court where the suit was first heard and determined.
24. The Court finds that the issues raised herein are *resjudicata* and the petition is struck out with costs since the petitioner failed to heed the decision of Radido, J. aforesaid.
25. In the final analysis, the Court allows the application and strikes out the petition with costs.

**Dated and delivered at Nairobi this 18<sup>th</sup> day of February, 2021.**

**MATHEWS N. NDUMA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this ruling has been delivered to the parties online with their consent. 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 18 of the Civil 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.

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances**

Tom Mutei & Co. Advocates for the Applicant

Aggrey Ajwang Juma, Petitioner in person

Chrispo: Court clerk