



**REPUBLIC OF KENYA**

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

**PETITION NO. 38 OF 2016.**

***(Before Hon. Justice Mathews N. Nduma)***

**PASCAL BARASA OLAIMO AND 75 OTHERS.....PETITIONERS**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....RESPONDENT**

**RULING**

1. The respondent filed application dated 21<sup>st</sup> January 2019 seeking the court to strike out and/or dismiss the petition herein in that it is time barred by dint of Section 3 of the Public Authority Limitation Act Cap 39 Laws of Kenya and Section 90 of the Employment Act 2007.
2. That the petitioners have brought the petition over 31 years from the date when the cause of action arose. That no application has been filed to the court seeking leave to extend time within which to file the petition out of time as prescribed in the mandatory terms of Section 5 of the Public authority Limitations Act.
3. That the court ought not to aid the indolent petitioners. That the Court of Appeal has expended itself on the issue of indolence and non-explained delay authoritatively and the court should abide by the court of Appeal decision.
4. The petitioners filed a replying affidavit in which it states that the petition was filed at High Court Kitale as petition number 10 of 2014 and was subsequently transferred to this court as Kisumu ELRC Petition No. 38 of 2016.
5. That this is a constitutional petition and therefore cannot be time barred.
6. That the petitioners suffered cruel inhuman and degrading treatment under the Moi regime in 1982 and the petitioners had justification to hesitate to file the suit under the same regime. That they were constantly kept under watch by the principal Administration hence the hesitation.
7. That there is no limitation to seek redress for past violation of human rights.
8. That the application be dismissed for lack of merit.
9. In ***Samuel Chege Gitau and 283 others vs Attorney General (2016) eKLR***, similar objection was raised in terms of *Public Authority Limitation Act Cap 38* which bars proceedings based on tort be brought against the government or local Authority after the end of twelve months from the date on which the cause of action arose and those founded on contract not to be filed upon expiry of three (3) years.
10. The suit arose from same cause of action as the present one. That one was filed in 1995 whereas this one was filed in the year 2014, about 19 years later.
11. The claimants in that suit had filed an application to file suit out of time. The application for extension of time was granted by Justice J.B. Ojwang by a ruling dated 15<sup>th</sup> April 2005.

***The Doctrine of Limitation of Time in Constitutional Petitions alleging violation of fundamental rights and freedoms.***

12. In the present case, the 41 petitioners allege that in 1982, they suffered brutal arrest, inhuman and degrading treatment in prison cells which included being locked up naked in crowded cells with mentally sick inmates, being put in water logged cells, being beaten with buttons, gun butts, whips kicks and slaps all over their bodies and deprived of sleep, rest, food, water and use of toilet facilities, consequently being forced to drink water they had excreted and urinated in for a number of days. Some of the petitioners were released

without charge and without being taken before any court of law but were nevertheless dismissed from service; others were forced to trumped up charges as a result of torture and were convicted and jailed without fair hearing. Some of the petitioners have suffered permanent injuries set out in the petition and pray for declaration that their constitutional rights guaranteed under *Section 70 (a) and 74(1) of the former constitution* were violated and they be awarded General damages for the violation of their human rights and fundamental freedoms set out in the petition. Under *Section 84 of the erstwhile constitution*.

13. The question of limitation of time in regard to allegations of breach of human rights and fundamental freedoms have in many cases been raised by the state and in the case of **Joan Akinyi Kaba Sellah and 2 others vs Attorney General, Petition No. 41 of 2014**, the learned judge observed that:

*“Nonetheless, I take into account the views of the court with regard to limitation in respect of claims for enforcement of fundamental rights. In a line of cases such as **Dominic Arony Amollo vs Attorney General, Nairobi High Court Misc. Civil Case No. 1184 of 2003 (OS) 2010 eKLR, Otieno Mak’ Onyango vs Attorney General and another, Nairobi HCCC No. 845 of 2003**, (unreported), courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights.*

*[25] I note also the sentiments of the court in **James Kanyiita vs Attorney General and another, Nairobi Petition No. 180 of 2011** that although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under Section 84 of the constitution is entitled to consider whether there has been inordinate delay in lodging the claim. The court is obliged to consider whether justice will be served by permitting a respondent whether an individual or the state, in any of its manifestations, should be vexed by an otherwise state claim”*

14. The present case was filed on 21<sup>st</sup> November 2014, some 32 years from the date the cause of action arose. The petitioners relied on a replying affidavit sworn to by the 19<sup>th</sup> petitioner on 27<sup>th</sup> January 2019 and filed on 28<sup>th</sup> January 2019 in which he deposes that pleadings have closed in this matter and same is scheduled for hearing on the merits on 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> February 2020 and therefore the application is not in good faith, is an afterthought with no tangible basis at all and should be dismissed.

15. The deponent states that the petitioners suffered cruel, inhuman and degrading treatment under Moi regime and the petitioners had a justification to hesitate to seek redress for the said violations under the same regime. That they were required to report to the provincial administration continuously being the chief’s office and were always under strict surveillance. That there is no limitation to seek redress for past violation of human rights and the application to strike out is misconceived. That they had financial challenges and were not able to timeously follow through instructions given to advocates to file the matter as a group. That it is in the interest of justice that the petition be heard and determined and the objection dismissed.

16. The court has considered **HCCC at Nairobi Constitutional and Human rights Division Petition No. 204 of 2013 Njuguna Githu and the Attorney General** in which the petitioner claimed that he had suffered various violations of his constitutional rights by the state at the Nyayo torture chambers in the year 1989. The petition was filed in 2013, 24 years later.

17. In dealing with the preliminary objection to dismiss the petition on grounds of limitation of time, Lenaola J. High Court judge then, now Supreme Court judge stated after reviewing several relevant authorities including **HCC Petition No. 306 of 2012 Ochieng’ Kenneth K’ogutu vs Kenyatta University and 2 others, Joseph Migere Oloo vs Attorney General Petition No. 424 of 2013. Geral Gichoki and 9 others vs Attorney General Petition NO. 487 of 2012 stated at paragraph 37** as follows:

*“In agreeing with the above decision, I must also agree with the petitioners that the dictates of transitional justice cannot be ignored. Transitional justice is a set of judicial and non-judicial measures that have been implemented by different countries in order to redress the Legacies of massive human rights abuses with Kenya being no exception. This court in previous decisions has stated that these measures include criminal prosecutions, truth and justice commissions, reparations programs and various kinds of institutional reforms. Having said so however, it is imperative for a petitioner to demonstrate some justification for prolonged delays in instituting claims especially in light of the fact that the awareness and measurements for addressing such violations were already in existence after the change of the alleged oppressive regime of governance. I say so because as early as the year 2003, persons aggrieved by the acts of the Moi Regime approached the courts for redress pertaining to alleged violations of their constitutional rights and fundamental freedoms”*

18. In **Mombasa Civil Case No. 128 of 1962, Rawel vs Rawel (1990) KLR 275** the learned judge stated thus:

*“The effect of any limitation enactment is to prevent a plaintiff from prosecuting state claims on the one hand and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time. It is not to extinguish claims”*

19. The point was further successfully made in **Abraham Kaisha Kanzila alias Moses Savala Keya t/a Kapco machinery services and Milamo investments limited vs Government Central Bank of Kenya and 2 others, Misc. Civil Application 1759 of 2004** where the court observed

*“In my view failure by a constitutional court to recognize general principles of law including, limitation expressed in the constitution would lead to legal awarding or crisis. It would also trivialize the constitutional jurisdiction in that Applicants would in some cases ignore the enforcement of their rights under the general principles of law in order to convert their subsequent grievance into a ‘constitutional issue’ after the expiry of the prescribed limitation periods”.*

20. In the present case, which arises from the events of the 1982, attempted *coup d’etat* courts have recognized and held variously that the

matter falls under the category of violations of human rights and fundamental freedoms by the state against the ex-air force soldiers. The present case is not exception to that finding by High Court and the Court of Appeal in similar matters that have already been concluded including the case of *Lt Col Peter Ngari Kagume and others vs Attorney General, constitutional Application No. 128 of 2006; Samuel Chege Gitau and 283 others vs Attorney General (2016) eKLR; General Juma Gichohi and 9 others vs Attorney General (2015) eKLR and Civil Appeal No. 79 of 2012 Major General P.M. Kaniki vs Attorney General.*

21. The court recognizes that these matters that belong in the transitional justice category have been filed between 1995 and the year 2014. The petitioners urge the same reasons for the late filing as in this case. However, these reasons shall at some point cease to carry any reasonable weight because since the promulgation of the 2010 constitution, the circumstances in Kenya have largely shifted in favour of enlarging space for ventilation of any past and present violation of human rights and fundamental freedoms such that it is no longer valid or tenable for any aggrieved person to wait longer than necessary to file their cases. These prolonged delays degrade the ability of the state to get witnesses and provide records in defence when the cases are filed so much late in the hour to their loss and prejudice.

22. Majority of the petitioners in this matter allege that being based in the rural areas, they were more handicapped than their counterparts in towns and cities especially around central province and Nairobi who were able to file their cases earlier than they were able to due to the handicaps they have advanced in this matter.

23. The court in the circumstances, albeit with some hesitation find that the reasons advanced by the petitioners in this matter in which they allege gross violation of their human rights and fundamental freedoms suffice for the court to find that the suit is not time barred being in the category of transitional justice in the new constitutional dispensation.

24. Accordingly, the preliminary objection raised on limitation vide application dated 21<sup>st</sup> January 2019 is dismissed. The petition to proceed on merits as earlier scheduled. Costs in the cause.

**Ruling Dated, Signed and delivered this 31<sup>st</sup> day of July, 2019**

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Wamalwa for Respondent/Applicant.

Mr. Orengo for petitioners/Respondents

Chrispo: Court clerk