



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

NAIROBI

PETITION 43 OF 2015

MICHAEL MURJI MATHENGE

AND 28 OTHERS.....PETITIONERS/RESPONDENTS

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE CABINET SECRETARY, DEFENCE.....2ND RESPONDENT

THE DEFENCE COUNCIL.....3RD RESPONDENT

RULING

Introduction

1. The Respondents filed the Notice of Motion dated 23.11.2018 seeking the following orders:

- a. **THAT** this Honourable Court be pleased to hear this Application in priority to the hearing of the main Petition herein.
- b. **THAT** this Honourable Court be pleased to strike out and/or dismiss the Petition in its entirety.
- c. **THAT** the costs of this Application be provided for.

2. The grounds upon which the motion stands are that the Petition is time barred and fatally defective by dint of sections 3 and 5 of the Public Authorities and Limitations Act; that the Petitioners have failed to explain the reason for bring the petition after a period of 35 years and the leave of the court; that the Court of Appeal has dismissed similar petitions for being brought out of time without proper explanation; and that it is in the interest of justice that the Application be allowed and that no prejudice will occasioned to the Petitioners in allowing the same.

3. The Petitioners did not file a response to the motion but they filed written submissions to oppose the motion.

4. In their submissions dated 15.3.2019, the Applicants submit that the Petition does not raise constitutional issues but rather a claim, which ought to be addressed by a civil suit for wrongful or unlawful dismissal. They further submitted that the claim is time barred by virtue of the provisions of section 90 of the Employment Act and section 3 of the Public Authorities Limitations Act, and the Petitioners did not to seek leave of the Court to file out of time. It is their position that the Court should not aid the Petitioners' indolence as it violates the spirit of Article 50 of the Constitution of Kenya.

5. It is their submissions that the interpretation of the Constitution should be done wholesomely to avoid absurdities. To buttress this assertion, they have relied on the case of *Center for Rights Education and Awareness & Another vs. John Harun Mwau & 6 Others [2012]eKLR*. It is their further submissions that this Court does not have jurisdiction to hear the Petition as it is a Court established to only entertain employment and labour relations matters. They fortified that point, by relying on *Republic vs. Karisa Chengo & 2 Others [2017]eKLR* and the Supreme Court decision of *Moses Mwigigi & 14 Others vs. Independent Electoral and Boundaries Commission & 5 Others*.

6. The Applicants submitted that the Petition is oppressive as the Petitioners have not explained or demonstrated reasons for the delay in filing their Petition. They relied on the recent decision of the Court of Appeal in *Wellington Nzioka Kioko v Attorney General [2018] eKLR* to fortify that position. They further submitted that Article 50 of the Constitution of Kenya is applicable to both parties in a suit. That the Petition should be struck out for non-disclosure of material evidence which will prejudice the Applicants due to lack of plausible

evidence as they would be unable to retrieve the same from the Court Martial due to passage of time. They have further argued that the institution of this Petition has exposed them to hardships such as death of witnesses with plausible evidence, loss of memory due to effluxion of time and destruction and/or loss of key documents and records. They are also of the view that the government being a going concern entity run by human beings, it is not immune to contingencies that come with human nature. They relied on the cases of *Lt. Col. Peter Ngari Karume & Others vs. Attorney General [2009] eKLR*, *Petition No. 180 of 2011 James Kanyita Nderitu vs Attorney General and Another*.

7. On the other hand, the Petitioners submitted posit that they were victims of torture orchestrated by the previous regime's state machinery. That the provisions of section 3 and 5 of the Public Authority and Limitation Act as relied upon by the Applicants, do not apply to the nature of claims in their Petition. That an action for the enforcement of fundamental rights and freedoms under Articles 22 or 258 of the Constitution is not inhibited by the rules of limitation of actions under any statute. They rely on the case of *Peter N. Kariuki vs. the Attorney General [2014] eKLR*.

8. They urged this Court to reject the Applicants' arguments subjecting the reliefs sought to any period of limitation. They gave the example of the British government which compensated victims of torture after a lapse of 50 years. They further contended that H.E. President Uhuru Kenyatta had acknowledged the ills of the previous regime and made a commitment to compensate the victims of torture.

9. In conclusion, they submitted that the Applicants did not demonstrate what prejudice they were likely to suffer if the Petition is heard to its logical conclusion and urged the Court to give effect to substantive justice as provided for under article 159 of the Constitution of Kenya 2010.

Analysis and determination

10. There is no dispute that the Petition herein was filed more than 30 years after the alleged violations. The issues for determination arising from the application and the rival submissions are:

- a. Whether the application is *res judicata*.
- b. Whether this Honourable Court has jurisdiction to hear and determine the Petition.
- c. Whether the Applicants' petition is time barred and incompetent.

Whether the application is *res judicata*.

11. The respondent filed Notice of Preliminary objection dated 24.5.2017 to the petition herein on grounds that:

- a) The petition is *res judicata* by dint of judgment in ELRC 2212 of 2012.
- b) That the court is *functus officio*.
- c) The petition is fatally defective as it is premised on a non-existent law, namely the constitution of Kenya 1969.
- d) The petitioner(s) are guilty of laches/ inordinate delay for filing the petition 35 years after the alleged violation
- e) The petition(s) is/are stale/lacks merits
- f) The petition(s)is/are an abuse of the court process
- g) The petition(s) is /are incompetent and ought to be struck out.

12. Except for the issue of jurisdiction, the above grounds have been cited as the basis upon which the instant application is brought. Ndolo J dismissed the said preliminary Objection by her ruling delivered on 9th January 2018 where she observed as follows-

“Regarding the delay in bringing the current Petition I have this to say; while there is no statutory limitation on actions arising out of violation of fundamental rights, the Court must receive an explanation for a delay that runs into decades. This was the reasoning by Lenaola J. (as he then was) in Charles Gachathi Mboko vs. Attorney General [2014]eKLR and Mumbi Ngugi J. in Wellington Nzioka Kioko vs. Attorney General [2016]eKLR with which I agree. However, the learned judges did not reach their respective conclusions at the preliminary stage, they did so after hearing the Petitions on merit.

I think it would be erroneous to find the Petitioners guilty of inordinate delay without hearing them. Regarding the question whether the Petitioners have come to court under the correct constitution, the only thing to say is that this is a matter to be determined once the Petition is fully ventilated.”

13. In view of the foregoing ruling by Ndolo J on the issue of inordinate delay in filing the petition and the competence of the petition, I return that the application is *res judicata* to the extent that it seeks to adjudicate on matters which were directly and substantially in issue in the said preliminary objection. The said issues will therefore await trial as directed by Ndolo J in the said ruling.

Whether the court lacks Jurisdiction to determine the petition

14. Article 162 (2) (a) of the Constitution of Kenya 2010 provides for the establishment of this Court to hear and determine disputes relating to employment and labour relations. Further, section 12 (a) of the Employment and Labour Relations Court Act grants this Court jurisdiction to hear and determine disputes relating to or arising out of employment between an employer and an employee. In addition, Article 165 (5) of the constitution donates jurisdiction to this court to interpret the constitution and determine whether Fundamental Rights and Freedoms under the constitution have been violated in matters concerning employment and labour relations. This Petition arises out of alleged constitutional infringements that were occasioned to the Petitioners in the course of their employment with the Kenya Defence Forces, then the Kenya Armed Forces. As such this Honourable Court has jurisdiction to hear the same.

15. The foregoing view is fortified by the celebrated decision of Justice Majanja J. in *United States International University (USIU) v Attorney General [2012] eKLR* as follows:

“Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in section 12 of the Industrial Court Act, 2011 or to interpret the Constitution would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court.”

Conclusion and determination

16. In conclusion, the court has found that the application is *res judicata* the Preliminary Objection dated 24.5.2017, and that it is seized of the jurisdiction to determine the Petition herein. Consequently, I dismiss the application dated 23.11.2018 with costs.

Dated, Signed and Delivered in Open Court at Nairobi this 20th day of September, 2019

ONESMUS N. MAKAU

JUDGE