



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION 52 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

**IN THE MATTER OF: ALLEGED CONTRAVENTION FUNDAMENTAL FREEDOMS IN ARTICLES 20, 21, 27, 41, 43 AND 47
OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION THE CONSTITUTION IN ARTICLES 2, 3 AND 10 OF THE
CONSTITUTION OF KENYA**

IN THE MATTER OF: THE EMPLOYMENT ACT (NO. 7 OF 2007)

-BETWEEN-

CHRISTINE MBITHE MUINDU.....1ST PETITIONER
JESSE GICHURU MWANGI.....2ND PETITIONER
NYATLME A. KITHINJI GATAKA.....3RD PETITIONER
MARY WANGUI NGUGI-IRERI.....4TH PETITIONER
JANE CHELANGAT TOO.....5TH PETITIONER
JOSEPH K. MACHARIA.....6TH PETITIONER
MARGARET N. NDUNGU.....7TH PETITIONER
CHARLES M. IKIARA.....8TH PETITIONER
CHARLES GIDIEON NYAKARU.....9TH PETITIONER
FRANCIS W. MUKEBO.....10TH PETITIONER
SAMUEL E. MASAKHALA.....11TH PETITIONER
OLIVER D. AMOLO.....12TH PETITIONER
DORIS N. KABUL.....13TH PETITIONER
JUDITH K. MUTHUI.....14TH PETITIONER
ELIZABETH G. WANYOIKE.....15TH PETITIONER
RONALD M. KIMEGA.....16TH PETITIONER

ELIZABETH OLAGO.....	17 TH PETITIONER
FAITH W. KURIA.....	18 TH PETITIONER
BANCY M. KAMAU.....	19 TH PETITIONER
MICHAEL K. ILUMBI.....	20 TH PETITIONER
PAUL J. MWENE.....	21 ST PETITIONER
MARK MUNENE.....	22 ND PETITIONER
JULIANA W. MUROGO.....	23 RD PETITIONER
ESTHER WABA KAMIRU NGATA.....	24 TH PETITIONER
JAMES K. WAITHAKA.....	25 TH PETITIONER
MAGDALENE N. MUNENE.....	25 TH PETITIONER
LUCY P.W. KIBATHI.....	27 TH PETITIONER
ROSE N. MUSYOKA.....	28 TH PETITIONER
VINCENT O. OJUNGA.....	29 TH PETITIONER
IRENE VIATA MUTHAMI.....	30 TH PETITIONER
EDWINA W. KIARO.....	31 ST PETITIONER
ISACK DAWA GOLOMBO.....	32 ND PETITIONER
HELLEN WANJIKU K.	33 RD PETITIONER
NANCY W. MAINA.....	34 TH PETITIONER
FLORENCE W. NGOTHO.....	35 TH PETITIONER
PAUL KURIA NGUGI.....	36 TH PETITIONER
JOEL KITAVI TIMOTHY.....	37 TH PETITIONER
MARGARET' W. GICHIU.....	38 TH PETITIONER
KARANJA MUURI.....	39 TH PETITIONER
ANNE KIHU.....	40 TH PETITIONER

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT

RULING

Before this Court, is the Respondent's Notice of Preliminary Objection dated 5th April 2019 wherein the Respondent has raised a preliminary objection against the Petition on the following grounds-

- a. Section 90 of the Employment Act 2007 provides that no civil action or proceedings based or arising out of that Act or a contract of service in general shall lie or be instituted unless such are commenced within 3 years of the act, neglect or default complained about.

b. The Petition is time-barred by dint of section 90 of the Employment Act 2007 as the alleged cause of action arose in the year 2013.

c. The Petition – although instituted as a constitutional petition – is purely a labour relations dispute with no constitutional rights and issues for determination.

The Preliminary objection was disposed of by way of written submissions. The Respondent filed their written submissions on 14th June 2019 while the Petitioners filed theirs on 2nd July 2019.

The Respondent submitted that the preliminary objection raised ought to be upheld because these proceedings were instituted 6 years after the cause of action arose. Secondly that the issues arising have been disguised as constitutional in nature yet they are purely employment and labour relations in nature, thus do not invoke the provisions of the Constitution.

The Respondent further submitted that the issue of the issuance of a discriminatory package to a section of its employees and the ill treatment they experienced during the computation of their dues can be addressed under section 87 of the Employment Act. They are of the position that the petition is an attempt to circumvent the provisions of section 90 of the Employment Act. As such, it is an abuse of the court process and a waste of judicial time. The Respondent relies on the case of **Gabriel Mutava & 2 Others vs. Managing Director Kenya Ports Authority & Another [2016] eKLR** where the Court of Appeal held-

“Back home and in a string of cases, this Court has severally held that where a right is regulated by legislation, such legislation, and not the underlying constitutional right, becomes the primary means for giving effect to the constitutional rights.”

The Respondent also relies on the cases of **Peter Lubale Lubullellah vs. Kenya National Union of Teachers [2017] eKLR** and **Peter Ndegwa Nderitu vs. Teachers Service Commission [2019] eKLR**. The Respondent further submits that if the Petitioners are allowed to pursue the claim, the Respondent will be prejudiced because they will not be capable of procuring the best witness or mount the best defence hence infringing on its constitutional right to a fair trial as under article 50 of the Constitution.

For the Petitioners it is submitted that the Respondent’s preliminary objection is misplaced and fatally defective since the question of whether the petition raises valid constitutional issues should be determined at the substantive stage of the proceedings. They rely on the case of **Beatrice Wanjiru and 2 Others vs. The Attorney General & Another [2017] eKLR**.

The Petitioners also submitted that there is no hindrance for an aggrieved party to file a petition where a dispute is of an employment nature. They further submitted that the petition herein was a proper constitutional petition as evidenced in the issues raised and the orders sought. It was their position that their rights under articles 2, 10, 27, 28, 41, 43 and 47 were violated when the Respondent issued to its employees an exit package that favoured those who had worked for a shorter time.

They relied on the cases of **Munir Sheikh Ahmed vs. National Bank of Kenya [2018] eKLR**, **Barclays Bank of Kenya & Another vs. Gladys Muthoni & 20 Others [2018] eKLR** and **United States International University (USIU) vs. Attorney General & 2 Others [2012] eKLR**.

The Petitioners submitted that there is no time limit set within which claims for constitutional violations should be instituted. They further submitted that the issues before this court emanate from violations of their constitutional rights hence their claim is not time barred as set out in section 90 of the Employment Act. They rely on the cases of **Clement Ernest Opiyo Murenga vs. Principal Secretary, Treasury & Another [2017] eKLR**, **Agnes Wachu Wamae & 104 Others vs. Barclays Bank of Kenya [2018] eKLR**, **Edward Akong’o Oyugi & 2 Others vs. The Attorney General [2019] eKLR** and **Beatrice Wanjiru & 2 Others vs. The Attorney General & Another [2017] eKLR**.

Analysis and Determination

After considering the arguments and submissions by the parties regarding the preliminary objection, the issues for determination are –

- a. Whether the Petition is time barred.
- b. Whether the Petition as filed raises constitutional issues

Limitation of Time

It is not disputed that the Petitioners ceased to be employed around 6 years ago. As rightfully posited by the Respondent, section 90 of the Employment Act requires an aggrieved party to institute employment and labour relations proceedings within 3 years of the act, neglect or default complained of. The Respondent further submitted that the issues raised in the Petition as constitutional issues are aptly covered in the Employment Act hence it ought to be dismissed since it is a claim disguised as a petition. It relies on Section 5(3) of the Employment Act provides as follows-

“No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—

- a. On grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, marital status or HIV status;**

b. In respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.”

The facts of the case are that the petitioners applied for the voluntary early retirement package offered by the respondent. This is an employment matter relating to discrimination in the payment of terminal benefits and would adequately be addressed under Section 5 of the Employment Act.

As was stated in the case of *Gabriel Mutava and 2 Others –V- Managing Director Kenya Ports Authority and Another* (supra) this is a matter adequately provided for in the Employment Act. I would agree that the reason the petitioner approached the court by way of petition is to circumvent the provisions on limitation in Section 90 of the Employment Act.

For the foregoing reasons the preliminary objection succeeds with the result that the petition is dismissed with no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF NOVEMBER 2019

MAUREEN ONYANGO

JUDGE