



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**PETITION NO. 40 OF 2017**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010**

**ARTICLES 10, 19(2), 20(1), (2), (3), &(4), 21 (1) & (2),**

**41(1) & (2), 165 (3) (b) & 258 (i)**

**IN THE MATTER OF THE UNCONSTITUTIONAL REMOVAL FROM**

**NATIONALBANK OF KENYA LIMITED OF MR. JAMES MWANGI NJIIRI**

**AND**

**IN THE MATTER OF UNLAWFUL LIQUIDATION OF PENSION AND UNLAWFUL**

**UTILIZATION OF PENSION PROCEEDS OF MR. JAMES MWANGI NJIIRI**

**BETWEEN**

**JAMES MWANGI NJIIRI.....PETITIONER**

**-VERSUS-**

**NATIONAL BANK OF KENYA LIMITED.....1ST RESPONDENT**

**NATIONAL BANK OF KENYA STAFF**

**RETIREMENT BENEFITS SCHEME.....2ND RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 1st November, 2019)**

**JUDGMENT**

The petition was filed on 26.04.2017 through M/S J. A. Guserwa & Company Advocates. The petitioner prayed for:

- a) A declaration that the petitioner's constitutional rights were violated by the respondent.
- b) A declaration that the 1st respondent had no constitutional or statutory right to unlawfully suspend or terminate the services of the petitioner without proven valid reasons.
- c) A declaration that the petitioner is entitled to damages to be paid by the respondents to be assessed by the Honourable Court.
- d) Any other favourable order that the Court may grant.

The petitioner was employed by the 1st respondent as a management trainee effective 01.07.1972 on permanent and pensionable terms of service. He rose through the ranks to the position of Chief Inspector of Branches effective 06.09.1989 on salary terms revisable from time to time as per the 1st respondent's terms and conditions of service of non-unionisable staff.

By the letter dated 26.07.1993 the 1st respondent sent the petitioner on compulsory leave. The letter alleged that the petitioner had acted in a manner prejudicial to the best interests of the 1st respondent by releasing confidential information to unauthorised persons. The compulsory leave was said to be for 60 working days with immediate effect and with entitlement to all his normal terms and conditions of service but naturally he'd not be required to report to the bank except for his own normal personal banking until the matter was resolved. The compulsory leave was extended for almost 6 years. The alleged confidential information that was said to have been released to unauthorised persons by the petitioner has never been disclosed to the petitioner or otherwise. The 1st respondent subsequently terminated the claimant's employment by giving the claimant three months' pay in lieu of the notice period. The termination was effective 12.01.1999 and the letter put terminal dues at Kshs. 741, 587.00 plus pension dues contributed by the claimant and the 1st respondent of Kshs. 1, 006, 866.70. The amount was to be availed to the claimant once the appropriate PAYE had been levied on the gross amounts and any money owed to the bank.

The petitioner's case is that the termination violated the Constitution and the petitioner's legitimate expectation to remain in lawful employment unless there was proven justification for his termination or otherwise. In the process, it is the petitioner's case that the respondents connived to liquidate the petitioner's pension benefits and applied them to an alleged debt owed to the 1st respondent. The petitioner says he was thereby deprived the full benefit of the law as set out in Article 27 (1) of the Constitution of Kenya, 2010 thus; "**Every person is equal before the law and has the right to equal protection and equal benefit of the law.**" Further, the 1st respondent unfairly denied the petitioner full service period in violation of Article 27 and it amounted to discrimination. The denial of the full benefit of the terms of service also amounted to unfair labour practice and violated Article 41 of the Constitution.

The petitioner's further case is that by reason of employment on 01.07.1972 on permanent and pensionable terms and promotion to Chief Inspector of Branches effective 06.09.1989, the petitioner had a legitimate expectation that he'd continue in employment until retirement unless there was justifiable reasons for early exit from employment. His rights were denied by reason of dismissal of HCCC No. 25 of 1998 for want of dismissal and which suit he had filed to enforce his claims herein. The petitioner urged that the 1st respondent's actions of terminating his contract of service are arbitrary, discriminatory and against the letter and spirit of the law as expressly provided in the Constitution and the Employment Act, 2007. It is also urged that it was arbitrary, unlawful, unconstitutional and discriminatory for the 2nd respondent to liquidate the petitioner's pension through the 1st respondent applying it to alleged debts.

The petitioner further states that the 1st respondent denied him fair administrative action in the manner he was terminated from employment.

The petitioner has filed schedule 1 and schedule 2 showing his alleged computed outstanding payments accruing to him by reason of the alleged violations and amounting to Kshs. 34, 970, 944.00. The computation includes normal annual salary increments and salary adjustments which had been awarded to other managers of the petitioner's rank following several salary reviews for management staff.

The petitioner filed his witness statement on 05.03.2019, a supplementary affidavit on 19.06.2018 and a further supplementary affidavit on 23.01.2019.

The respondent opposed the petition by filing on 15.05.2018 the replying affidavit of Stephine Obong'o, the 1st respondent's Head of Employee Relations and through Oraro & Company Advocates. Learned Counsell Mr. Chacha Odera Advocate appeared in that behalf. It is admitted that the respondent employed the claimant as a management trainee effective 28.06.1972 on probationary term of 6 months. The employment history, compulsory leave and subsequent termination by the notice of termination of service dated 12.01.1999 is not in dispute. The respondents' case is that the termination was lawful and the petitioner was paid terminal dues as tabulated in the notice of termination dated 12.01.1999 and paid per terms of service. While in service the 1st respondent advanced to the petitioner loans which are in dispute in **HCCC No. 465 of 2013 Sophy Njiiri –Versus- Natinal Bank of Kenya and Another** where the petitioner is the interested party. It is the respondents' case that the petitioner defaulted on in his obligations and as a result the bank attempted to exercise its statutory right of sale which led to several suits including:

- a) HCCC No. 96 of 2000 (OS) James Mwangi Njiiri –Vesus- National Bank of Kenya Limited dismissed on 27.04.2004 for want of prosecution.
- b) HCCC No. 276 of 2006 (OS) James Mwangi Njiiri –Vesus- National Bank of Kenya Limited which was discontinued by the debtor.
- c) HCCC No. 310 of 2007 Antony Maina Njiiri (Suing as Attorney of debtor) –Versus- National Bank of Kenya Limited.

The claims made in the present petition were previously made by the petitioner in HCCC No. 25 of 1998 James M. Njiiri –Versus- National Bank of Kenya Limited seeking special and general damages plus interest on account of the petitioner's alleged unlawful termination of employment. The suit was however dismissed for want of prosecution on 05.07.2004 where the 1st respondent was awarded party to party costs which are yet to be recovered. The dismissal of that suit was legitimate and it is un-procedural for the petitioner to reintroduce the same matters in the present petition.

The respondent's further case is that the present petition was filed 18 years after the alleged cause of action or complained of took place and no explanation has been extended for the delay or to explain or justify the filing of the suit at this point in time. The time of limitation should not be overlooked towards trivialising the constitutional jurisdiction. Further the petitioner's complaint is not of a constitutional nature and his remedy, if any, would be under the provisions of the Retirement Benefits Act. The petition is therefore an abuse of Court process and should be dismissed with costs.

The petitioner testified to support his case and relied on his affidavits on record and his witness statement. The respondents relied on the replying affidavit. The parties filed their respective submissions. The Court has considered the material on record.

The **1st issue** for determination is whether the Court has the jurisdiction to entertain the petition. The respondents' case is that the petitioner has converted an employment dispute into a constitutional issue and the petitioner has blatantly disregarded the statutory channels that are in place to aid the resolution of employment disputes. The respondents have cited numerous decisions wherein it was held that if there is a

specific mechanism given for resolution of disputes, then that must be followed and that the Constitution is not meant to replace the existent statutory regime. The petitioner has cited, amongst other authorities in that regard, Mativo J in **David Ramogi & 4 Others –Versus- The Cabinet Secretary, Ministry of Energy & Petroleum & 7 Others**[2017]eKLR. The respondents cited the Court of Appeal in **Gabriel Mutava & 2 Others –Versus –Managing Director Kenya Ports Authority & Another** [2016]eKLR, thus, “**Time and again it has been said that where there exists sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation. Indeed, in the case of Harrikisson –Versus- Attorney General [1980]AC 265, the Privy Council held that: “...The notion that whenever there is a failure by an organ of the Government or public authority or public officer to comply with the law necessarily entails the contravention of some fundamental freedom guaranteed to individual by Chapter 6 of the Constitution is fallacious. The right to apply to the High Court under Section 6 of the Constitution for redress when any human right or fundamental freedom is, or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for normal proceedings for invoking judicial controls of administrative action....”**”

The respondents also cited **Speaker of the National Assembly –Versus- James Njenga Karume** [1992]eKLR where it was held, “**...In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed....”**”

The respondents cited the Supreme Court in **Communications Commission of Kenya & 5 Others -Versus- Royal Media Services & 5 Others, Petition No. 14, 14A, B & of 2014** that the principle of avoidance also known as constitutional avoidance entails that a court will not determine a constitutional issue, when a matter may properly be decided upon another basis. It was submitted for the respondent that litigants must channel their grievances to appropriate forums especially where the substantive issue in dispute has a prescribed dispute resolution mechanism in statute or any other law. In the instant case the petitioner has disguised an employment dispute as a constitutional claim and it was urged the Court should not aid that camouflage.

In that regard, it was submitted that the petitioner’s case is based on the 12.01.1999 termination of his employment and the applicable law was the Employment Act, Cap. 226 (repealed). It was submitted that the petitioner could not therefore base his petition on the Employment Act, 2007 and the Constitution of Kenya 2010 both of which were not in operation on 12.01.1999. The respondents cited **Duncan Otieno Waga-Versus- Hon. Attorney General** [2012]eKLR, where it was held that for claims before 27.08.2010 then the former Constitution applied.

The respondents further urged that the petition was filed 18 years after 12.01.1999, the date of the cause of action. The petitioner had offered no explanation for the delay or justified the institution of the petition belatedly. Thus, it was submitted that the suit was time barred under the time of limitation being section 90 of the Employment Act, 2007 which prescribed 3 years of limitation.

On the time of limitation, it is submitted for the petitioner as follows;

**“13. Whereas the petitioner was subjected to the inhuman treatment and torture in the year 1991, his rights to a fair hearing or dignified treatment while working for the respondent cannot be defeated by citation of time bar. In any even the dismissal of his case against the Respondent Bank i.e H.C.C No. 25 of 1998 was grounded on dismissal for want of prosecution while he was in the USA as an asylum seeker. The petitioner’s case is based on the Employer’s violation of his Constitutional rights touching on the right to fair hearing and/or denial of the rules of natural justice.”**

The respondents on the asylum question have submitted that the petitioner’s case is that he was haunted outside Kenya by the respondent bank for unknown reasons which saw him seek political asylum in the USA between 2004 – 2016 and because of that he was unable to prosecute H.C.C.C No. 25 of 1998. The respondents deny that submission as not truthful because in the further supplementary affidavit sworn on 22.01.2019 the petitioner has stated, “**...arising from my frustrations and threats from the Government of the day I fled into exile in the United States of America on 29th November 2000.**” The respondents state that the petitioner has not sued the Government or the alleged powerful Government officers who led to his seeking asylum. The seeking of asylum had nothing to do with the respondents and accordingly, he cannot use that as a ground in filing the suit or constitutional petition.

The Court has considered the parties’ respective positions and submissions.

**First**, the petitioner admitted that the matters leading to the present petition were urged in H.C.C.C No. 25 of 1998 but which was dismissed with costs for want of prosecution. The explanation given by the petitioner is that he went into exile in the USA and was granted political asylum in May 2001 until he returned to Kenya on 14.03.2016. The circumstances leading to the exile and asylum in the USA as narrated by the petitioner and which are not rebutted by the respondents are as follows:

a) On 26.07.1993 the 1st respondent’s Executive Chairman summoned the claimant to his office and showed him a letter from Treasury addressed to the 1st respondent by Dr. Wilfred Koinange the Permanent Secretary Ministry of Finance. He also showed him a letter signed by Professor Philip Mbithi, Permanent Secretary in the Office of the President, Head of the Civil Service and Secretary to the Cabinet, addressed to the Permanent Secretary Ministry of Finance, Dr. Wilfred Koinange. The letter by Professor Philip Mbithi was read to the claimant and it alleged that the claimant was divulging confidential information on the operations of the 1st respondent to members of the political opposition and the press. The letter directed the Treasury to take action against the petitioner. It was that letter by Professor Philip Mbithi that was forwarded to the 1st respondent directing the 1st respondent to take action against the petitioner.

b) In such circumstances the 1st respondent’s Executive Chairman told the petitioner that his hands were tied up and he had no alternative but to comply. Thus the Executive Chairman by the letter directed that the petitioner goes on compulsory leave for 60 days effective 26.07.1993 to enable the bank to carry out investigations in the matter. The compulsory leave was extended over a period of 6 years until 12.01.1999 when the petitioner’s employment was terminated.

c) In 1994 the petitioner had met Dr. Wilfred Koinange, Permanent Secretary Ministry of Finance at his Treasury office who informed the petitioner that the petitioner's inspection report on the 1st respondent's status had nothing wrong in it, the Government knew whatever was happening at the 1st respondent, and the 1st respondent had written to Treasury clearing the petitioner about the allegations leading to his being put on compulsory leave.

d) At that meeting in 1994, Dr. Wilfred Koinange, Permanent Secretary Ministry of Finance then informed the petitioner that his predicament was by powerful persons outside the 1st respondent who were unhappy with his work as Chief Inspector of Branches at the National Bank of Kenya and that they accused him of putting pressure on the bank to demand payment of their debts. That the petitioner was further informed that some of the powerful persons involved were the late Hon. Ndolo Ayah, Ketan Somaia, and the late Hezekiah Oyugi, Permanent Secretary for Internal Security.

e) The petitioner says he was aware of a directive by the Office of the President that he takes over as the 1st respondent's General Manager but the matter was highly politicised and his reinstatement was frustrated.

f) He demanded that his salary and allowances be regularised by the 1st respondent but when that failed, he filed H.C.C.C No. 25 of 1998.

g) Arising from frustrations and threats from the Government of the day he then fled into exile in the USA on 29.11.2000 where he was granted political asylum and he resided in the USA since then until 14.03.2016 when he returned to Kenya. While in exile, H.C.C.C No. 25 of 1998 was dismissed for want of prosecution.

It is generally true that a litigant should not convert a matter to a constitutional issue where there is a clear statutory mechanism of resolving the dispute. In the present case, the only reason that H.C.C.C 25 of 1998 was dismissed was for want of prosecution. The petitioner has established that the dismissal was occasioned by his having gone into exile and obtained asylum in the USA. The petitioner had further exhibited a medical report that during that period (2006 – 2016) he suffered ill-health with multiple chronic diseases and he was advised to postpone his international travel. To that extent, the Court returns that the petitioner has established reasonable cause for the delay in filing the present petition.

However, the petitioner has not explained why upon return in 2016 he did not seek to review and set aside the orders dismissing H.C.C.C No. 25 of 1998 for want of prosecution. The petitioner in his testimony admitted that the issues in the current petition were substantially similar to the matters in issue in H.C.C.C No. 25 of 1998. The earlier suit having been dismissed, the legitimate cause of action (in the opinion of the Court) was to seek to review and set aside the dismissal order and not to file the present petition raising substantially the same matters in issue in that earlier suit. The Court finds that the petition is trapped by the principle of *res judicata* and is found to be an abuse of Court process to that extent.

**Second**, does the petition raise a constitutional issue? The petitioner has alleged violation of Article 27(1); Article 41; and Article 47 of the Constitution of Kenya. His lamentation is that he was unfairly placed on compulsory leave pending investigations whose outcome the 1st respondent has never communicated; during the compulsory leave he claims unpaid salaries and allowances; and consequential to termination he demands an account of how his terminal dues were applied by the respondents. The Court finds that the petitioner has a continuing injury which accrued consequential to his termination, namely the respondents have a duty to render an explanation of circumstances leading to the petitioner's termination and the accruing terminal dues. In the circumstances, the Court finds that whereas the claim evolved out of the employment relationship between the 1st respondent and the petitioner, there would be no other prescribed statutory process that the petitioner would address his continuing injury except by the present petition. In view of the continuing injury as per alleged constitutional violations, the Court finds that the Employment Act, 2007 and the Constitution of Kenya 2010 would properly apply to the case. In any event the Court is guided that under section 90 of the Employment Act, 2007 for a continuing injury the suit must be instituted within 12 months from cessation of the cause of action. The present continuing injury commenced upon retirement on 12.01.1999 and has not ceased to run. The claimant continues to suffer unexplained computation and application of his terminal dues. However, the Court has found that the claimant had filed H.C.C.C No. 25 of 1998 to address his concerns substantially in issue in the present case and that offered him a proper avenue to pursue his claims without having to file the present petition.

**Third**, the Court follows the holding in Okiya Omtatah Okoiti –Versus- Joseph Kinyua and 2 Others [2018]eKLR, thus, “**To answer the 11<sup>th</sup> issue for determination, the Court returns that it is now clear that the petitioner was entitled to approach the Court by way of a petition rather than by ordinary action or other originating process. In view of the findings on the constitutional transgression as alleged or shown to attach, it is apparent that the petitioner was entitled to move the Court by way of a constitutional petition under Article 22 and more so Articles 258 as read with 3(1) of the Constitution. The Court follows Revital Healthcare (EPZ) Limited & Another –Versus- Ministry of Health & 5 Others [2015]eKLR (Anyara Emukule J) that a constitutional issue exists only if there was no alternative forum to resolve the dispute. Again in COD & Another –Versus- Nairobi City Water & Sewerage Co. Ltd [2015]eKLR (Onguto J), thus, “14.The law above is crystal clear that where there exist sufficient and adequate mechanisms or forums to deal with a specific issue or dispute by other designated constitutional organs or under a statute, the jurisdiction of the High Court under Article 165(3) (b) of the Constitution should not be invoked until such mechanisms have been exhausted. To my mind therefore, not every litigant ought to come to court by way of a constitutional petition even where there are no constitutional issue arising and where there are adequate remedies provided in other laws to determine such situations.”** The Court finds that after the termination the claimant went into exile, the case he filed was dismissed for want of prosecution by reason of the exile and ill-health, the alleged violations flowing from the termination continue to exist, and in the circumstances, the constitutional petition was available manner of ventilating the alleged continuing injury but only if he had not filed H.C.C.C No. 25 of 1998.

**Fourth**, the Court follows Beatrice Wanjiru and 2 Others –Versus- The Attorney General and Another [2017]eKLR where the Court stated as follows,“**The court has also considered the judgment in Njuguna Githiru –Versus- Attorney General [2016]eKLR (Lenaola J, as he then was). The holding in that case was that each case must be considered on its own merits in the court's exercise of the discretion that the time of limitation shall not apply to cases of enforcement of the Bill of Rights. The essence of a time of limitation was upheld by the court in that case as preventing a plaintiff from prosecuting stale claims on the one hand, and on the other hand, protecting the defendant after he had lost evidence for his defence, from being disturbed after a long lapse of time; but it was not to**

extinguish the claims. The law as set out in that case appears to be that in cases for enforcement of rights and fundamental freedoms, time of limitation may not apply provided it is established that the petitioner did not ignore the enforcement of his rights or freedoms under the general principles of law (say common law or equity or statutory law) with a calculation to convert his claims or grievance into a “constitutional issue” after the expiry of the time of limitation; and, the petitioner must offer an acceptable explanation or demonstrate some justification for prolonged delays in instituting claims especially in light of the fact that the avenues and mechanisms for addressing such violations were already in existence after the change of the alleged oppressive regime of governance. Thus a claim may not be bound by the prescribed period of limitation if, there exist a genuine constitutional issue (meaning an issue not properly enforceable by ordinary action under prevailing laws); and, the petitioner explains the delay or belated filing of the claim as per the circumstances of the case.”

The Court finds that the reasons for going into exile were intertwined with matters leading to the petitioner’s compulsory leave and subsequent termination. The Court agrees with the respondents that the fact of going into exile and obtaining asylum cannot constitute a claim against the respondents but in the Court’s opinion, it would constitute a valid reason to justify the belated filing of the present petition against the respondents – together with the fact that after the exile, the petitioner became unwell and his doctor advised him against international travel. The Court has found that the injury is continuing and the cause of action is not stale – namely violation of rights as was alleged.

Nevertheless, the petitioner had alternative method of ventilating and pursuing his claims and indeed filed H.C.C.C No. 25 of 1998. Further the petitioner has not denied that the grievance about application of his terminal and pension dues to settle debts owed to the 1st respondent is subject of other suits that are pending or may have been determined. In such circumstances the Court returns that the petitioner had other alternative procedures and remedy in law and which he has invoked so that even if he has given a valid explanation for the belated filing of the constitutional petition, the court finds that the petition was not a legitimate manner to move the Court as it was an abuse of Court process in that regard.

To answer the 1st issue for determination, the Court returns that whereas it has jurisdiction to hear and determine the present petition, the jurisdiction was impaired by reason that the petition is an abuse of Court process in view of the previously filed and dismissed H.C.C.C No. 25 of 1998. The Court has considered its role in the circumstances of the present petition and the provisions of Article 159 and 23 (3) (a) of the Constitution and considers that in view of the foregoing findings by the Court, the petitioner should be entitled to a declaration that he is at liberty to file an appropriate application in H.C.C.C No. 25 of 1998 within 30 days.

The **2nd issue** for determination is whether the petitioner’s rights were violated as alleged. The Court needs not address the issue in view that the petition has been found to be an abuse of Court process. The Court has also found that the petitioner had alternative mechanisms in law to advance his alleged claims that the compulsory leave was unlawful and unconstitutional and his terminal and pension dues might have been wrongly applied to settle his debts to the 1st respondent. The dispute is better settled in the pending suits or through revival of the determined suits as may be appropriate and lawful. The Court finds accordingly.

The Court has considered the history of the case and returns that each party to bear own costs of the petition.

In conclusion judgment is hereby entered for the respondent against the petitioner for dismissal of the petition with orders for:

- a) Each party to bear own costs of the petition.
- b) The declaration that the petitioner is at liberty to file an appropriate application in H.C.C.C No. 25 of 1998 within 30 days from the date of this judgment.

**Signed, dated and delivered** in court at **Nairobi** this **Friday, 1st November, 2019.**

**BYRAM ONGAYA**

**JUDGE**