



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO 43 OF 2015

MICHAEL MURJI MATHENGE.....1ST PETITIONER

NICHOLAS LITAO LESAMBU.....2ND PETITIONER

VERSUS

THE HON ATTORNEY GENERAL.....1ST RESPONDENT

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

THE DEFENCE COUNCIL.....3RD RESPONDENT

RULING

1. This ruling is in respect to a preliminary objection raised by the Respondents by notice dated 24th May 2017. The objection is based on the following grounds:

- a) That the Petition herein is *res judicata* by dint of judgment in E&LRC 2212 of 2012;
- b) That this Court is *functus officio*;
- c) That the Petition is fatally defective as it is premised on a non-existent law, namely the Constitution of Kenya, 1969;
- d) The Petitioners are guilty of laches/inordinate delay in that the Petition has been instituted 35 years after the alleged event;
- e) That the Petition is stale and lacks in merit;
- f) That the Petition is an abuse of the court process;
- g) That the Petition is incompetent and ought to be struck out with costs.

2. The parties agreed to urge the objection by way of written submissions. However, only the Respondent filed submissions. The Respondent contends that because other petitioners have previously moved the Court seeking similar prayers as the current petitioners, then the matter is *res judicata*. The Court was referred to a number of authorities on this issue.

3. In *George W.M. Omondi & another v National Bank of Kenya Ltd & 2 others [2001] KLR*, the Court stated thus:

“Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. They are bound to bring all their case at once. They are forbidden from litigating in instalments.”

4. My understanding of the Respondent’s objection is that since other former Kenya Air Force soldiers have been to court complaining of violation of their rights following the abortive coup d’état in 1982, then the matter has been finally decided for all persons claiming under the same circumstances. With much respect, I think that this is a misrepresentation of the doctrine of *res judicata*.

5. Section 7 of the Civil Procedure Act codifies this doctrine as follows:

7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

6. There are three ingredients in the doctrine of *res judicata*:

- a) That the matter in issue has been directly and substantially in issue in a previous suit;
- b) That the parties are either directly or indirectly the same;
- c) That the matter has been finally decided by a court of competent jurisdiction.

7. While the subject matter may be the same in all the petitions related to the 1982 coup d’état, the petitioners have not sued as a group. They are distinctly different and the doctrine of *res judicata* is inapplicable. For the same reasons, the Court cannot be said to be *functus officio*.

8. 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 v Attorney General [2014] eKLR* and **Mumbi Ngugi J** in *Wellington Nzioka Kioko v 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.

9. 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.

10. For the foregoing reasons, I find the preliminary objection by the Respondent not well taken and hereby overrule it.

11. The costs of the objection will be costs in the petition.

12. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF JANUARY 2018

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 2ND DAY OF FEBRUARY 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Agina for the Petitioners

Mr. Odukenya for the Respondent