



## REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. 10 OF 2017

**CHARITY WANJIRU NDEGWA**

**CECILIA WANGECHI GAKUHI**

**PERIS NYAMBURA WAHOME**

**(suing on their behalf and on behalf of 702 other**

**interested persons who established and worked at and**

**were evicted from Nyayo Tea Zones tea farms in Tetu**

**part of Aberdare Forest).....CLAIMANTS**

**VERSUS**

**ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**NYAYO TEA ZONES**

**DEVELOPMENT CORPORATION.....2<sup>ND</sup> RESPONDENT**

### RULING

1. The Petition was one where the Claimants sought relief for the exploitation and serfdom they were exposed to in the establishment of Nyayo Tea Zones in the Aberdare forest areas in Tetu. The Petition was objected to by the Respondents. The 2<sup>nd</sup> Respondent also filed a preliminary objection on 19<sup>th</sup> July 2017 to the following tenor:

1. The cause of action on which the Petition is predicated is on alleged breach of contract of employment which falls under the provisions of the Employment Act and therefore the Petition is incompetent and bad in law for invoking the wrong procedures.
2. The alleged cause of action allegedly arose between 1985 and 1986 and the Petitioners are therefore guilty of laches.
3. A constitutional Petition is not suitable for determining serious and disputed matters of facts as contained in the Petition.

2. The Respondents filed submissions to the objection raised. The 2<sup>nd</sup> Respondent filed its submissions on 19<sup>th</sup> March 2018 and the 1<sup>st</sup> Respondent filed submissions on 26<sup>th</sup> March 2018. The Petitioners filed their submissions in opposition to the preliminary objection on 4<sup>th</sup> April 2018.

3. The 2<sup>nd</sup> Respondent submitted that the court had no jurisdiction to entertain the Petition as Petitioners claims were not amenable to resolution in a constitutional petition and that the Petition was defeated by laches and thus incompetent and bad in law. The 2<sup>nd</sup> Respondent submitted that merely filing a constitutional petition does not give life to a claim filed as such. The 2<sup>nd</sup> Respondent submitted that even where the alleged breaches may amount to a breach of fundamental rights, the mere allegation of infringement of constitutional right does not automatically make it a constitutional matter. The 2<sup>nd</sup> Respondent submitted that the claim was one for unpaid dues for which there is a

remedy under ordinary civil suit for a claim of payment for work done. The 2<sup>nd</sup> Respondent submitted that based on the principle of constitutional avoidance, the Petition was a gross abuse of the process of this court and the same should be struck out with costs to the 2<sup>nd</sup> Respondent. The case of **Gabriel Mutava & 2 Others v Managing Director Kenya Ports Authority & Another [2016] eKLR** was cited where the Court of Appeal held as follows:

*In employment matters, such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except to the extent that the terms are contrary to the law; or have been superseded by statute. Certainly invoking the constitutional route in the circumstances of this case was misguided. The Constitution should not be turned into a thoroughfare for resolution of every kind of common grievance.*

*A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done.*

The Respondent 2<sup>nd</sup> Respondent submitted that the matter should have been ventilated in the right forum which is the civil proceedings before the Labour & Employment Relations court. The 2<sup>nd</sup> Respondent submitted that the Petitioners' claims are defeated by laches as they filed the Petition after a period of about 30 years and offered no explanation for the delay. The 2<sup>nd</sup> Respondent submitted that delay was inordinate and a basis for the striking out of the Petition as was held in the case of **Peter Ngari Kagume & 6 Others v Attorney General [2016] eKLR** where Nyamu J. (as he then was) held that *the learned trial judge correctly observed that none of the appellants proffered any explanation for the delay of 24 years in coming to court. Whichever way one looks at it in the circumstances of this appeal, the delay spanning 24 years was inordinate. The appellants slept on their rights. We are unable to find fault in the findings made by the learned judge and that in absence of plausible explanation for delay the suit amounts to an abuse of court process.*

The 2<sup>nd</sup> Respondent submitted that the Petitioners sought leave to file the Petition in the Chief Magistrates court and not this court. The 2<sup>nd</sup> Respondent submitted that was improper procedure and thus sought the striking out of the Petition with costs.

4. The 1<sup>st</sup> Respondent in its submissions submitted that the Petition was not suitable for the determination of serious and disputed matters of fact as contained in the Petition. The 1<sup>st</sup> Respondent cited the case of **Gabriel Mutava & 2 Others v Managing Director Kenya Ports Authority & Another [2016] eKLR** also cited by the 2<sup>nd</sup> Respondent and asserted that in matters of redress arising out of contract a constitutional petition was improper. The 1<sup>st</sup> Respondent also cited the case of **Peter Ngari Kagume & 6 Others v Attorney General [2016] eKLR** for the submission that there was inordinate delay in presenting the claim. The 1<sup>st</sup> Respondent submitted that the 3 Petitioners were even guilty of failing to comply with the order issued in the Chief Magistrates court requiring them to advertise to notify the persons they are representing through public advertisement.

5. The Petitioners in their submissions submitted that there was no bar in limitation for human rights abuse claims. The Petitioners submitted that far away from our jurisdiction, victims of Mau Mau war atrocities found favour with the Queens Bench in their claim for compensation for the torture visited on them in 1950's in spite of having filed their claim about 60 years later. The preliminary objection against their claim was rejected in spite of it having been covered by the Limitation Act 1980 of England the equivalent of our Limitation of Actions Act, cap 22. The Petitioners submitted that the authority of **Mutua & Others v The Foreign and Commonwealth Office [2012] EWHC 2678 (QB)** where the court held that

*the seriousness of the allegations made obviously gives any court pause for thought before it holds that the claim cannot be brought.*

And further

*It would be understood from the foregoing that I find Mr. Nyingi, Mr. Nziri and Mrs. Mara have established a proper case for the court to exercise its discretion in their favour to direct that the provision of Section 11 of the 1980 Act shall not apply to them.*

The Petitioners submitted that there was exclusion of limitation from such claims as those made by them as their experience was much more or less the same. The Petitioners claimed their experience was for 5 years or so and that their claims should be saved from limitation laws. The proper approach, it was submitted was that the court in **Njuguna Githiru v Attorney General [2016] eKLR** appreciated the dictates of transitional justice and concluded that the court cannot shut its eyes to the historical injustices committed in the past. It was submitted that the general jurisprudence of our courts is for admitting such claims in spite of the lapse of time. Reliance was placed in the case **In re McKerr v Northern Ireland [2004] UKHL 12** where the court held that *past events have continuing effects*. The Petitioners submitted that the Respondent continues to reap astronomical profits from the fruits of the Petitioners' labour while the Petitioners are still lounging in abject destitution as a result of the impugned events. They submitted that their claims on reparation are still current and not stale. The Petitioners relied on the writings of **Stephen Gray: The Elephant in the Drawing Room: Slavery and the Stolen Wages, (2007) Vol. II (1) Australian International Law Review** which discussed wage violation in respect of the Aboriginal people and viewed it as a form of slavery, particularly since the same was variously countenanced by the state as was the case herein. The Petitioners submit that this is not a typical employment matter. It was submitted that it amounts to slavery where persons were restrained by insidious nature of employment to which they had consented to earn income, but with a burden to repay a debt from their employer so that they are compelled to work particularly hard to pay off the debt before they were able to earn income for themselves. They submitted that they were reduced to a status where they were compelled to work and not demand their wages lest they be evicted while hoping upon hope that they will benefit from with the government land as promised. They submitted that the issues pleaded in any form except may be a reference to the International Court of Justice or such other international judicial bodies and that thanks to the new Constitution they could seek redress locally in the instant forum. The Petitioners reminded the 2<sup>nd</sup> Respondent of the provisions of Article 22(2)(b) and 258(1)(b) of the Constitution which provide that in articulating a matter in the bill of rights, the same can be made by a person acting as a member of, or in the interest of a group or class of persons. The Petitioners cited the case of **John Temoi v Governor of County of Bungoma & 17 Others [2014] eKLR** and submitted that the order for leave was only useful for giving the Petitioners legitimacy *inter se* amongst themselves and other interested parties in the class or group of claimants for whom they are litigating and not to cure any want of *locus standi*. The words of Lord Denning were cited in **Moon v Atherton (1972) 3 All ER 145** where in his usual flair and flamboyance stated thus *in a representative action the one who is named as a*

plaintiff is, of course, a full party to the action. The others who are noted named, but whom she represents are also parties to the action. They are all bound by the eventual decision in the case. The Petitioners submitted that the 2<sup>nd</sup> Respondent's objection was bare and hollow and cannot even stand in respect of typical civil actions and with the constitutional provisions on the issue which have greatly widened and opened up the capacity to litigate on constitutional complaints. The Petitioners thus the preliminary objection lacks merit and should be dismissed with costs.

6. The objection is one that can be summed up as one in which there is an objection to the Petition as being incompetent and bad in law for invoking the wrong procedures in form of a constitutional petition yet the dispute is on employment issues and on account of the alleged cause of action having arisen between 1985 and 1986, the Petitioners are thus guilty of laches. The Petitioners were of the view that the atrocities they faced were not to be dismissed flippantly and they cited various decisions of the House of Lords and the famed Lord Denning. In the cases cited, there was a common thread on retaining litigation. On the Respondent's side cases from our Court of Appeal were cited. The Petitioners cited the case of **Njuguna Githiru v Attorney General** (supra) where the learned judge cited the case of **Ochieng' Kenneth K'Ogutu v Kenyatta University and 2 Others High Court Petition No. 306 of 2012** (unreported) with approval stating thus:-

*"[35]As I conclude this matter, I will address the issue of delay in filing this petition. The respondent has argued that the petitioner is guilty of inordinate delay, and I am inclined to agree with it. The events complained of took place more than 12 years ago. There is nothing before the court that explains or justifies the delay in coming to court to vindicate his rights. The petitioner's counsel submitted that he was so traumatised that he could not come to court before, but I can see no basis for this submission. While the petitioner alleges that he was arrested and charged, and that he served for 15 days before his fine was paid, I cannot see any basis for alleging that he was so traumatised that it has taken him 12 years to recollect that he had a claim against the respondents. While the reason for delay in cases such as those involving the Nyayo House torture cases may be acceptable, at least for a time, that they were not able to file claims because of the politically repressive climate then prevailing, there is no such justification in this case. Even had I found that the facts demonstrated a violation of the petitioner's rights (which I have not), I would have had difficulty in excusing the 12 years' delay in this matter."*

Regarding the need to explain apparent delays in instituting the said suits, he stated thus:

*"[36]There is a great danger that parties are abusing the constitutional protection of rights to bring claims before the court whose sole aim is enrichment rather than vindication of rights. A delay of 10 years or more before one comes to court to allege violation of rights is clearly not justifiable. As Nyamu J observed in Abraham Kaisha Kanzika and Another vs Central Bank of Kenya (supra): "Even where there is no specified period of limitation it is proper for the court to consider the period of delay since the accrual of the claim and the reasons for the delay. An applicant must satisfactorily explain the delay. In this case a delay of 17 years is inordinate and it has not been explained. The prosecution of the claimant took 6 years and although he gives this as the reason for the delay he has not explained the balance of eleven years."*

The Learned Judge thereafter concluded that:

*"In my view failure by a Constitutional Court to recognize general principles of law including, limitation expressed in the Constitution would lead to legal anarchy 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."*

7. In **Gabriel Mutava & 2 Others v Managing Director Kenya Ports Authority & Another** (supra) which was cited by the Respondents, the Court of Appeal held as follows:

*To our mind, the issue here is simple and straightforward. The trial court having found that the termination of the appellants in the public interest was in breach of the Respondents' regulations and the rules of natural justice, could it withhold a remedy on the premises that the appellants approached the court through a wrong procedure?*

*Time and again it has been said that where there exists other 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.*

And also

*In employment matters, such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except to the extent that the terms are contrary to the law; or have been superseded by statute. Certainly invoking the constitutional route in the circumstances of this case was misguided. The Constitution should not be turned into a thoroughfare for resolution of every kind of common grievance.*

8. The Petitioners have drawn some inferences that their treatment by the 2<sup>nd</sup> Respondent is as gross as that meted out to the Aborigines in Australia or the Mau Mau who sought reparations 60 years after the atrocities. Without delving into the merits of their suit, it is not possible that there has been anything close to the havoc caused to the Mau Mau or the Aborigines in Australia by the colonial power. Period!

9. The suit in my view was brought inordinately late. The infarctions the Petitioners assert were committed were allegedly committed in 1984 or thereabout. That is not in the recent past. No explanation has been offered for the delay in seeking redress. The minds of witnesses must have become foggy, documents have most probably been misplaced, records destroyed and other witnesses dimmed by death. It would be unconscionable to permit a suit so long after the acts allegedly giving rise to the suit took place. I decline to exercise my discretion as Lord Denning did in admitting a suit out of time or as Justice McCombe held in **Mutua & Others v The Foreign and Commonwealth Office**

(supra) held while admitting the Mau Mau veterans claim. While the reason for delay in cases such as those involving the Nyayo House torture chambers may be admitted as the then prevailing politically repressive climate caused hesitation to seek redress, there is no such justification in this case as the repression ended long before the institution of the suit. The claim is therefore fit for striking out and I proceed to do precisely that with costs to the Respondents.

It is so ordered.

**Dated and delivered at Nyeri this 21<sup>st</sup> day of May 2018**

**Nzioki wa Makau**

**JUDGE**