



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**PETITION NO. 27 OF 2016**

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

**AND**

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS  
UNDER SECTION 70(a), 72(3), 74(1) AND SECTIONS 77 OF THE CONSTITUTION OF  
KENYA 1969**

**AND**

**IN THE MATTER OF ARMED FORCES ACT (CHAPTER 199 OF THE LAWS OF KENYA)**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION  
AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL)  
HIGH COURT PRACTICE & PROCEDURE RULES 2013**

**BETWEEN**

<b>PETER KOSKEI KIPLOSKEI</b>	<b>1<sup>ST</sup> PETITIONER</b>
<b>JOHN KIPKOECH SAWE</b>	<b>2<sup>ND</sup> PETITIONER</b>
<b>DANIEL KIPROTICH SITIENEI</b>	<b>3<sup>RD</sup> PETITIONER</b>
<b>SAMUEL KIPRUTO BUNGEI</b>	<b>4<sup>TH</sup> PETITIONER</b>
<b>ERNEST KIPROTICH CHERUIYOT</b>	<b>5<sup>TH</sup> PETITIONER</b>
<b>ISAIAH KIPNGETICH ROTICH</b>	<b>6<sup>TH</sup> PETITIONER</b>
<b>JUSTUS CHERUIYOT CHELEGO</b>	<b>7<sup>TH</sup> PETITIONER</b>
<b>MATHIAS MIBEI CHERUIYOT</b>	<b>8<sup>TH</sup> PETITIONER</b>
<b>MIKE KIPTANUI BERKELES</b>	<b>9<sup>TH</sup> PETITIONER</b>
<b>PHILIP CHEPKWONY ARAP SIGEI</b>	<b>10<sup>TH</sup> PETITIONER</b>

**RULING**

1. The Petitioners who were serving in the Kenya Airforce at all material times moved the Court on 26 July 2016 alleging violation of their constitutional rights through illegal detention at Kamiti Maximum Prison, torture, inhumane and degrading treatment, sexual assault, loss of properties and legal representation.
2. The alleged violations arose from the 1982 coup attempt.
3. On 21 September 2017, the Respondent filed a Notice of Preliminary Objection in the following terms

**TAKE NOTICE THAT THE HON. ATTORNEY GENERAL** shall at the hearing of the aforementioned suit raise and argue a preliminary objection based on the following points of law:

1. That the claim as drafted and filed contravenes article 162(2) of the constitution. 2. That the claim as drafted offends section 12(1) of the Industrial court act.
4. On 24 October 2017 the Court directed that the preliminary objection be taken on 9 November 2017.
  5. Despite service, the Petitioners did not file any response or grounds of opposition but their advocate made oral submissions (parties agreed to adopt the submissions in a related case, Nakuru Petition No. 26 of 2016, *Benjamin Kipyegon Mutai v Attorney General*, wherein a ruling has also been delivered today).

**Respondent's submissions**

6. According to the Respondent, the alleged violations of the Petitioners rights and freedoms did not occur within the context of an employment relationship and therefore in terms of section 12(1) of the Employment and Labour Relations Court Act as read with Article 162(2) of the Constitution, this Court lacked the requisite jurisdiction.

**Petitioners' submissions**

7. The Petitioners urged that the preliminary objection raised by the Respondent did not meet the threshold as set out in the celebrated case of *Mukisa Biscuits Manufacturing Co. Ltd v Westend Distributors Ltd* (1969) EA 696.

8. It was also urged that the Petitioners were governed by the terms of the Armed Forces Act (now repealed) and being employees who have a dispute with their then employer, Kenya Air Force (now the Kenya Defence Forces), it is this Court which has jurisdiction.

9. When asked by the Court to explain the identity of the persons who allegedly violated the Petitioners rights and freedoms, Mr. Agina stated that the violations were perpetrated by members of the Armed Forces who arrested and interrogated the Petitioners.

10. According to Mr. Agina, the Prisons and Police only played a peripheral role by providing detention facilities.

11. As what should be the consequence of the Court upholding the preliminary objection, Mr. Agina urged the Court to transfer the Petition to the competent Court instead of dismissing it.

12. Mr. Agina also cited a few decided cases but he did not provide any copies to the Court or the Respondent ( Court has established the said decisions as *Peter Ngari Kagume & 7 Others v Attorney General* (2009) eKLR and *Samuel Chege Gitau & 283 Others v Attorney General* (2016) eKLR.

13. The Petitioners also filed authorities on 10 November 2017 after the submissions, and therefore the Respondent did not have the benefit of responding to the same.

## **Evaluation**

14. The Court has looked at the *Peter Ngari Kagume* case and established that the dismissal of the Petitioners was directly in issue neither was the jurisdictional question now posed by the Respondent addressed in it.

15. In the *Samuel Chege Gitau* case, the principal question before the Court was the dismissal of the Claimants from employment/service in violation of the Armed Forces Act.

16. The two decisions are therefore of no relevance to the jurisdictional question.

17. The Court has keenly perused the Petition. It is inelegantly drafted but the gravamen of the Petitioners cause of action does not appear to be violation of their rights *qua* employees despite the brief and broad allegation in paragraphs 9. There are no allegations of breach of contract or employee rights and freedoms flowing from the Constitution.

18. Equally, there is no relief sought which would arise expressly or implicitly from violation of their rights as employees.

19. This Court is also aware that the High Court has in several cases brought by former colleagues of the Petitioners dealt with similar allegations of violations of constitutional rights and granted appropriate relief (see *Peter Ngari Kagume & 7 Others v Attorney General* (2009) eKLR cited by the Petitioners; *David Gitau Njau & 8 Ors v Attorney General* (2013) eKLR and *Gerald Juma Gichohi & 9 Ors v Attorney General* (2015) eKLR).

20. Considering the foregoing and the Court of Appeal decision in *Daniel N Mugendi v Kenyatta University & 3 Ors* (2013) eKLR, the Court orders that this Petition be transferred to the High Court sitting in Nakuru for hearing and determination.

21. Costs in the Cause.

**Delivered, dated and signed in Nakuru on this 17<sup>th</sup> day of November 2017.**

**Radido Stephen**

**Judge**

**Appearances**

For Petitioners      Mr. Agina instructed by Agina & Associates, Advocates

For Respondent      Mr. Kirui, Senior Litigation Counsel, Office of the Attorney General

Court Assistant      Nixon