



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT MOMBASA**  
**PETITION NUMBER 8 OF 2015**

**BETWEEN**

**PETER OBIERO ..... PETITIONER**

**VERSUS**

**KENYA PORTS AUTHORITY ..... RESPONDENT**

**RULING**

1. Mr. Peter Obiero was an Employee of Kenya Ports Authority. He was retired way back on 31<sup>st</sup> October 1994. He faults his former Employer for failing to calculate his retirement benefits in a proper and legal way.
2. He took action on 18<sup>th</sup> February 2013, approximately 19 years after he was retired, by filing an Ex-Parte Originating Summons at the Industrial Court at Mombasa. He asked for the leave of the Court to file Claim against the Respondent out of time, and attached Statement of Claim be deemed as duly filed.
3. The Application was heard and dismissed. The Petitioner then filed Petition Number 50 of 2015 at the High Court Mombasa. He sought the High Court to make a declaration that his dismissal from employment was illegal, and order his pension and terminal benefits are worked out between the Parties, and certified by the Registrar of the Court.
4. The Petitioner was sent back by the High Court, to the now renamed Employment and Labour Relations Court, on jurisdictional grounds. The Petition was registered at the Employment and Labour Relations Court as Number 8 of 2015.
5. The Respondent raises a point of preliminary objection arguing the Petitioner's right to bring a Claim against the Respondent, is extinguished under the statutes governing the times within which employment claims must be filed. The objection was heard on the 5<sup>th</sup> October 2016, the Parties having earlier filed their written submissions.
6. The Respondent's position is that the Petitioner left employment in 1994. His contract was governed by the repealed Employment Act Cap 226 the Laws of Kenya. There was no specific provision on time limits on filing of claims under the repealed law. The time limits for contractual claims contained in the Limitation of Actions Act Cap 22 the Laws of Kenya applied to employment contracts. Section 4 [1] required such claims are filed within 6 years from the date the cause of action accrued. The Petition is therefore time-barred.

7. The Respondent relies on decision in ***Benjamin Wachira Ndiithi v. Public Service Commission & Another [2014] e-KLR***, in urging the Court that elevation of a dispute into a constitutional petition, does not jettison the statutes of limitation governing the contractual dispute at the core. The Respondent cites also, the well publicized Court of Appeal decision in ***Divecon Limited v. Samani [Civil Appeal Number 142 of 1997]*** in buttressing the point that statutes of time limitation, are in the nature of jurisdictional law, rather than procedural law. The Court must decline jurisdiction.

8. The Petitioner submits his Petition is based on discriminatory acts carried out against him by the Respondent. The issue is outside the scope of statutes of limitation. He was retired 2 years before his correct retirement age. His right is enshrined in the Constitution. Only after a full hearing would the Court determine if there was violation. The Bill of Rights aims at protection of human rights, fundamental rights and promotion of social justice. The Constitution provides the Petitioner with recourse. It entitles him to fair determination.

### **The Court Finds:-**

9. Parties agree the Petitioner left employment in the year 1994. It is clear he did not file anything in any Court, indicating he had any grievance with the Respondent over his manner of retirement, until the filing of the Originating Summons seeking extension of time, filed on 18<sup>th</sup> February 2013, 19 years after retirement.

10. The Court rejected the application for extension of time. The argument about when the cause of action arose; whether claim is time-barred; whether the Court could extend time; is an argument which should properly have been exhausted in the application for extension of time. The Court made a decision rejecting that application, which decision the Petitioner did not appeal against. The presumption would be that the issue was considered and determined, making it unnecessary for the Court to be compelled by the Parties to revisit the subject.

11. The Petitioner re-characterized his dispute as a Constitutional Petition. He took this rebranded dispute to the High Court, which referred back the dispute from where it was originated.

12. There is no constitutional moment in the Petition before this Court. The Petitioner has just renamed his pleadings, while the remedy sought remains the same.

13. The Constitution is not a blueprint for everyday litigation. It is not to be invoked by Parties to extend time, or remove limitation of time from the picture altogether, where relevant statutes have set clear timelines for taking certain actions, and for whatever reasons no actions are taken inside the timelines. Renaming of the dispute as a Petition, and presentation of that Petition at the High Court after the Employment and Labour Relations Court had ruled the Claim is time-barred, offended both the Constitution and the Statutes barring the claim. The Petitioner sought to circumvent the decision which rejected the application for extension, by doing what he was barred from doing, in a different Court. Such a trend can only engender constitutional disorder, rather than protect and promote fundamental rights, freedoms and advance social justice.

14. This Court agrees that the Petitioner had a contract with the Respondent. The first port of entry in event a dispute arose out of that relationship, would be the contract. That contract was subject to the limitation imposed on contractual disputes under the Limitation of Actions Act. The Petitioner failed to move the Court within the temporal confines created under the law to which his contract of employment was subject. This default cannot be corrected through a constitutional argument. There is no constitutional moment in this dispute.

15. The Petitioner indicated in his application for extension of time that he was prevented in bringing his Claim on time, by financial handicap. This is unfortunate, but 19 years is a long time. The forerunner to the Employment and Labour Relations Court was in place in 1994, and Claims were presented in that Court without payment of any Court fees. The Claimant should have moved under that regime, or seek the avenue of the indigent litigant which was still in place under the civil procedure regime at the time the

cause of action arose.

16. The Petitioner slept on his right for an inordinately long time. The Court approves the 2 Judicial Authorities cited by the Respondent at paragraph 7 above. It is not possible to revive this Claim by redesigning its form. The Court ruled on extension of time, and the preliminary objection must be upheld. IT IS ORDERED:-

*a. The preliminary objection is allowed, and the Petition hereby rejected.*

*b. No order on the costs.*

**Dated and delivered at Mombasa this 25th day of November 2016**

**James Rika**

**Judge**