



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**PETITION NO. 14 OF 2014**

<b>MOSES A. SEGITE</b>	<b>1<sup>ST</sup> CLAIMANT</b>
<b>PAULINE J. KOIMUR</b>	<b>2<sup>ND</sup> CLAIMANT</b>
<b>ERICK K. CHERUIYOT</b>	<b>3<sup>RD</sup> CLAIMANT</b>
<b>JOEL M RONO</b>	<b>4<sup>TH</sup> CLAIMANT</b>
<b>WILLIAM SOME</b>	<b>5<sup>TH</sup> CLAIMANT</b>
<b>RAPHAEL ATINGA ATINGA</b>	<b>6<sup>TH</sup> CLAIMANT</b>
<b>PAULINE MUDOLA</b>	<b>7<sup>TH</sup> CLAIMANT</b>
<b>JOEL CHESIRE</b>	<b>8<sup>TH</sup> CLAIMANT</b>
<b>BENARD K. LAGAT</b>	<b>9<sup>TH</sup> CLAIMANT</b>
<b>MONICA K. KIBOSS</b>	<b>10<sup>TH</sup> CLAIMANT</b>
<b>KIMAIYO MUZEE</b>	<b>11<sup>TH</sup> CLAIMANT</b>
<b>TOROITICH MERENG</b>	<b>12<sup>TH</sup> CLAIMANT</b>
<b>SILAH C. CHEMWENO</b>	<b>13<sup>TH</sup> CLAIMANT</b>
<b>GRACE J. KOSILBET</b>	<b>14<sup>TH</sup> CLAIMANT</b>
<b>PETER NDARA PSIRMOL</b>	<b>15<sup>TH</sup> CLAIMANT</b>
<b>WIILIAM M. CHEPYEGON</b>	<b>16<sup>TH</sup> CLAIMANT</b>
<b>JONATHAN K. KIMWAL</b>	<b>17<sup>TH</sup> CLAIMANT</b>
<b>SIMON BERU</b>	<b>18<sup>TH</sup> CLAIMANT</b>
<b>DANNY K. BOR</b>	<b>19<sup>TH</sup> CLAIMANT</b>

<b>JONATHAN TOROITICH CHELELGO</b>	<b>20<sup>TH</sup> CLAIMANT</b>
<b>JOHN C MUTAI</b>	<b>21<sup>ST</sup> CLAIMANT</b>
<b>DAMARIS A. KIPROP</b>	<b>22<sup>ND</sup> CLAIMANT</b>
<b>DORCAS J. KIPTANUI (suing as the administrator of the estate of MUSA KIPTANUI)</b>	<b>24<sup>TH</sup> CLAIMANT</b>
<b>FRANCIS MACHARIA</b>	<b>25<sup>TH</sup> CLAIMANT</b>
<b>SHADRACK KIPTUM</b>	<b>26<sup>TH</sup> CLAIMANT</b>
<b>BENJAMIN CHEPKONGA CHELANGA</b>	<b>27<sup>TH</sup> CLAIMANT</b>
<b>DAMARIS ADEGA KIPROP</b>	<b>28<sup>TH</sup> CLAIMANT</b>
<b>SAMWEL CHEPKWONY MOI</b>	<b>29<sup>TH</sup> CLAIMANT</b>
<b>JACOB KIPKEMBOI BIWOT</b>	<b>30<sup>TH</sup> CLAIMANT</b>
<b>v</b>	
<b>KENYA FLOUSPAR COMPANY LTD</b>	<b>RESPONDENT</b>

### **RULING**

1. The 30 Claimants filed a Petition against the Respondent on 16 September 2014, and the issue in dispute was stated as *Undervaluation of the Pension Entitlement of the Claimants*.
2. They alleged that the terminal benefits they were paid by the Respondent were grossly undervalued and did not accord with the Employment Act and the Collective Bargaining Agreement that was in force at the material time.
3. They did not set out the date of termination of employment or when the undervalued benefits were paid but the certificates of service exhibited to the Petition set out the termination/separation as ranging from periods 1994 to 2009 (for some of the Claimants).
4. The Respondent filed a Reply to Petition on 3 November 2014, and in paragraph 3 it set out the respective Claimants last date of employment ranging from 1994 to 2009. It further pleaded that the claims for terminal benefits were statute barred pursuant to section 90 of the Employment Act, 2007.
5. The Respondent further pleaded that it was non-suited as the proper party in regard to undervalued pension was the Pension Fund.
6. On 5 November 2014, the Respondent filed a Notice of Preliminary objection contending that the claim was statute barred, bad in law and an abuse of court process.
7. The Preliminary Objection was taken on 16 April 2015.
8. Before examining the Objection, the Court notes that the Petitioners did not file a rejoinder on the separation dates as outlined by the Respondent.
9. In its submissions, the Respondent urged that because the Petitioners left employment before the commencement of the Employment Act, 2007, the applicable law was section 4(1) of the Limitation of Actions Act and the claims should have been commenced latest by 20 December 2013.
10. And for those who left after the commencement of the Employment Act, 2007, (in 2009) the claims should have been brought within 3 years pursuant to the provision of section 90 of the Act, and this lapsed by end of 2012.

11. The Respondent further submitted that the Petition did not raise any constitutional questions.
12. The Petitioners opposed the preliminary objection.
13. Mr. Mwinamo who took their case submitted that limitation did not apply to Petitions and further that Article 159 of the Constitution obligated Courts not to dwell on procedural technicalities.
14. The Petitioners further urged that the dates of separation were not set out in the Petition and therefore the date of separation was an issue of fact to be discerned from the evidence. The celebrated case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 was invoked.
15. On the failure to enjoin the Pension Fund, the Petitioners asserted that irregularity could be cured by an amendment.
16. First, the Petition does not raise any constitutional question. The cause of action being agitated for by the Petitioners is contractual. The claims flow out of an employment relationship and purported failure to compute terminal benefits in accordance with a Collective Bargaining Agreement.
17. In fact, the Petition does not cite any singular provision of the Constitution violated or relied on. A party alleging violation of constitutional rights should specify the rights violated and how the violation occurred in the pleadings.
18. It is trite jurisprudence that non constitutional claims should not be camouflaged as constitutional claims. Disputes which have their anchorage on statute should be litigated under statute.
19. In this regard, the Court finds and holds that the Petitioners were abusing the court process by camouflaging their contractual claims under the umbrage of a constitutional Petition.
20. Secondly, the Respondent set out the dates when the parties separated. The Petitioners did not put in a rejoinder. The effect of the failure is that issue was not joined on the separation dates as contended to by the Respondent, and the Petitioners cannot and should not argue that since the Petition did not set out the dates, then that is an issue of fact to be ascertained at trial.
21. And taking that approach, it is open to the Court to determine whether the causes of action were statute barred because of limitation.
22. For those Petitioners who left in 2009 (4<sup>th</sup>, 17<sup>th</sup>), they should have commenced legal action latest by end of 2012, by dint of section 90 of the Employment Act, 2007 but they did not. These Petitioners claims are therefore statute barred.
23. For the Petitioners who separated with the Respondent prior to the commencement of the Employment Act, 2007, the applicable statute was the Limitation of Actions Act. Pursuant to section 4(1) of the Act, they had 6 years within which to commence action. The last of such cause of action accrued in 2003 and should have been commenced latest by 2009.
24. These causes of action are therefore clearly statute barred.
25. Procedures and technicalities in litigation are meant to ensure equality of arms and where a litigant fails to comply and does not give a satisfactory explanation, the litigant should not wave a copy of the Constitution and invoke the provisions of Article 159 of the Constitution.
26. The significance of procedures in litigation and its impact in litigation should be contextualised considering that it is a compulsory subject at the law school.
27. The Court therefore finds and holds that the Petition is an abuse of the court process, is frivolous and that the causes of action are statute barred, and upholds the preliminary objection and orders that the Petition to be struck out with costs to the Respondent.

**Delivered, dated and signed in Nakuru on this 26<sup>th</sup> day of June 2015.**

**Radido Stephen**

**Judge**

**Appearances**

For Petitioners Mr. Mwinamo instructed by Mwinamo Lugonzo & Co. Advocates

For Respondent Mr. Nyamwange instructed by Wamaasa, Masese, Nyamwange & Co. Advocates

Court Assistant Nixon