



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

PETITION NO 19 OF 2014

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
UNDER ARTICLES 22(1), 23(3)(a) & (e), 25(a), 27(1), (2), 28, 29(a), (b), 47(1), 50(1) OF THE
CONSTITUTION OF KENYA**

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (REPEALED)

AND

IN THE MATTER OF THE ARMED FORCES ACT (REPEALED)

AND

IN THE MATTER OF THE KENYA DEFENCE FORCES ACT NO. 25 OF 2012

JOHN MIRITI MBARIRE.....PETITIONER

VS

THE HON. ATTORNEY GENERAL.....RESPONDENT

RULING

1. This ruling flows from a preliminary objection raised by the Respondent by notice dated 25th April 2014. The Respondent's objection is based on the grounds that:

- a. The petition as drawn and filed is statutorily time barred and offends the provisions of the Public Authorities Limitations Act (Cap 39, Laws of Kenya);
- b. That the Petitioner cannot claim alleged violation of rights under the current Constitution in respect of violations that allegedly occurred prior to its promulgation.

2. In his submissions filed on 23rd June 2014, the Petitioner submits that the grounds upon which the Respondent's preliminary objection is based do not constitute a substantive ground. Moreover, the Petitioner's petition is not brought solely under the current Constitution but also under the repealed Constitution.

3. With regard to the 2nd limb of the preliminary objection, the Petitioner submits that the ground relied on is a mere technicality which cannot stand under Article 159(2) (d) of the Constitution, 2010.

4. On limitation, the Petitioner submits that breach of fundamental rights cannot be limited by statute. According to the Petitioner, the petition is neither an action founded on tort nor on contract and does not therefore fall under Section 3 of the Public Authorities Limitation Act.

5. The issues for determination in this application are as follows:

a) Whether the Petitioner's claim is subject to limitation of time under contract and if so whether the claim is statute barred;

b) Whether the provisions of the Constitution, 2010 are applicable to the Petitioner.

6. It is the Petitioner's case that his claim is not founded on contract and cannot therefore be subject to limitation under the Public Authorities Limitation Act. Section 3 (1) and (2) of the Act provides as follows:

1. ***No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.***
2. ***No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued.***

7. The Petitioner argues that because his claim is brought by way of a petition under the Constitution, then he is not bound by the provisions of limitation. In the submissions filed on his behalf, the Court was referred to several authorities on the point that actions for breach of fundamental rights and freedoms are not bound by limitation of time. While I fully agree with these authorities, I do not think that every action that is brought by way of a petition falls under this insulation.

8. In the case of ***Kemrajh Harrikissoon Vs the Attorney General of Trinidad and Tobago [1979] UKPC 3*** the Court held that the value of the right for redress for breach of fundamental rights and freedoms is diminished when it is misused as a general substitute for the normal procedures for invoking judicial control of administrative action. I am persuaded that this is the correct interpretation of our jurisprudence even against the backdrop of the current Constitution which elevates labour rights to the Bill of Rights. I do not think that this elevation jettisons the applicable substantive and procedural law on employment and labour relations.

9. In view of the foregoing, the Court finds that the Petitioner's claim is founded on contract and is therefore subject to limitation. According to the pleadings filed in Court, the Petitioner's commission was terminated effective 5th August 1995 giving rise to the cause of action herein. Even taking the six year limitation period provided under the Limitation of Actions Act, the Petitioner's claim is way out of time.

10. With regard to the question whether rights under the current Constitution are applicable to the Petitioner, I agree with the decision of ***Majanja J in Joseph Ihuo Mwaura & 82 Others Vs the Attorney General (Petition No 498 of 2009)*** that the provisions of the Constitution, 2010 do not apply retrospectively.

11. Ultimately, I find that the Petitioner's claim is statute barred and hereby strike it out with no order for costs.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18TH DAY OF
SEPTEMBER 2014**

LINNET NDOLO

JUDGE

Appearance:

Mr. Kounah for the Petitioner

Ms. Kassim for the Respondent