



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 43 of 2010

EMMANUEL MWAKISHA MJAWASI AND OTHERS.....PETITIONERS

VERSUS

THE HON. ATTORNEY GENERAL.....RESPONDENT

(Before Hon. Lady Justice Maureen Onyango on 18th December, 2012),

RULING

By a petition dated 14th August 2012 supported by the affidavit of **EMMANUEL MWAKISHA MJAWASI** sworn on 14th August 2012, the petitioners **EMMANUEL MWAKISHA MJAWASI, DAMIAN KASIMBA AND JUSTINA NTHUMBI MUA** in their capacity as chairman, secretary and treasurer respectively of the Former East African Community Beneficiaries Association Kenya on their own behalf and on behalf of their members against the Attorney General of the Republic of Kenya seek the following orders:

I. *A declaration that the Respondent's adamant and continued refusal, neglect and or failure to pay the Petitioners their terminal benefits for the services rendered by the Petitioners to the defunct East African Community constitutes a breach of the Petitioners' rights and freedom as provided for in Article 27, 41, 43, 47 and 57 of the Constitution of Kenya 2010.*

II. *A declaration that the Respondents' adamant and continued refusal, neglected and or failure to pay the Petitioners their terminal benefits for services rendered by the Petitioners to the defunct East African Community Constitutes a breach of Article 10 of the Constitution of Kenya 2010 and in particular the principles of good governance, integrity, transparency and accountability and social justice.*

III. *A declaration that the Respondent's adamant and continued failure, neglect and or refusal to pay the petitioners their terminal benefits for the services rendered by the applicants to the defunct East African Community constitutes a breach of the Petitioners right as protected by the provisions of Termination of Employment Convention 1982; Equality of Treatment (Social Security) Convention of 1962, Convention Concerning Equal Remuneration, 1951; Convention Concerning Discrimination (Employment and Occupation) 1958; Universal Declaration of Human Rights, 1948; International Covenant on Economic, Social and Culture Rights, 1976; International Convention on Civil and Political Rights, 1976; The African Charter on Human and Peoples' Rights.*

IV. *An order compelling the Respondent to pay the Applicants in accordance with the Applicants individual records, their terminal benefits for the services rendered by the Applicants to the defunct East*

African Community including but not limited to; pension, additional pension, gratuity, redundancy, payment in Lieu of notice, one month's salary in lieu of notice, loss of office benefits, pension emoluments, outstanding/accumulated leave, repartition expenses, real value and 7% compound interest until payment in full.

V. *General damages for breach of trust.*

VI. *Exemplary and/or Punitive damages for breach of trust.*

VII. *Compensation for breach of the Petitioners' rights.*

VIII. *Costs of this Petition.*

The petition was originally filed in the High Court on 3rd September 2012 as Petition No. 384 of 2012 but was transferred to this Court on 5th October 2012. The case was mentioned before me on 9th November 2012 when Mr. Marete instructed by Mutembei, Gichuru & Co. Advocates appeared for the petitioners while there was no appearance for the Attorney General. Mr. Marete informed the Court that the Attorney General was served but had not filed any reply.

Mr. Marete submitted that he had been instructed to request that the case be placed before the Chief Justice to constitute a 3 judge bench to hear the petition. I asked Mr. Marete to address the Court on the justification for a 3 judge bench and fixed the date for submissions on the same on 6th December 2012. Mr. Marete was directed to serve the Attorney General.

On 6th December, 2012 when the matter came up for arguments, Mr. Marete was present for the petitioners while the Attorney General was again absent.

In his submissions Mr. Marete gave the background of the case as detailed in the petition and the supporting affidavit of **EMMANUEL MWAKISHA MJAWASI**. Of specific significance is that the issue of payment of terminal dues to the former employees of the defunct East African Community was the subject of Nairobi High Court Civil Suit No. 1879 of 1997 and 743 of 2002 which were consolidated and heard as Civil Suit No.1879 of 1997.

Judgment in the case was delivered on 8th October 2004 by Honourable Justice Lenaola who dismissed the suit. Following the dismissal the petitioners referred the case to the East African Court of Justice as Reference No. 2 of 2010 **EMMANUEL MWAKISHA MJAWASI & 748 OTHERS –VS- THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA**.

The Reference was struck out by the Court on 29th September 2011. The Petitioners being dissatisfied with the decision of the East African Court of Justice, appealed against the decision to the Appellate Division of the East African Court of Justice in Appeal No. 4 of 2011. The appeal was also dismissed on 27th April 2012. The Petitioners thereafter decided to file this petition.

Mr. Marete submitted that there are weighty and grave issues that warrant a 3 Judge or more bench to determine. The following are among the weighty issues-

1. The extent of the application of Rules of International Law in Kenya, pursuant to the Constitution of Kenya 2010.
2. Whether the Petitioners' claim is barred by the limitation period.
3. Whether issues relating to violation of fundamental rights and freedoms are subject to limitation period.
4. Whether the Respondent has violated the general rules of international law and in particular the rights

of the Petitioners as recognized in various instruments including:

- a) *Termination of Employment Convention of 1982.*
- b) *Equality of Treatment (Social Security) Convention of 1962.*
- c) *Convention concerning Equal Remuneration of 1951.*
- d) *Convention concerning Discrimination (Employment and Occupation) of 1958.*
- e) *The Universal Declaration of Human Rights 1948.*
- f) *The International Covenant on Economic Social and Cultural Rights of 1976*
- g) *International Convention of Civil and Political Rights of 1976.*
- h) *African Charter of Human and Peoples Rights.*

5. Whether the Respondent has violated the Petitioners rights and freedoms as provided for under Articles 27,41,43 47 and 57 of the Constitution of Kenya

6. Whether the Respondent is in violation of Article 10 of the Constitution of Kenya which is premised upon the principles of good governance, integrity, transparency and Accountability.

7. What remedies the Petitioners would be entitled to if at all their rights under the Constitution of Kenya international instruments and conventions have been violated.

I have read the petition and the supporting affidavit together with all the annexure and I have considered the submissions by counsel for the Petitioners. Although the Petitioners submit that there are weighty issues that they wish to be considered by a 3 or more judge bench they do not state why these issues were never brought up when the issue of the payment of terminal dues was before the Court in Civil Case No. 1879 of 1997.

In the plaint in that case, the plaintiffs (now petitioners in the present case) alleged that the Government had failed to comply with the provisions of the East African Community Mediation Agreement Act. The particulars of non-compliance are given as follows:

- a) *Failing to make such amendments to any written law as are necessary to bring the written law in conformity with the provisions of the Mediation Agreement Act especially Section 9 thereof.*
- b) *Failing to pay the Plaintiffs employed by Corporations or the Community and retired from active service by the division date contrary to Article 10.05(a) of the Schedule to the Mediation Agreement Act.*

The Plaintiffs therefore sought the following orders:

1. *A declaration that the Defendant has failed to effect amendments to any written law to bring it into conformity with the East African Mediation Agreement Act.*
2. *An account for all the pensions, interest and other benefits due and payable to them as from the Division dates in Article 1 of the East African Community Mediation Agreement and orders for payment thereof.*
3. *The pension, interest and other benefits due and payable to the Plaintiffs be calculated using the former East African Community Formula and an order for payment thereof.*
4. *Costs and interest.*

After reading the pleadings, listening to the witnesses and hearing submissions by Counsel, Justice Lenaola found that there was no dispute over the following facts:

I. That the plaintiff's (now Petitioners) were employees of the East African Community up to the latest 30th June 1977 when the community collapsed.

II. That they were all entitled to pension for services rendered to the community, and

III. That the Government was obliged to pay them such pension.

The judge then framed the issues for determination as follows:

1. When was such pension payable
2. Had the Government complied with the Mediation Agreement?
3. Should the declarations and orders sought be granted?
4. In any event is the suit statute barred?
5. Who should pay the costs of this suit?

The judge then went ahead to rule on the issues as follows:

1. **When was pension payable**

The Judge found that the state paid those who retired on the **division date** while the state made provisions in Section 2 of the Pensions Act by providing that service under the community would be considered in computing pensions payable to public servants including the Plaintiff's (now Petitioners).

2. **Has the Government complied with the mediation Agreement?**

The Judge found that the Government had complied as admitted by the Plaintiffs' witnesses and through the enactment of the East African Community Mediation Act.

3. **Are the declarations and orders sought tenable?**

The Judge ruled that there was nothing to declare, that the declarations sought were in vain, that the plaintiffs' were not entitled to any of their prayers for reasons given in the judgment.

4. Having found that the plaintiffs' were not entitled to the declarations the Court did not make any finding on whether or not the claims were statute barred and the Court made no orders for costs.

What are the prayers in the Petition?

Prayers (i), (ii) and (iii) start on the premise that the Respondent is adamant and continues to refuse, neglect and/or fail to pay the petitioners their terminal benefits for the services rendered by the Petitioners to the defunct East African Community.

The Judge in Civil Case No. 1879 of 1997 found that the Government paid those who retired on the division date while the state made provision for payment for those who remained in service. The Court thus already decided on the issues raised in prayer (i), (ii) and (iii) to the effect that they were paid.

This decision has not been appealed or reviewed and remains the position long after the time set by law for appeal and/or review have lapsed. On this basis, these prayers are *res judicata*. They were already determined finally by a Court of competent jurisdiction.

Having found that there was no failure, neglect or refusal to pay the petitioners, the prayers no.(iv), (v), (vi) and (vii) which are all premised on non payment must also fail. All the issues in the prayers were

finally determined in Nairobi High Court Civil case No.1879 of 1997 and are thus also *res judicata*. The petition which is premised on failure, neglect or refusal to pay pensions, interest and other benefits to the Petitioners has no legs to stand on and must crumble. Clothing the same issues in the form of a petition cannot give the issues new life. As stated by Justice Maraga in **Mombasa HCCC No. 528 of 1998: LAWI DUDA & OTHERS VS BAMBURI CEMENT LTD**, ‘parties are not allowed to litigate in installments. They should plead their whole case at the first instance. If they fail to do that their later claims will be shut out. Explanation No. 4 to section 7 of the Civil Procedure Act makes that very clear.

“Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

In the case of **Yat Tung Investment Company Limited – Vs – Dao Heng Bank Limited and Another [1975] AC 581** this is how the Privy Council dealt with a similar issue:-

“But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of the process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The *locus classicus* of that aspect of *res judicata* is the Judgment of Wigram VC in *Henderson – Vs – Henderson (1843) Hare 100, 115*, where the Judge says:

‘Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belongs to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.’

In the case of **Anaj Warehousing Ltd – V s – National Bank of Kenya Ltd & Another, Mombasa HCCC No. 311 of 2000** the court said:-

“A matter is *res judicata* when it has been heard and finally decided. And a matter is ‘heard and finally decided’ when the court which has heard it has ‘exercised its Judicial mind on’ the matter in controversy after it has heard arguments, considered it and come to a decision on it.”

Black’s Law Dictionary defines *res judicata* as **“a thing adjudicated”, an issue that has been definitively settled by judicial decision; an affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been - but was not - raised in the first suit. The three essential elements are (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties.**

Justice Lenaola’s judgment was delivered after hearing evidence from both sides. He found that payment of pension and other terminal benefits had been made to the Plaintiffs who retired while arrangements had been made for those retained in service. His decision was final. There was no appeal against the decision. There was no application to review the decision of Justice Lenaola.

The case filed in the East African Court of Justice that indirectly sought to review the Judgment of Justice Lenaola was dismissed. So was an appeal filed against the decision. This court cannot be asked to make a new determination in the face of the decision of Justice Lenaola in Nairobi High Court Civil case No.1879 of 1997.

In conclusion, I find that there are no new issues to be determined by this Court or by a bench to be constituted by the Chief Justice. I strike out the petition with the result that there is nothing to refer to the Chief Justice.

Orders accordingly.

DATED AND DELIVERED IN NAIROBI ON 18TH DAY OF DECEMBER 2012.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

Mr. Marete instructed by Mutembei, Gichuru & Co. Advocates for the petitioners,

No appearance for the Respondent.