



Mulima & 2 others (Suing as Representatives of Ex-East African Airways Staff Welfare Association) v Attorney General & 8 others (Petition 17 of 2019) [2020] KESC 39 (KLR) (4 August 2020) (Judgment)

Alrfed Asidiga Mulima & 2 others (Suing as Representatives of Ex-East African Airways Staff Welfare Association) v Attorney General & 8 others [2020] eKLR

Neutral citation: [2020] KESC 39 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION 17 OF 2019**

PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ

AUGUST 4, 2020

BETWEEN

**ALRFED ASIDIGA MULIMA 1ST PETITIONER
CHARLES MARAO NJOROGE 2ND PETITIONER
PETER KIIO KITUKU 3RD PETITIONER
SUING AS REPRESENTATIVES OF EX-EAST AFRICAN AIRWAYS STAFF
WELFARE ASSOCIATION**

AND

**THE ATTORNEY GENERAL 1ST RESPONDENT
BARCLAYS BANK INTERNATIONAL LIMITED 2ND RESPONDENT
BARCLAYS BANK TRUST LIMITED 3RD RESPONDENT
BARCLAYS TRUST CHANNEL ISLAND LIMITED 4TH RESPONDENT
BARCLAYS TRUST INTERNATIONAL LIMITED 5TH RESPONDENT
BARCLAYS BANK KENYA LIMITED 6TH RESPONDENT
MINISTRY OF FINANCE 7TH RESPONDENT
MINISTRY OF TRANSPORT 8TH RESPONDENT
THE REGISTRAR GENERAL 9TH RESPONDENT**



***(Being an appeal from the Judgment and Order of the Court of Appeal
of Kenya at Nairobi E. M Gitinji, W. Karanja & D.K Musinga,
JJA dated 24 February 2017 in Civil Appeal No. 179 of 2015)***

A claim for restitution of emoluments and pensions under statute were not constitutional in nature.

Reported by Chelimo Eunice

Jurisdiction – *appellate jurisdiction of the Supreme Court – appeal on non-payment of emoluments and pensions – whether a claim for restitution of emoluments and pensions under statute were constitutional in nature - whether a claim that non-payment of pensions and emoluments violated a litigant’s constitutional rights gave the Supreme Court jurisdiction to entertain the matter - whether the Supreme Court could entertain a claim for restitution of emoluments and pensions – Constitution of Kenya article 163(4)(a).*

Brief facts

The petitioners who were former employees of the East African Airways Corporation (EAAC) which fell under the ambit of the East African Community (EAC) had filed a petition in the High Court (trial court). In the petition, they alleged violation of their constitutional rights under the Constitution as a result of non-payment of various amounts of money they alleged were due to them following the disbandment and dissolution of the EAC as well as the winding up of the EAAC. Their claim involved payment of emoluments accruing and owing to them as former employees of the defunct EAAC. They highlighted various provisions of the Constitution as the basis for their claim against the respondents.

The trial court dismissed the petition stating that it was *res judicata*, the issues that it raised having been the subject of consideration by courts of competent jurisdiction. Aggrieved by the decision of the trial court, the petitioners moved the Court of Appeal where the appeal was dismissed on grounds that the matter was time-barred as the real issue in contest was one based on contractual and statutory obligations and not violation of the Constitution *per se*. Aggrieved by that decision, the petitioners filed the instant appeal.

Issues

- i. Whether a claim for restitution of emoluments and pensions under statute were constitutional in nature.
- ii. Whether the Supreme Court could entertain a claim for restitution of emoluments and pensions.

Held

1. The trial court and the appellate court in holding that there was no violation of any constitutional rights and that the claim arose from a contract of employment proceeded to interrogate the claims against the East African Community Mediation Agreement Act (EACMAA), a statute, and not any part of the Constitution. None interpreted or applied the Constitution in any substantive manner.
2. Where a matter or claim was for restitution of emoluments and payments under statute, not of violated constitutional rights *per se*, then the Supreme Court would decline to assume jurisdiction under article 163(4)(a) of the Constitution. The instant claim was a civil claim against the respondents for unsettled or unpaid dues following the redundancy of the petitioners. The petitioners had not shown how the issues were of a constitutional nature, and hence, a requirement of them to make a determination on the same.
3. It was the applicability or otherwise of the EACMAA that was at the centre of the dispute and not the interpretation or application of the Constitution *per se*. None of the issues parties submitted on called for such interpretation or application of the Constitution in any substantive or even peripheral manner.
4. Having held that the issues before court were not constitutional in nature, there was no reason to delve into the other issues set out for determination. As long as EACMAA remained valid, the petitioners



were at liberty to pursue their emoluments and pensions under that Act. The petitioners would as well pursue the trial court's order directed at the National Bank of Kenya to pay retired staff of the EAC from funds it was holding.

5. A simple, otherwise straight forward claim for emoluments and pensions should never have taken almost 40 years to commence and prosecute.
6. Since the court had no jurisdiction, it would not address the place of the principle of *res judicata* in constitutional matters as well as the retrospectivity or otherwise of the Constitution.

Petition dismissed.

Orders

No orders as to costs.

Citations

Cases

Kenya

1. *Amugune, Samuel & 7 others v Attorney General* Civil Suit 1879 of 1997 [2013] KEHC 891 (KLR) - (Explained)
2. *Aramat & another v Lempaka & 3 others* Petition 5 of 2014; [2014] KESC 21 (KLR); [2014] eKLR - (Explained)
3. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] eKLR; [2012] 3 KLR 199 - (Explained)
4. *Maloba, Christopher & William Nasubo v Attorney General* Civil Case No 743 of 2002 - (Explained)
5. *Midland Finance & Securities Globetel Inc v Attorney General & another ?* 359 of 2007; [2008] KEHC 3905 (KLR) - (Explained)
6. *Mjawasi, Emmanuel Mwakisha & others v Attorney General* Cause 43 of 2010; [2012] KEELRC 171 (KLR); [2012] eKLR - (Explained)
7. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] 2 KLR 804 - (Explained)
8. *Njeru, Nicholas v Attorney General & 8 others* Civil Appeal 110 of 2011 [2013] KECA 217 (KLR) - (Explained)
9. *Nyakina, Wycliffe Gisebe v Attorney General, Selection Panel for appointment of Chairperson & Members Teachers Service Commission* Petition 403 of 2014 [2014] KEHC 8201 (KLR) - (Explained)
10. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2014] 2 KLR 253 - (Explained)

United Kingdom

Henderson v Henderson (1846-60) All ER 378 - (Explained)

India

Swamy Atmanda v Sri Ramakrishna Tapovanam [2005] 10 SCC 51 - (Explained)

Regional Court

Emmanuel Mwakisha Mjawasi and 748 others v Attorney General of Republic of Kenya Civil Appeal 4 of 2011; [2012] RC 4 (KLR); [2012] eKLR - (Explained)

Statutes

Kenya

1. Civil Procedure Act (cap 21) section 7- (Interpreted)
2. Constitution of Kenya articles 20(1); 27; 28; 29(f); 35; 40; 41; 43; 47; 48; 57; 163(4)(a); Schedule 6 sections 6, 7 - (Interpreted)
3. Constitution of Kenya (Repealed) - (Cited) In general
4. East African Community Mediation Agreement Act (cap 4) sections 4; 5; 10- (Interpreted)
5. Limitation of Actions Act (cap 22) section 4 - (Interpreted)



6. Pensions Act (cap 189) (Cited) In general

Advocates

1. Mr. Lubullelah - Counsel for the Petitioners.
2. Mr. Allen Gichuhi - Representing 2nd to 6th Respondents.

JUDGMENT

A. Introduction

1. The Petition of appeal dated 9 May 2019 is against the Judgment of the court of Appeal in Civil Appeal No 179 of 2015 (Githinji, Karanja & Musinga JJ A) dated 24th February 2017, in which the appellate Court upheld the dismissal of the petitioners' claims in HC Constitutional Petition No 113 of 2013 (Mumbi, J). In the Petition aforesaid, the petitioners had alleged violation of their constitutional rights under articles 20(1), 27, 28, 29(f), 35, 40, 41, 43, 47, 48 and 57 of the Constitution as a result of the non-payment of various amounts of money they allege were due to them following the disbandment and dissolution of the East African Community (EAC) as well as the winding up of the East African Airways Corporation (EAAC).
2. The petitioners state that they were all former employees of the EAAC, which fell under the ambit of the EAC. The EAAC ceased operations on 13th January 1977, and the petitioners were on 15th February 1977 declared redundant following a Board meeting resolution on January 31, 1977. Both the EAAC and the East African Airways Corporation Staff Provident Fund were subsequently wound up. Winding up proceedings had in that regard been commenced in Winding Up Cause No 1 of 1977. Subsequently, the East African Community Mediation Agreement Act 1984, EACMAA, was enacted and which addressed the issue of provident funds due to all former employees of the defunct EAC.
3. The petitioners further claim that, as a consequence of their being made redundant, they were entitled to terminal benefits including payment from their provident fund, redundancy payment and other cessation of service benefits, including unpaid leave, payments in lieu of notice, outstanding or accumulated leave days and repatriation expenses. They thus filed Petition No 113 of 2013 aforesaid and in her Judgment, Mumbi, J dismissed the Petition. In making her determination, the learned Judge stated *inter alia* as follows;

“I am therefore constrained to agree with the respondents that this petition is *res judicata*, the issues that it raises having been the subject of consideration by courts of competent jurisdiction. Although the petitioners in this matter were not party to the previous suit, the subject matter in this suit is the same as in the previous litigation, which was brought by parties suing on their own behalf and on behalf of other employees of the defunct East African Community and its corporations. The essence of *res judicata* is that litigation must come to an end, and this would not happen in respect of the former East African Community were all former employees of the Community and its corporations allowed to bring separate claims over the same issues.” [Para 103]

4. Aggrieved by the decision of the High Court, the petitioners moved the court of Appeal in Civil Appeal No. 179 of 2015 where the court (Githinji, Karanja & Musinga JJA) upheld the Judgment of the High Court and subsequently dismissed the appeal. In doing so, the court of Appeal partly stated as follows;



- i. That the matter was *res judicata* in view of previous decisions by the High Court and the Industrial Court.
 - ii. That the matter was time-barred as the real issue in contest was one based on contractual and statutory obligations and not violation of the Constitution *per se*.
 - iii. That the rights that the petitioners were pursuing were not available in the former Constitution and therefore the Constitution 2010 could not be applied retrospectively.
 - iv. That the learned Mumbi, J could not be faulted for not delving into the merits of the petitioners' claim since on the three issues above, she did not find in their favour.
5. The petitioners thereafter moved to this Court to seek its intervention in the matter by way of this appeal.

B. Parties' Submissions

a. Petitioners' submissions

6. The petitioners have based their submissions on the following grounds set out in the Petition ie;
- a. Whether the East African Community Mediation Agreement Act of 1984 comprehensively addressed the issue of provident funds due to the petitioners**
7. The petitioners submit that the High Court and the court of Appeal failed to take into account the findings and pronouncements of a mediator, who had been appointed by the EAC States, upon dissolution of their Community on whose findings and pronouncements the EACMAA was based on. They add that their claims were not to be paid exclusively in accordance with the EACMAA and that therefore the said Act did not comprehensively address the issues of their provident fund which they insist still had monies that they were entitled to.

- b. Whether the Appellate Court completely disregarded the evidence tendered before it**

8. The petitioners contend that the Superior courts below failed to take into consideration the Kenya government's admission in Parliament that it was indeed indebted to former EACC employees and that the existence of the EAC fund, with the Treasury as at 31 May 2009, was testimony to that fact. They further submit that the courts ignored the fact that the petitioners had relied on the assurances made in Parliament by the 1st, 2nd & 9th respondent that they would be paid their dues before filing their suit. They further rely on the persuasive decision in Midland Finance & Securities Inc v The Attorney General & another [2008] eKLR to urge that the State should not be allowed to change its mind on an issue where assurances have been made and parties have placed reliance on such pledges.

- c. Whether the High Court and Appellate Court erred in finding that the suit was *res judicata***

9. The petitioners urge that the courts were wrong in finding that their suit was *res judicata* for the following reasons; that none of them were party to the previous suits, a fact acknowledged but disregarded by both courts; that the issues in their case were not substantially nor directly in issue in the previous suits; that the issues arising have not been fully determined in any of the previous suits; that the courts below failed to analyze the Judgments in the previous decisions to be able to correctly separate the issues raised before them. The petitioners further submit that the issues raised in the earlier suits must be distinguished with their claim. To this end, they urge that Emmanuel Mwakisha Mjawasi & 748 others v Attorney General East African Court of Justice Civil Appeal No 4 of 2011;



Samuel Amugune and 7 others v The Attorney General, Civil Suit No 1879 of 1997 consolidated with *Christopher Maloba & William Nasubo v. The Attorney General* Civil Case No 743 of 2002; and *Emmanuel Mwakisha Mjawasi and others v The Attorney General*, Industrial Court of Kenya Cause No 43 of 2010, concerned other employees of the defunct EAC and not themselves.

d. Whether the matter is time-barred

10. The petitioners submit that their suit is not time-barred as there is a continuing trust between them and the respondents that is not subject to a time limit; that there are allegations of fraud and corruption which the 7th respondent has tasked the Ethics & Anti-Corruption Commission, EACC, to investigate including the allegation that the 2nd to 6th respondents effected only part payment to the petitioners. In addition, that the two Superior courts found there was a constitutional breach of the right to information and therefore the *Limitation of Actions Act* cannot override constitutional dispositions and contentions. The petitioners further allege that since the obligations imposed by the *EACMAA* have not been discharged to the satisfaction of all the petitioners, then the cause of action is still live, regardless of the duration before which the claim is brought before the courts.

e. Whether the Constitution 2010 applies retrospectively

11. The petitioners submit that transitional provisions of the *Constitution*, in particular sections 6 and 7 of the Sixth Schedule of the *Constitution* provide that existing obligations and existing laws should be modified to conform with the *Constitution*, 2010. Furthermore, it is submitted that the courts have applied the provisions of the *Constitution* 2010, to situations arising prior to its promulgation, to give a remedy to historical and transitional injustices.

b. 1st respondent's submissions

12. The respondents filed their submissions in response to the allegations made by the petitioners and argued as follows:

a. Whether the court was bound by the East African Community Mediation Agreement Act of 1984

13. The 1st respondent submits that the *EACMAA* and the appropriate *Pensions Act* provided for the emoluments and pensions of former employees of the EAC, including the petitioners. It is further submitted that the preamble to the *EACMAA* provided that the *Act* would be deemed to have come into operation retrospectively in 1984 even though it was enacted in 1987. This, it was submitted, there was evidence that *EACMAA's* objective was to facilitate the division of assets and liabilities across the three EAC countries.
14. It was also submitted that sections 4 and 5 of the *EACMAA* and the schedules therein are applicable to the instant matter, as they both relate to the making of financial provisions for payment, out of the Consolidated Fund, of such sums as the Government was required to pay out under the terms of the *EACMAA*.

b. Whether the East African Community Mediation Agreement Act of 1984 comprehensively addressed the issue of provident funds due to the petitioners

15. The 1st respondent submits and agrees with the findings of the Superior courts that section 10 of the *EACMAA* addresses the issue of pensions and provident funds. He thus submits that the court of Appeal was correct in finding that the *EACMAA* addressed all issues relating to pensions and that the trial Court was not exclusively bound by it neither was that court bound to consider, which it did



not, the other material and documents relating to the petitioner's claim, having determined all other relevant and substantive issues.

c. Whether the Appellate Court erred in finding that the suit was *res judicata*

16. The 1st respondent relied on the provisions of section 7 of the [Civil Procedure Act](#), and particularly at Explanations 4 & 6 on the issue of *res judicata*. In submitting that the matter presently before this court had been heard and determined by other courts of competent jurisdiction, the 1st respondent relied on the determination of Lenaola J (as he then was) in [Wycliffe Gisebe Nyakina v. The Attorney General](#) [2014] eKLR where the learned Judge issued a caution against litigants seeking to re-litigate civil and other issues disguised as constitutional matters.
17. Further, the 1st respondent submitted the cases of [Henderson v Henderson](#) (1846-60) All ER 378, [Swamy Atmanda v Sri Ramakrishna Tapovanam](#) [2005] 10 SCC 51 and [Nicholas Njeru v Attorney General & 8 others](#) [2013] eKLR where courts had considered and expressed themselves with regard to the issue of *res judicata*, and went on to submit that the present matter falls within the ambit of the holdings in these decisions.

d. Whether the matter was statutorily time-barred

18. The 1st respondent submits that the petitioner was time barred pursuant to section 4 of the [Limitation of Actions Act](#), having been filed some 30 years after the cause of action arose.

e. Whether the Appellate Court failed to determine all the issues raised before it

19. It is submitted by the 1st respondent that, once a Court makes a pronouncement on a preliminary issue that determines a matter, as was the case presently, the court need not determine any of the other issues raised. He thus urges that, once the court decided that the suit was *res judicata*, the other issues framed for determination stood moot. However, they submit that the other issues raised were in any event adequately dealt with in Winding Up Petition No 1 of 1977 as well as under the [EACMAA](#).

f. Whether the Constitution 2010 applies retrospectively

20. The 1st respondent submits that the Superior courts below rightfully found that the [Constitution](#) cannot have a retrospective application. They relied on this courts' decision in SC Application No 2 of 2012 [SK Macharia v The Kenya Commercial Bank Limited & 2 others](#); [2012] and [Charles Murugi Muriithi & 2 others v Attorney General](#) (2015) eKLR where in the latter case, the High Court held, *inter alia* that;

“...this court cannot enforce new rights created under the new Constitution unless those rights are recognized and protected under the previous Constitution.”

c. 2nd – 6th respondents' submissions

21. The above respondents filed their submissions in response to the allegations made by the petitioners and on the issues raised by the latter, they stated as follows:

a. Whether the East African Community Mediation Agreement Act of 1984 comprehensively addressed the issue of provident funds due to the petitioners

22. The 2nd – 6th respondents submit on this issue that section 10 of the [EACMAA](#) deals extensively with pensions and provident funds. They therefore agree with the findings by the Superior courts below that the [EACMAA](#) addresses the issue of provident funds' payments, including to the petitioners,



contrary to their assertion in that regard. To conclude on this issue, they urge that the petitioners received pension and provident payments as is required by the [Act](#) and have failed to produce evidence in support of their assertions that they have never been paid.

b. Whether the High Court and the Appellate Court erred in finding that the suit was *res judicata*

23. The 2nd – 6th respondents highlight parallel cases that have been decided by courts on the same issues and between the respondents and/or parties ‘suing for themselves and on behalf of all the corporations’ ex-staff’. They urge in that regard that, it is a well laid principle in law that no party can be allowed to re-litigate where a court of competent jurisdiction has determined a matter. They thus refute the petitioners’ submission that the principle of *res judicata* does not apply to constitutional petitions and argue that courts must apply the principle sparingly in constitutional petitions while guarding against litigants who are clearly evading the application of the doctrine by introducing new causes of action by filing constitutional matters as was stated by Lenaola J (as he then was) in [Wycliffe Gisebe Nyakina v The Attorney General](#) [2014] eKLR.

c. Whether the matter is time-barred

24. The 2nd – 6th respondents submit that the EACC ceased to operate on February 15, 1997, and therefore at the time of filing the Petition at the High Court, 36 years had lapsed from the time the cause of action had arisen and therefore the [Limitation of Actions Act](#) properly applied and the proceedings herein ought to be declared time-barred.

d. Whether the Appellate Court failed to determine all the issues raised before it

25. It is submitted by the 2nd – 6th respondents that once a court makes a pronouncement on a preliminary issue that determines the case, as was the case in this matter, the court need not determine any of the other issues raised. They thus urge that, once the court made a determination that the suit was *res judicata*, the other issues framed for determination stood moot.

e. Whether the Constitution 2010 applies retrospectively

26. The 2nd – 6th respondents submit that the courts have rightfully and routinely found that the [Constitution](#) cannot have a retrospective application. They relied on this courts’ decision in SC Application No 2 of 2012 [SK Macharia v The Kenya Commercial Bank Limited & 2 others](#); [2012] in support of that contention.

C. Analysis and Determination

27. From the pleadings and submissions five (5) issues emerge for our determination. The issues are highlighted as follows;

- (a) Whether the issues before the court are constitutional in nature;
- (b) Whether the matter was *res judicata*;
- (c) Whether the matter is time barred
- (d) Whether the [Constitution](#) applies retrospectively; and
- (e) What reliefs are available to the Parties?



Whether the issues before the court are constitutional in nature

28. The claim by the petitioners involves primarily the payment of emoluments accruing and owing to them as former employees of the defunct EAAC. They allege in that regard that the said emoluments are unpaid, or were partly paid, and that they remain due and outstanding to many former employees of the EAAC. They further allege that the withholding of these funds amounted to a violation of their constitutional rights as pronounced in articles 20(1), 27, 28, 29(f), 35, 40, 41, 43 47, 48 and 57 of the Constitution.
29. In that context, this court has, on various occasions, had the onus of determining whether the issues presented before it have attained the requisite constitutional muster as provided under articles 163(4) (a) of the Constitution. But what issues were in contest in the present case?
30. In Petition No 113 of 2013, the petitioners highlighted various provisions of the Constitution paras. [1] and [6] thereof as the basis for their claim against the respondents. The petitioners specifically claimed that non-payment of their pensions and emoluments violated their constitutional rights, and that they were entitled to the reliefs sought. The High Court in determining the dispute partly stated as follows (per Mumbi, J):

“I must express some disquiet about the petitioners lodging this matter as a constitutional petition at this point time. What is at the core of their petition, as I understand it, is certain unliquidated claims that they had in respect of their employment with the defunct East African Airways Corporation. With regard to the pensions and provident funds, the court in *Samuel Amugune & 109 others v The Attorney General (supra)* addressed itself to the issue and found that the issue of pensions and provident funds had been addressed in the East African Community Mediation Agreement Act, a finding that I agree with in the analysis above.” [Para. 106] [Emphasis added]

31. The learned Judge went on to find that the claim by the petitioners emanated from the EACMAA and its provisions with regards to the settlement of emoluments of former EAAC employees. the court also held that these issues could have been adequately settled and determined under statutory provisions, and any monies due would have been recoverable under Winding Up Cause No 1 of 1977. [See para 107]. The Judge added that there was therefore no constitutional question that the court would have been alluded upon to settle. In any event, that, other former employees of EACC had sought determination of similar questions for in Emmanuel Mwakisha Mjawasi & others v The Attorney General [2012] eKLR at the Industrial Court. In that case, allegations of breach of articles 27, 41, 43, 47 and 57 of the Constitution had been made. the court of Appeal on its part, rendered itself as follows:

“It is doubtful whether there was any violation of any constitutional rights as was alleged by the appellants as the appellants’ claim arose from [a] contract of employment”.

35. Both Superior courts below on making the above findings then proceeded to interrogate the appellants’ claims against the EACMAA, a statute, and not any part of the Constitution and none interpreted or applied the Constitution in any substantive manner.
32. On our part, we have had occasion, previously, to deliberate on the constitutionality of matters before us, as well as our jurisdictional scope and sphere, and make a determination on the same. Thus in SC



Petition No 5 of 2014 *Lemanken Aramat v. Harun Meitamei Lempaka & 2 others*; [2014] eKLR (Aramat) this Court considered its jurisdictional nature and held that;

“From the principles thus stated, it is clear to us that this Court ought to maintain constant interest in the scheme and the quality of jurisprudence that it propounds over time, even where it is constrained to decline the jurisdiction to deal with any particular questions. Whatever option it takes, however, this court ought always to undertake a methodical analysis of any issues it is seized of, and ought always to draw the whole dispute to a meaningful conclusion, bearing directions and final orders, in the broad interests of both the parties, and of due guidance to the judicial process and to the courts below.”

[Para 111] [Emphasis added]

33. Further, in SC Petition No 3 of 2012 *Lawrence Nduttu & 6000 others v. Kenya Breweries Ltd & Another*; (2012) eKLR (Nduttu), we noted on the true intent of article 163(4)(a) of the *Constitution* thus:

“This article must be seen to be laying down the principle that not all intended appeals lie from the court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the *Constitution* can be entertained by the Supreme Court

Towards this end, it is not the mere allegation in pleadings by a party that clothes an appeal with the attributes of constitutional interpretation or application.” [Para 27]

34. Furthermore, we went on to state that on article 163(4)(a);

“... appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the *Constitution*. In other words, an appellant must be challenging the interpretation or application of the *Constitution* which the court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the *Constitution*, it cannot support a further appeal to the Supreme Court under the provisions of article 163(4) (a).” [para 28]

35. Also, in *Nduttu*, it was stated:

“What then is a case involving the interpretation or application of the *Constitution*? Does the mere allegation by an intending appellant that a question of constitutional interpretation or application is involved automatically, without more, bring an appeal within the ambit of article 163(4)(a) of the *Constitution*? A two-judge bench of this Court had occasion to deal with this issue in the case of *Erad Suppliers & General Contractors Limited National Cereals & Produce Board* SC Petition No 5 of 2012. In disposing of this issue among others, the court opined as follows and we quote:

“In our opinion, a question involving the interpretation or application of the *Constitution* that is integrally linked to the main cause in a superior Court of first instance is to be resolved at that forum in the first place, before an appeal can be entertained. Where, before such a Court, parties raise a question of interpretation or application of the Constitution that has only a limited bearing on the merits



of the main cause, the court may decline to determine the secondary claim if in its opinion, this will distract its judicious determination of the main cause; and a collateral cause thus declined, generally falls outside the jurisdiction of the Supreme Court”. [Para 25] (Emphasis added)

36. It is therefore, from the foregoing, manifestly clear that, where a matter or claim is for restitution of emoluments and payments under statute, not of violated constitutional rights per se then this court would decline to assume jurisdiction under article 163(4)(a). The present claim is certainly but a civil claim against the respondents for unsettled or unpaid dues following the redundancy of the petitioners. The learned Judges of the superior courts were thus most erudite in their deliberation when they stated that the petitioners had not shown how the issues were of a constitutional nature, and hence, a requirement of them to make a determination on the same. They were equally perturbed, as we are, as to why the petitioners would seek constitutional reprieve for issues that were and are clearly about statutory application, and have no nexus whatsoever with violation of constitutional rights. We thus reiterate the fact that it was the applicability or otherwise of the EACMAA that was at the centre of the present dispute and not the interpretation or application of the Constitution per se. Indeed, of the four issues that parties submitted on, none calls for such interpretation or application of the Constitution in any substantive or even peripheral manner.
37. Having held as above, we do not see any reason to delve into the other issues set out for determination save the following:
38. Firstly, it is obvious to us that, as long as EACMMA remains valid, the petitioners are at liberty to pursue their emoluments and pensions under that Act.
39. Secondly, we heard Mr Allen Gichuhi for the 2nd – 6th respondents to be saying that documents relating to the dispute have been destroyed but he, again stated that in Emmanuel Mwakisha Mjawasi, Mumbi, J directed the National Bank of Kenya to pay retired staff of the EAC presumably, including the petitioners, from funds it was holding. Mr Lubullelah for the petitioners conceded that point but submitted that

“the State has not acted on this order”.

The petitioners may well pursue that order to obtain relief. For avoidance of doubt, the learned Judge ordered as follows:

“For the sake of petitioners and others who may have an entitlement to the funds realized from the realization of the assets of the East African Airways Corporation currently held in the Official Receivers account with National Bank, I direct the office of the Attorney General within ninety days (90) days of today to publish, in a newspaper with wide circulation nationally:

1. The names and addresses of former employees of the defunct East African Airways Corporation who received dividends seven times from the office of the Official Receiver;
2. The names and addresses of former employees of the defunct East African Airways Corporation who have not yet received/collected their monies from the Official Receiver;



3. The total amount lying in the Official Receiver’s account with National Bank in respect of such persons.”
44. Thirdly, the issue of delay in filing and prosecuting the present proceedings caused us discomfort. Mr Lubullelah submitted that 40 years (or 36 years’) delay is excusable in the circumstances. We disagree. A simple, otherwise straight forward claim for emoluments and pensions should never have taken that long to commence and prosecute.
41. Lastly, we have been persuaded that, having found that we have no jurisdiction, we should not address the place of the principle of *res judicata* in constitutional matters as well as the retrospectivity or otherwise of the [Constitution](#) 2010.

D. Costs

42. On the issue of costs, this court has previously settled the law on award of costs, deeming that costs follow the event. Further, that a Judge has the discretion in awarding the same. This was our decision in the case of Petition No 4 of 2012 [Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others](#); [2014] eKLR where we stated:

“It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.”

...[Although] there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the applicant.”

43. We have, in applying the above principle, considered that the petitioners retired in 1977 and all evidence points to the fact that they have not been paid their emoluments and pensions for reasons that were all explained in previous litigation on the same issue. Our view is therefore that, to punish them with an award of costs in favour of the respondent would not be efficacious. In that event, we shall exercise discretion and order that each party should bear its costs of this appeal.

E. Disposition

44. Consequent upon our findings above, the final orders are that;
 - i. The Petition of Appeal No 17 of 2019 dated May 9, 2019 is hereby dismissed;
 - ii. Each party shall bear its costs.
45. Orders accordingly

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF AUGUST, 2020.



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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

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NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

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I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

