

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**PETITION NO 113 OF 2013**

**ALFRED ASIDAGA MULIMA.....1<sup>ST</sup> PETITIONER**

**CHALRES MARARO NJOROGE .....2<sup>nd</sup> PETITIONER**

**PETER KIIO KITUKO (suing as representatives of Ex East  
African Airways Association)..... 3<sup>RD</sup> PETITIONER**

**VERSUS**

**THE HON ATTORNEY GENERAL .....1<sup>ST</sup> RESPONDENT**

**BARCLAYS BANK INTERNATIONAL LTD .....2<sup>ND</sup> RESPONDENT**

**BARCLAYS BANK TRUST COMPANY LTD .....3<sup>RD</sup> RESPONDENT**

**BARCLAYS TRUST CHANNEL ISLAND LTD.....4<sup>TH</sup> RESPONDENT**

**BARCLAYS TRUST INTERNATIONAL LTD..... 5<sup>TH</sup> RESPONDENT**

**BARCLAYS BANK KENYA LTD.....6<sup>TH</sup> RESPONDENT**

**MINISTRY OF FINANCE .....7<sup>TH</sup> RESPONDENT**

**MINISTRY OF TRANSPORT .....8<sup>TH</sup> RESPONDENT**

**THE REGISTRAR GENERAL.....9<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The present petition has its roots in events that took place some thirty seven (37) years ago following the dissolution of the East African Community that brought together Kenya, Uganda and Tanzania in an economic block. The petitioners allege 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 they allege were due to them upon the dissolution of the East African Community and winding up of the East African

Airways Corporation ((hereafter '**East African Airways**' or '**the Corporation**) and seek the intervention of the court.

2. The petitioners have brought their claim against the respondents alleging that they were, on diverse dates indicated in their respective letters of employment, employed by the Corporation, which ceased operations on 13<sup>th</sup> January 1977. As a result, the petitioners were declared redundant on 15<sup>th</sup> February 1977 lost their employment through the abolition of their offices and therefore became entitled to their provident fund, redundancy payments, unpaid leave and other cessation of service benefits which they have enumerated in the petition as the provident fund scheme entitlements under the New Staff Provident Fund Scheme (NSPF); payment in lieu of notice; 15 days' pay for each completed month of service (Redundancy/ loss of office; outstanding/ accumulated leave days and repatriation expenses. They allege that the respondents are responsible, in various degrees, for non-payment of the said dues, as a result of which the constitutional rights enumerated above have been violated.

### **The Parties**

3. The petitioners are officials of the **ex-East African Airways Welfare Staff Association**, an association comprising former employees of the Corporation which, according to the Certificate of Registration No. 37621 annexed to the affidavit in support of the Petition sworn by **Mr. Alfred Asidaga Mulima** was registered on 12<sup>th</sup> June 2012. They state that they have brought the petition in their personal capacity and on behalf of the members of the Association and former employees of the East African Airways. While orders were made for the petition to be advertised for interested parties to participate in the proceedings and an advertisement placed in the Daily Nation, no other former employees of the defunct East African Airways came forward to be enjoined as interested parties.

4. The petitioners have named the Attorney General of the Republic of Kenya as the 1<sup>st</sup> respondent. The Attorney General is sued pursuant to the provisions of Article 156 of the Constitution and on behalf of **The Ministries of Finance and Transport** as well as the **Registrar General**.

5. The 2<sup>nd</sup> -6<sup>th</sup> respondents are limited liability companies whose parent company is **Barclays Group Holdings Limited**. The 2<sup>nd</sup> and 6<sup>th</sup> respondents, **Barclays Bank International Ltd** and **Barclays Bank Kenya Ltd**, are limited liability companies incorporated under the Companies Act, Cap 486 Laws of Kenya; while the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents, **Barclays Bank Trust Company Ltd**, **Barclays Trust Channel Island Ltd** and **Barclays Trust International Ltd**, are incorporated in the United Kingdom. It emerged at

the hearing that 2<sup>nd</sup> and 5<sup>th</sup> respondents had changed their names from the names in the petition to **Barclays Bank PLC and Barclays Private Bank and Trust Limited**, but it was conceded that this change did not prejudice the petitioners.

6. The 7<sup>th</sup> and 8<sup>th</sup> respondents are the Ministry of Finance of the Republic of Kenya. The petitioners have sued it in its capacity as the Ministry responsible for all matters relating to finance, drawings from the consolidated fund and the funds received upon the dissolution of the East African Community.

7. The Ministry of Transport, the 8<sup>th</sup> respondent, is enjoined in these proceedings as the Ministry responsible for all matters relating to the defunct East African Airways Corporation under the East African Airways Act (Now repealed).

8. Finally, the 9<sup>th</sup> respondent, the Registrar General, has been enjoined as being the government department responsible for all the assets and records for the winding up of the defunct East African Airways Corporation under the office of the Official Receiver and Liquidator.

### **The Petition**

9. In the undated petition which was filed in court on 16<sup>th</sup> February 2013 according to the court stamp, the petitioners have sought, as against the respondents jointly and severally, the following orders:

1. *A declaration that the Respondents' conduct amounts to discrimination and to that extent, is discriminatory against the Petitioners under Article 27 of the constitution.*

2. *A declaration that the respondent's conduct, acts of commission and/ or omission are unlawful, illegal and or unfair and the same violates Petitioners Fundamental Rights and Freedoms to human dignity, right to property and right to Fair Administrative Action as encapsulated under Articles 20 (1), 27, 28, 29 (f), 35, 40, 41, 43 47, 48 and 57 of the*

*constitution and that the said rights and freedoms have been violated, transgressed and trampled upon by the 1st Respondent.*

*3. A declaration that the process leading up to, including the decision, findings and recommendations of the 7th Respondent contained in his written brief to the parliament dated 19th September 2012 and of his task force set up to inquire into the payments due to the former East African Community Employees dated 20th September 2011, was unconstitutional, unprocedural, substantively unconstitutional, high handed, biased, lacking in independence, in breach of the rules of Natural Justice, in breach of the principles of separation of powers, judicial independence, ultra-vires thus null and void ab initio.*

*4. A Declaration that the Petitioners are entitled to and as such, have an indefeasible right of access to information from the 1st respondent in terms of Article 35.*

*5. An order compelling the Respondents to release and disclose the information necessary to know and access their entitlements for the provident fund scheme and also for redundancy/ loss of office as specified in the Mediation Agreement, 1984.*

*6. An order that the Petitioners are entitled to compensation by way of damages for violations under Article 23, Article 27. (1), Article 27. (2), Article 27 (4), Article 28, Article 29. (f), Article 35. (1) (a), Article 35. (1) (b), Article 40. (1), Article 41. (1), Article 41. (2) (a), Article 43. (1) (e), Article 47. (1), Article. 48 and Article 57. (c) of the constitution.*

*7. A declaration that the Petitioners are additionally entitled to the benefits enumerated in paragraphs 6 (a) 6 (b) and 6 (c) in this Petition.*

*8. An order directing the Respondents to pay up the sums due to the Petitioners from the provident fund and for loss of office as enumerated in paragraphs 6 (a), 6 (b) and 6 (c) in this Petition.*

9. *Special damages as pleaded in paragraphs 6 (a), 6 (b) and 6 (c) in this Petition.*

10. *Costs of this suit.*

11. *Interest at court rates from the date of filing until payment in full.*

12. *Such other further or better Orders as this Honorable Court shall deem just and fit to grant.*

#### **The Petitioners' Case**

10. In support of the petition and in reply to the respondents, the petitioners have sworn four affidavits. The 1<sup>st</sup> petitioner, Mr. **Alfred Asidiga Mulima**, has sworn two affidavits, the first on 15<sup>th</sup> February 2013 and a further affidavit on 30<sup>th</sup> January 2014. Affidavits in support of the petition were also sworn by **Mr. Adrian Gilbert Muteshi** and **Mr. K.S. Bhullar** on 15<sup>th</sup> February 2013. The final affidavit is sworn by one **Robert Gathigani Njagi** who describes himself as a Forensic Accountant and makes various depositions regarding his calculation of the sums allegedly due to the petitioners in respect of loss of office/redundancy and provident funds. The petitioners have also filed extensive written submissions and judicial authorities in support. Their case was presented by their Learned Counsel, Mr. Enonda.

11. The petitioners' case is set out under four heads. They make their claim for provident fund payments and loss of office/ redundancy which they then summarize under the head of their total discernible financial claim. They allege that the respondents are guilty of concealment and acquiescence, and then set out the specific constitutional violations which they deem to have been committed against them.

12. The petitioners aver that upon the collapse of the Corporation, they were declared redundant and lost their employment through the abolition of their offices; that they therefore became entitled to their provident fund, redundancy payments, unpaid leave and other cessation of service benefits, which they have enumerated and aver can be discerned from some nineteen documents annexed to their affidavits in support of the petition.

13. It is their submission that at the time of the liquidation of the Corporation by the 9<sup>th</sup> respondent, they were to be paid their terminal benefits as preferential creditors in terms of **Section 311** of the **Companies Act** and that the individual benefits quantum was dictated by, among other factors, the individual's employment particulars in regard to duration of service, seniority, and last salary as at 15<sup>th</sup> February 1977. They submit that they have made an attempt to reconstruct each of their entitlements and claims in the report prepared by Mr. Njagi, a forensic accountant, annexed to the affidavit of Mr. Mulima, but allege that the particulars of their individual files and payments thereof are in the custody of the office of the Registrar General/ Official Receiver (The 9<sup>th</sup> respondent) at the Attorney General's offices.

14. The petitioners claim that from records obtained from the **Kenya National Archives**, the Official Receiver and Liquidator of the defunct East African Airways Corporation, who was from the 1<sup>st</sup> and 9<sup>th</sup> respondent's offices, has to date allegedly made a payment of only a portion of the entitlements of some of the petitioners by way of dividend distribution of 12% in 1979 and 13% in February 1980. They claim that other than the fact that they recently stumbled upon the said documents indicating that they had been invited to collect dividends in 1979 and in 1980, they have never received any payments from the 1<sup>st</sup> or 9<sup>th</sup> respondent to date. It is also their averment that there is no concrete clarity as to what sum, that was due to them, the official receiver and liquidator deposited with the Government upon winding up of the East African Airways Corporation, even though the Government has through various correspondence and answers on the floor of Parliament made admissions that it owed them various sums over the years. They therefore assert that the court should make an order directed at the Registrar General/ Official Receiver to provide the particulars of all the records held by them for purposes of ascertaining and confirming the payments due to and received for, on behalf of and by the petitioners.

15. The petitioners further contend that the 1<sup>st</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents, as employees and agents of the Government of Kenya, were under a constitutional, statutory and equitable duty and obligation to meet their terminal benefits and emoluments as specified in the various documents that they have relied on, but in particular the **East African Mediation Agreement** and the **East African Community Mediation Agreement Act**.

16. It is the petitioners' case further that they were contributory members of the staff provident fund (known as the **New Staff Provident Fund**) which funds were invested by the trustees of the said provident fund through or within the 2<sup>nd</sup> and/ or the 6<sup>th</sup> respondent and in their sister companies, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondent companies by virtue of the **Investment Management Agreement** dated 12<sup>th</sup> February 1975, the trust deed dated 16<sup>th</sup> August 1974 and the **Supplemental Trust Deed** dated 12<sup>th</sup> February 1975 amending the rules of the Trust Deed to the Provident Fund.

17. They further allege that following the collapse of the Corporation, the trustees of the Provident Fund made a resolution on 16<sup>th</sup> February 1977 to dissolve and wind up the Provident Fund and appointed the 2<sup>nd</sup> and/ or the 6<sup>th</sup> respondent to be the custodian of the said funds and to immediately pay 25% of the funds due to the members of the fund in Kenya.

18. They contend that only some of the members were paid 25% of the provident funds and the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents have to date not made any payments to them; that the respondents have collectively and individually failed to disclose the whereabouts of the balance of the entitlements of the petitioners' monies held or invested in the Provident Fund scheme; and that they have taken undue advantage of the confusion surrounding the collapse of the Corporation and the Community to withhold the provident funds due to the petitioners.

19. It is the petitioners' claim further that the respondents have refused to reveal the whereabouts of the funds and assets of the Provident Fund scheme which, strictly speaking, they were holding in trust for the benefit of the petitioners herein; and that as the Crown Agents who were the managers of the assets of the defunct East African Community and the Corporations therein, including the East African Airways Corporation, they have denied receiving any funds regarding the Provident Fund scheme. The petitioners further claim that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents have not, in their response to the petition, addressed the whereabouts of the funds that they held in the Provident Fund Scheme and how the funds were disposed of.

20. The petitioners allege that the funds held by the Crown Agents relate to monies for provident and pension funds for the East African Community Employees and some of the

Corporations but not those of the East African Airways Corporation. It is therefore their case that these funds were always in the custody of the 2<sup>nd</sup> to 6<sup>th</sup> respondents jointly and severally. They state that their claim against the respondents jointly and severally in respect of the Provident Fund claim is for the sum of **United Kingdom Pounds Sterling Two Billion Two Hundred and Sixty Seven Million One Hundred and Three Thousand Nine Hundred and Eighty Six and Thirty Five Cents (UK £ 2,267,103,986.35)**, equivalent to **Kenya Shillings Three Hundred and Six Billion, Three Hundred and Sixty Seven Million, Eight Hundred and Forty Thousand Three Hundred and Ninety One and Twenty Three cents Only [Kshs. 306,367,840,391.23]** at the conversation rate of 1 GBP = 135.13621 KES together with interest and costs thereon.

21. They further claim against the respondents the sum of **Kenya Shillings Three Hundred and Two Billion, Six Hundred and Sixty Six Million, Five Hundred and Fifty Nine Thousand One Hundred and Sixty Three and Seven cents Only [Kshs. 302,666,559,163.07]** together with interest and costs thereon attributable to loss of office (redundancy) payments.

22. It is also their claim that they have not been able to compute their outstanding leave, notice and the repatriation expenses claims due to the absence of records being held by the 1<sup>st</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents. They nevertheless claim the said sums upon provision of records and information by the respondents.

23. The petitioners submit that they are entitled to the sums claimed in this petition and the respondents have deliberately delayed, concealed, failed and neglected to pay the said amounts, thus subjecting them to loss and harm given that they did not contribute in any way to the failure of the respondents to undertake their responsibilities; that the 7<sup>th</sup> respondent has not set up a task force with regard to the monies due to them nor has it accepted to make good the payments due to them; that in 2009, the then Deputy Prime Minister and Minister for Finance made an undertaking to pay the petitioners in a statement to Parliament dated 11<sup>th</sup> June 2009 which was read on 5<sup>th</sup> August 2009, an undertaking further buttressed by the then Minister for Finance in his address to Parliament on 19<sup>th</sup> September 2012 in which he intimated that the government would make an *ex gratia* payment.

24. The petitioners claim further that the 1<sup>st</sup> respondent made an undertaking to Parliament on 1<sup>st</sup> August 2012 that the petitioners, amongst others, would be paid before the 10<sup>th</sup>



Parliament was dissolved. It is their contention that as a result of the respondents' failure to make the payments, they have suffered loss and harm despite the respondents conceding that they owe the funds.

25. The petitioners aver that in light of the foregoing matters, they have been treated with inequality on the basis of their nationality and age on various fronts. They cite, among others, the recommendation that payments be made, and being made, to former East African Airways employees in Uganda and Tanzania while no payments were made to Kenyan employees; the award of better benefits and preferential payments to staff from the former East African Community who were retained in the Civil Service; by fully compensating expatriate employees (from within and without the East African Community) while excluding local employees.

26. They therefore allege violation of their right to equality and freedom from discrimination and in particular **Article 27 (4)** of the **Constitution** and rely on the decisions in **RM and Another v Attorney General (2008) 1 KLR** and **Nyarangi and 3 Others v Attorney General (2008) KLR 688** to support their case.

27. It is also their contention that the respondents have violated their right to fair labour practices as guaranteed under **Article 41 (1)** and **(2) (b)**. They allege that this violation arose for reasons, among others, of the respondent issuing them with extremely minimal payments in the period immediately after the demise of the Corporation; offending the rules of natural justice by unfairly dismissing their inquiries and claims on their entitlements without their being given a hearing or reasons; and refusing to disclose information to them in regard to their entitlements and directing them to get this information from Uganda and Tanzania.

28. The petitioners further allege violation of Article 35 of the Constitution. In this regard, they allege that due to the confusion surrounding the collapse of the East African Airways Corporation, the respondents have by fraudulent misrepresentation, concealment and/ or none disclosure of material facts withheld the entitlements of the petitioners' due to loss of office and those held in the Provident Fund Scheme, thereby violating the petitioner's right to information guaranteed by **Article 35** of the **Constitution**.

29. The petitioners also allege violation of their right under Article 40 of the Constitution, which contains the constitutional guarantee to property. They contend that the respondents have on many occasions carried themselves in a manner that has the effect of taking away the Petitioners right to property by, among other things, withholding the petitioners' payments with opaque and unclear promises to pay them; that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents are holding the provident funds with the connivance and acquiesce of the 1<sup>st</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents.

30. They claim, in the alternative, that the respondents are holding information that would enable the petitioners access their right to their property in the provident fund scheme; that the 1<sup>st</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents have abdicated their responsibility in law to ensure that they receive their just entitlement to their property in terms of their interests in the provident fund scheme and entitlements for loss of office; and they allege misappropriation of the funds received from the trustees, the Crown Agents and the Receiver/ Liquidator on account of and for their benefit.

31. The petitioners assert that as a result of the actions of the respondents set out above, they have been exposed to inhuman and degrading treatment in violation of **Article 28**; been deprived of their right to dignity under **Article 29**; subjected to modern day slavery in violation of **Article 30**; and that the respondent has ensured that they are excluded from the right to enjoy or benefit from the national values and principles of Governance as enshrined under **Article 10** of the **Constitution**.

32. They rely on the decisions in **Law Society of Kenya -vs- Attorney General and Another 2009 KLR 55**, **Kanzika v Governor, Central Bank of Kenya and 2 Others (2006) 2 KLR 545** and **Nabori and 9 Others v Attorney General 2007 KLR 331** in support of their argument that they have been deprived of their property rights. They also allege that the acts of the respondents are a violation of various international instruments read alongside **Article 2(5)** and **(6)** of the **Constitution**, which they have set out in their petition.

33. It was submitted on behalf of the petitioners that since the factual basis of their case has not been controverted or challenged, the court should accept the facts relied on as correct and true. They rely on the decision in **Rev. Lawford Ndege Imunde v Attorney General JR Pet No 693 of 2008 (unreported)** and **Joseph Sitonik v The Attorney General and Another Pet No 29 of 2011** for that proposition.

34. To the respondents' challenge of the court's jurisdiction to hear this matter, it is the petitioners' contention that constitutional courts generally abhor technicalities and challenges to jurisdiction and they rely on the decisions in **Nabori and 9 others v Attorney General (supra)** and **Moses Tompu Kuya and 5 Others v Attorney General and 2 Others Pet No 65 of 2008** in support of their case. It is their contention that the role of the court in dealing with constitutional issues has been interpreted to align to the unlimited original jurisdiction of the High Court to look into the issues as long as there is an allegation of a constitutional violation.

35. To the respondents' contention that this petition is barred by limitation, the petitioners submit that there is a continuing trust between the petitioners and the respondent which is not subject to any time limits; that there has been part payment by the 2<sup>nd</sup> and 6<sup>th</sup> respondents; that the 7<sup>th</sup> and 9<sup>th</sup> respondent have repeatedly acknowledged the existence of the claims; and there is also apparent fraud being perpetrated in the concealment of the payments due to the petitioners which led to the recommendation of a task force by the 7<sup>th</sup> respondent that the offices of the 1<sup>st</sup> and 9<sup>th</sup> respondents be investigated by the Ethics and Anti-Corruption Commission; and it is therefore their case that these facts take away the claim of limitation. They submit, further, that the Limitations of Actions Act cannot override constitutional provisions which have no bar to the validity and lodging of claims of constitutional violation.

36. With regard to the claim that the petition offends the principle of *res judicata*, it is the petitioners' submission that their case does not violate the provision of **Section 7 of the Civil Procedure Code**; that they are aware of the existence and determination of **Samuel Amugune and 109 Others v The Attorney General HCCC No 1879 of 1997 (Consolidated with HCC No. 743 of 2002)** and **East African Court of Justice Reference No 2 of 2010 Emanuel Mwakisha Mjwasi and 748 Others v The Attorney General** but not of the decision in **Emanuel Mwakisha Miwasi and Others v Attorney General Industrial Cause No 43 of 2010**; but that these three cases are different and distinct from this petition.

37. They claim, further, that none of the petitioners were party or privy to these cases; that the cases concerned non-payment (or underpayment) of pension dues to former employees of the defunct East African Community but not the East African Airways Corporation; that this suit seeks to address violations of fundamental rights and freedoms for it involves allegations

of a 'taking' akin to compulsory acquisition of property in the form of non-payment and concealing of entitlements due to the petitioners by the state; and that it is concerned with provident fund, loss of office (redundancy payments) and concomitant constitutional violations.

38. The petitioners submit that the Constitution of Kenya 2010 is applicable as the petition is premised on a continuing trust which is still in place. They further claim that the **East African Mediation Agreement Act** created a statutory trust between certain state actors and the petitioners and even if this court is to find no such trust(s) then one may be presumed from the conduct of the parties. It is their submission therefore that the Constitution applies by dint of Sections 6 and 7 of the Sixth Schedule, and that it is the duty of the court to be progressive in the interpretation of the Constitution.

### **The Case for the 1<sup>st</sup> and 7<sup>th</sup> -9<sup>th</sup> Respondents**

39. Through their Learned Counsel, Mr. Opondo, the state respondents opposed the petitioners' case. They filed a Replying Affidavit sworn by Mr. **Silvanus Maundu Ndisya**, the Assistant Registrar General, and submissions dated 11<sup>th</sup> March 2014 together with a bundle of authorities.

40. Mr. Opondo challenged the assertion by the petitioners that they were all former employees of the defunct East African Airways Corporation. He submitted that the petitioners have not demonstrated beyond reasonable doubt that they were indeed employees as no proof of employment had been adduced. It was his contention that the petitioners are an amorphous group that must fulfill certain requirements so as to be able to enforce such rights. It was his submission, further, that there was a requirement that formed a pre-condition to payment of dividends at the time of winding up of the Corporation, contained in the petitioners' annexure **AAM 8** in the affidavit of Mr. Mulima, which demonstrates that the State began to pay the dividends claimed by the petitioners as early as 1980 but with a pre-requisite that one had to prove that they were indeed ex-employees. Mr. Opondo submitted therefore that the petitioners have not discharged their burden under **Sections 107 (1) and 109** of the **Evidence Act**.

41. The respondents aver that the office of the Official Receiver does not, and has never kept any records allegedly received from the Crown Agents as claimed by the petitioners. They concede, however, that the advising accountants released liquidation documents to the Official Receiver at the conclusion of the liquidation of the East African Airways Corporation

in 1988. They submit however, that some of these documents may have been destroyed or defaced or altogether lost due to the inordinate lapse of time prior to the filing of this petition.

42. It is also the respondents' submission that on realization of the assets of the Corporation, the Official Receiver, with the assistance of the advising accountants, declared and paid out dividends to creditors, including former employees, seven times; that a number of the former employees have not collected their dividend cheques to date and their names are contained in the advising accountants' final report to the Official Receiver and liquidator dated March 1988; and that these monies are still in the Corporation's liquidation account kept by the Official Receiver at National Bank.

43. Counsel submitted that, contrary to the assertion by the petitioners, representatives of the former employees of the East African Airways, among them a **Mr Sabwa, Kamande Ashubwe and Two Others** were granted access to the available documents and were allowed to make copies thereof, that the office of the Official Receiver has always co-operated with officials of the petitioners' association, and that it is therefore fallacious and misleading for them to claim that the respondents have not responded to their plea to get information on their payments and entitlements.

44. The respondents further aver that they paid some dividends upon liquidation of the East African Airways Corporation; that the challenge of this payments by the petitioners as illegal, null and void and lacking a basis in law is untenable as the **East African Mediation Agreement** vested such powers in the Official Receiver while the liquidation process is regulated by the Companies Act Cap 486. It was their further submission that the petitioners' claim that the Official Receiver has failed to provide individual provident fund statements to them is false, the factual position being that the Official Receiver is not holding any information whatsoever regarding the Provident Funds scheme and any provident fund claims are to be pursued from the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents in terms of the resolution of the 1976 ordinary Board Meeting of the East African Airways Corporation held in Nairobi on 16<sup>th</sup> December, 1976.

45. The respondents submit that this court is bound by the **East African Community Mediation Agreement Act**, which was '*An Act of Parliament to provide for the giving effect to certain provisions of the East Africa Community Mediation Agreement, 1984, and for connected purposes*'; that the said Act still has the force of law; that the court is enjoined to interpret the East African Community Mediation Agreement in line with the East African Community Mediation Agreement Act so as to afford the parties thereto the widest possible enjoyment of rights that accrue therefrom.

46. The respondents submitted further that the East African Community Mediation Agreement Act was enacted to give the East African Community Mediation Agreement the full force of law, and that **Article 10** of the **Mediation Agreement Act** addressed the issue of the Provident Funds elaborately.

47. The respondents contend that in any event, this suit is *res judicata*, and the petitioners cannot go round the doctrine by alleging that since no pleadings in respect of the previous cases have been annexed, the court cannot inquire into the issue. Mr. Opondo submitted that section 60 of the Evidence Act Cap 80 enjoins this court to take judicial notice of court pleadings; that court pleadings are public documents; and the fact that a party has not attached them to his pleadings does not render them useless. It was also the respondents' submission that a broad and purposive interpretation of **Section 7 of the Civil Procedure Act** can only lead to the conclusion that this matter is *res judicata*. It is their case that the issues directly and substantially in issue in this case have been directly and substantially in issues in earlier decisions namely **Nairobi HCCC No. 1879 of 2009 Samuel Amugune & Others -vs- The Attorney General**.

48. The respondents submit further that the petitioners unsuccessfully moved the First Instance Division of the East Africa Court of Justice at Arusha in **Reference No. 2 of 2010**; that they appealed to the East African Court of Justice in **East Africa Court of Justice Appeal No.4 of 2011 Emmanuel Mwakisha Mjawasi and 748 Others v The Attorney General of the Republic of Kenya**, an appeal that they also lost. The respondents have relied on the decision in **Mombasa HCCA No.37 of 2012, Mombasa Maize Millers Limited v Hassan Sura Dele & Another and Henderson v Henderson (1843- 60) ALL E.R. 378** to support their argument that this matter is *res judicata*.

49. It is also the respondents' contention that this case is barred by limitation; that Limitation of Actions Act Cap. 22 is still a valid statute which prescribes time limits within which certain actions can be brought and the petitioners cannot run away from its provisions; that this claim arises out of a contract between the governments of Kenya, Uganda, and Tanzania on behalf of its people which is couched in an Act of Parliament and to which section 4 of the **Limitation of Actions Act** applies.

50. It is their further contention that the cause of action arose some 37 years ago; that some of the documents that relate to the winding up proceedings might have got destroyed or misplaced altogether; that the petitioners themselves have not established their claim satisfactorily and they urge the court to find the petition an abuse of the court process. They ask the court to be guided by the reasoning in the case of **Peter Ngari Kagume & Others – vs- The Attorney General Petition No. 28 of 2006**, and find the claim statute barred.

51. With regard to the petitioners' claim of constitutional violations, the respondents submit that neither the Constitution nor statutes apply retrospectively as was held in **Petition No. 438 of 2013 National Conservative Forum –vs- Attorney General** while echoing the holding of the Supreme Court of Kenya in the case of **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others, Supreme Court of Kenya Application No. 2 of 2011**. It is their submission that while the petitioner has relied extensively on the Constitution that was enacted in 2010, the matters complained of occurred some 37 years before the enactment of the new Constitution.

52. The respondents submit further that the rules of interpretation of statutes demand that a statute is read as a whole. It is their submission that **sections 4 and 5** of the Act form part of the **East African Community Mediation Agreement Act** that is subject to scrutiny of this court and as such the Act should not be read in isolation.

53. To the petitioners' contention that the Government received certain valuable assets from the dissolution of the East Africa Community and the Corporations thereunder part of which ought to have been utilized to settle employment claims, the respondents contend that this is a matter of speculation, conjecture and otherwise a fishing expedition by the petitioners; that what was received by the Government, out of which payment were made to the genuine claimants, is clearly laid out under **Articles 2 and 3** of the **East Africa Community Mediation Agreement Act of 1984**.

54. It is their submission further that if the petitioners know of any other valuable assets that were handed over to the Government, they should adduce evidence to support their claim; that the petitioners' claim that section 311 of the **Companies Act** is applicable to this matter is to engage in a fishing expedition as the East African Community Mediation Act was specifically enacted to operationalize the East Africa Mediation Agreement of 1984 and the provisions of the Companies Act did not therefore apply. They ask the court to be guided by the decision of

Lenaola J in the **Samuel Amugune** case (*supra*) at **paragraph 36** and find that this petition is unmerited.

### **The 2<sup>nd</sup> -6<sup>th</sup> Respondents' Case**

55. These corporate respondents filed a response to the petition dated 30<sup>th</sup> May 2013, a Replying Affidavit sworn on 7<sup>th</sup> February 2014 by **Mr. David Swao** and written submissions dated 13<sup>th</sup> February 2014. Their case was presented by their Learned Counsel, Mr Gichuhi.

56. The respondents oppose the petition on the basis of several preliminary objections. They argue that the claim is time barred pursuant to Section 4 of the Limitation of Actions Act having been filed more than 30 years after the cause of action accrued, contrary to the requirement that any action for an account must be filed within 6 years from the date of accrual. They argue, further, that it is impossible for a fair trial to take place on account of the 30 year delay and loss of documents, and there are no witnesses who can give any credible evidence thus severely prejudicing the right to a fair trial.

57. The respondents agree with the submissions of the state that the matter is *res judicata* and has been the subject of litigation in various proceedings filed in the High Courts of Kenya. They cite the case of **Samuel Amugune** (*supra*) and **Emmanuel Mwakisha & Others –vs-Attorney General Industrial Court Cause No. 43 of 2010**.

58. The respondents further object to the petition on the grounds that the **East African Community Mediation Agreement Act of 1984** comprehensively addressed all the issues that are now raised in the petition. In particular, it is their argument that all issues pertaining to the Pension and Provident Funds were specially addressed in Article 10.03 (c) of the **East African Community Mediation Agreement Act of 1984** where the funds were acknowledged to be in the custody of the Crown Agents.

59. The respondents argue further that the **Records Disposal Act, Cap 4, Laws of Kenya** expressly states at **Section 4** that no suit or other proceeding shall be instituted against any person in respect of the disposal by destruction or otherwise of any records, books or papers



in accordance with any rules made under the Act. It is their submission that it is impossible to have a fair trial when most public documents may or have been destroyed.

60. They rely on the letter dated 21<sup>st</sup> December 2012 from the Registrar-General exhibited by the petitioners in the affidavit of Mr. Alfred Asidaga Mulima in which the Registrar-General states, among other things, that there was a Winding Up Cause No 1 of 1977 where the files were available for perusal; that members of the State Law Office and the petitioners' Committee jointly but unsuccessfully searched for records concerning the payroll and provident fund tabulations, and the petitioners' committee was advised to try and obtain copies from Tanzania and Uganda.

61. They have cited the decisions in **Shtun v Zalejska (1996) 3 ALL ER 411 (CA)**, **Sweeney v Sir Robert Mcalpine and Sons Ltd (1974) 1 ALL ER 474** and **Biss v Lambeth, Southwark and Lewisham Health Authority (1978) 2 ALL ER 126 (CA)** in support of their argument with regard to the prejudice to the defendant on account of delay. It is their contention that the petitioners are in breach of **Article 50** of the **Constitution** which sets out the ingredients of a fair trial and contend that there cannot be a fair trial when a delay of 36 years have lapsed before the filing of the Petition.

62. The respondents further argue that the petition has not raised any constitutional issues since, to establish their claim, evidence would have to be led which can only be done within a civil suit; that the petitioners have not pleaded and proved their claims for special damages; and that there is no legal basis to claim compound interest on the provident funds that were factored in the East African Community Mediation Agreement Act of 1984 and which did not provide for compound interest. It is also their contention that, in any event, the 2010 Constitution is not retrospective nor does it upset legal rights accrued or already vested prior to promulgation unless specifically provided. It is their submission therefore that the petitioners cannot rely on its provisions.

63. They respondents also deny the claim for special damages set out in the petition. They submit, with regard to the claim of **UK £ 2,267,103,986.35** in respect of the Provident Fund, that no documentary evidence had been adduced by the petitioners to prove the claim. As regards the claim in respect of loss of office (redundancy) payments and the claims for outstanding leave, notice and repatriation expenses, it is their submission that there was never

any privity of contract between them and the petitioners and the claims cannot therefore be maintained against them.

### **Petitioners' Submissions in Reply**

64. In his reply to the respondents' submissions, Mr. Enonda argued that the Attorney General has not addressed the issue of who was paid, and that none of the petitions appear on the list of those paid.

65. With regard to the issue of *res judicata* and the previous decisions on the issue, it was his submission that Reference No. 2 at the East African Court of Justice relates to employees of the East African Community, not the East African Airways; and that in any event the finding in that case is that the government had a responsibility of trust to the EAC employees.

66. It was his submission further that the case involved the issue of pensions, not provident funds and terminal benefits on redundancy; and further, that the Provident Funds held by the Crown Agents were distinct from those held by the 2<sup>nd</sup> – 6<sup>th</sup> respondents, and it is the funds held by the Crown Agents that were covered by the East African Community Mediation Agreement Act.

### **Determination**

67. Having set out above the respective submissions of the parties, I now turn to consider the issues that arise for determination. The parties had filed a list of eighteen agreed issues, the first five of which seek determination of certain preliminary points, the determination of which may well determine the entire petition. I therefore propose to first address these issues, which are as follows:

**1. *Whether the Court is bound by the East African Community Mediation Agreement Act of 1984;***

2. *Whether the East African Community Mediation Agreement Act of 1984 addressed the issue of Provident Funds that were due to the petitioners;*

3. *Whether this suit is res judicata;*

4. *Whether this suit is statutorily time barred and if a fair trial can be had on account of limitation;*

5. *Whether the new Constitution of Kenya, 2010 applies retrospectively to upset accrued rights such as limitation of actions.*

68. In considering the above issues, I am guided partly by a set of agreed facts duly signed by Counsel for the parties and filed in court. The agreed facts have some bearing on the issues identified as arising for determination, so it is useful to set them out first before delving into a consideration of the issues. The parties initially agreed that the petitioners are former employees of the defunct East African Airways; that the East African Airways ceased operations on 13<sup>th</sup> January 1977 and the petitioners were declared redundant by the Corporation on 15<sup>th</sup> February 1977 following a Board meeting of the Corporation on 31<sup>st</sup> January 1977. It is also an agreed fact that both the East African Airways Corporation and the East African Airways Corporation Staff Provident Fund were wound up, and that winding up proceedings in respect of the Corporation were commenced in **Winding up Cause No. 1 of 1977- East African Airways Corporation (in Liquidation)**.

69. The parties also agreed that the 2<sup>nd</sup>-6<sup>th</sup> respondents were not liable to the petitioners in respect of the claim for loss of office or redundancy as there was no master servant relationship between them.

70. It is also agreed as a fact that some of the employees of the community were absorbed in the Kenya civil service or corresponding successive corporation while others opted to retire. The few petitioners who were absorbed by Kenya Airways did so on new and separate

contracts. It is also an agreed fact that the Pensions and emoluments of former Community employees of the defunct East African Community were secured by the **East African Community Mediation Agreement Act** and appropriate amendments to the **Pensions Act**.

71. In the course of submissions, however, Counsel for the State Mr Opondo changed his position on one agreed fact. It was his submission that the petitioners would need to provide proof that they were indeed employees of the defunct East African Airways Corporation. For the purposes of this judgment however, I will accept the above facts as not being substantially in dispute, particularly in view of the documents annexed to the petitioners' affidavits in support of the petition which show, at least in the case of the petitioners whose letters of appointment are annexed, that they were employees of the defunct East African Airways Corporation. I now turn to consider the five issues set out above.

#### **Whether the Court is bound by the East African Community Mediation Agreement Act of 1984**

72. In considering this issue, I observe that it is not in dispute, indeed it is one of the facts agreed upon by the parties, that the Pensions and emoluments of former Community employees of the defunct **East African Community** and its corporations were secured by the **East African Community Mediation Agreement Act** and appropriate amendments to the **Pensions Act**. The Act, which was enacted in 1984 following the collapse in 1977 of the East African Community, states in its preamble as follows:

*“An Act of Parliament to provide for giving effect to certain provisions of the East African Community Mediation Agreement, 1984, and for connected purposes.”*

73. Kenya ratified the agreement and in 1987, it enacted the **East African Community Mediation Agreement Act, No. 7 of 1987**. The 1987 Act states that it is *“An Act of Parliament to provide for giving effect to certain provisions of the East African Community Mediation Agreement, 1984, and for connected purposes.”* In enacting the Act, Parliament gave it retrospective application, and the Act therefore states that *“This Act may be cited as the East African Community Mediation Agreement Act, 1987 and shall be deemed to have come into operation on the 14th May, 1984.”* The Preamble to the Act expressly recognizes that the Act is intended to give effect to the provisions of the East African Community Mediation Agreement signed between the state parties on 14<sup>th</sup> May 1984, which is then set out in the First Schedule to the Act.

74. It is thus evident that Kenya enacted the **1987 Act** specifically to give effect to the **1984 East African Community Mediation Agreement**, whose objective was to facilitate the division of assets and liabilities of the former East African Community. This petition touches on certain aspects of the division of the assets and liabilities of the former East African Community. The Act and the Mediation Agreement that preceded it were the only basis for the division of assets of the Community. It is therefore my view that this court is bound by the **East African Community Mediation Agreement Act of 1984**. In taking this view, I am guided by the provisions of **Section 60 (1) (a)** of the **Evidence Act** which provides that:

*“The courts shall take judicial notice of all written laws, and all laws, rules and principles, written or unwritten, having the force of law, whether in force or having such force as aforesaid before, at or after the commencement of this Act, in any part of Kenya.”*

75. A related issue raised by the parties is whether **sections 4 and 5 (1) of the East African Community Mediation Agreement Act** together with the Schedule of the Act under Article 10.05 are applicable to this case. I have already set out above the reasons why the Act is applicable to this case, indeed, none of the parties disputes the application of the Act. It therefore goes without saying that **sections 4 and 5** of the **East African Community Mediation Agreement Act** and the schedules are applicable to this case. Section 4 provided for the assets and liabilities of the East African Community while section 5 related 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 East African Community Mediation Agreement.

#### **Whether the East African Community Mediation Agreement Act of 1984 Addressed the issue of Provident Funds that were due to the Petitioners**

76. Article 10 of the First Schedule to the **East African Community Mediation Agreement Act, 1984** is titled **“Pension and Provident Funds.”** It provided as follows:

**10.01- The assets of the Pension and Provident Funds of the Corporations and GFS consist of the value of the Pension and Provident Funds assets located in the States and those currently held and managed by the Crown Agents.**

**10.02-The Pension assets and liabilities of the Corporations and GFS shall be subject to an actuarial exercise which shall determine the value of the**

*Pension assets and liabilities in each State and abroad for a decision by the States on the final division of the assets and the liabilities.*

*10.03-Pending the determination of the Pension assets and liabilities for each State—*

a. *Pensions and Provident Funds assets located in the States shall continue to be vested and managed by the states where they are so located;*

b. (i) *Pension and Provident Funds assets of the community currently held and administered by the crown Agents shall vest in and be managed and administered by a Board of Trustees consisting of the Governors of the Central Banks of the States*

*(ii) The Board shall sit not later than one month after the signing of the Mediation Agreement and shall thereafter meet quarterly and submit its reports to the ministers responsible for finance in the States.*

*(iii) The Board shall function in accordance with the rules of procedure set forth in Annex 'F' to this Agreement. If any question of procedure arises which is not covered by the said Annex, the Board shall decide the question*

iv. *The Board shall cease to exist upon a final division of the Pension and Provident Funds assets and other assets and liabilities as provided for in sub-Articles 10.01, 10.02 and 11.3 of this Agreement.*

c. *The Pension and Provident Funds assets of the community now held and managed by the Crown Agents consisted of the following as at 31<sup>st</sup> March, 1984-*

*(i) Pension Fund assets amounting to Pounds Sterling twenty million, five hundred and ninety-two thousand, four hundred and fifty (£20,592,450.00)*

*(ii) Provident Fund assets amounting to Pounds Sterling one million, two hundred forty-eight thousand, nine-hundred and seventy-seven thousand (£1,248,977)*

77. At section 10.05, the Act provides that each State shall

a. *Pay its nationals, employed by the Corporations or GFS and retired from active service by the division date the pension and other benefits due to them on account of such employment;*

b. *Make provision for the Pension rights and entitlements to other benefits accrued as of the division date in favour of its nationals in active service with such corporations and GFS at that date.*

78. Section 10.06 provides

a. *Each State shall pay to members of staff formerly employed by the corporations or GFS, other than its nationals and other than those covered by the Pensions Take-over Agreement with the United Kingdom whose last duty station was within its territory, and to their widows and orphans the pensions and other benefits lawfully due to them on account of such employment.*

b. *The obligation referred to in paragraph (a) of this Sub-Article covers both members of staff retired from active service and those in active service at the division date.”*

79. A plain reading of the above provisions indicates that the Act addresses the issue of pensions and provident funds, for “*members of staff formerly employed by the corporations or GFS*” (General Fund Services) both located in the member states and those held and managed by the Crown agents. The Act further sets out specifically the amount of the Pension and Provident Funds assets of the community held and managed by the Crown agents as at 31<sup>st</sup> March 1984, namely:

i. *Pension Fund assets amounting to Pounds Sterling twenty million, five hundred and ninety-two thousand, four hundred and fifty (£20,592,450.00)*

ii. *Provident Fund assets amounting to Pounds Sterling one million, two hundred forty-eight thousand, nine-hundred and seventy-seven thousand (£1,248,977).*

80. This issue must therefore also be answered in the affirmative. The petitioners seek to portray their pension dues, as former employees of the defunct East African Airways, as falling outside what was addressed by the East African Mediation Agreement Act. However, once it is acknowledged that the defunct East African Airways was a ‘corporation’ within the East African Community, it is difficult to see how its pension fund can be addressed other than in accordance with the provisions of the Act. Had it been intended to be addressed separately, then a provision similar to the one made in respect of the **East African. Posts and Telecommunications Corporation (EAP & T)** at Article 10.04 could have been made:

*“The value of the assets of the Pension Fund of EAP & T other than those covered in Sub-Article 10.01 above, located in Uganda shall be ascertained and a decision made thereon by the States in the light of actuarial and other findings.”*

#### **Whether this Suit is Res Judicata**

81. The third issue emerges from the objections and submissions of the respondents. It is their contention that the petition offends the provisions of section 7 of the **Civil Procedure Act**, the issues that it raises having been determined in three previous cases.

82. Section 7 of the Civil Procedure Act Cap 21 Laws of Kenya provides as follows:

*“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”*



83. Explanation 4 and 6 in the explanations of the rule of *res judicata* provided in the Civil Procedure Act are significant for purposes of this petition:

*Explanation.(4)—Any matter which might and ought to have been made 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.*

...

*Explanation (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.*

84. Black's Law Dictionary (7th Edition) at page 1312 defines *res judicata* in as follows:

*“Latin 'a thing adjudicated' 1 an issue that has been definitely settled by judicial decision. 2. An affirmative defense barring the same parties from litigating a second law suit 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 essentials 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.....”*

85. Courts in this and other jurisdictions have considered and expressed themselves with regard to the doctrine of *res judicata*, and their sentiments on the issue are unanimous. In **Nicholas Njeru -vs- Attorney General & 8 Others (2013)e KLR**, the Court of Appeal expressed itself as follows with regard to the doctrine of *res judicata*:

*“This doctrine has been applied in a number of cases including; Reference No. 1 of 2007 EACJ, James Katabazi & 21 Others -vs- The Attorney General Of The Republic Of Uganda where the court stated that for the doctrine to apply;*

*- The matter must be directly and substantially in issue in the two suits.*

*-The parties must be the same or parties under whom any of their claim, litigating under the same title; and*

***-The matter must have been finally decided in the previous suit (see Uhuru Highway Development Limited -vs- Central Bank & 2 Others – Civil Appeal No. 3 of 1996.)***

86. Similar views were expressed in the cases of **Job Kipkemei Kilach –vs- Director of Public Prosecutions and 2 Others (2014) eKLR**; **Charo Kazungu Matsere and 273 Others v Kencent Holdings Limited and Another (2012) eKLR**; and **Karia and Another v the Attorney General and Others (2005) 1EA 83**.

87. In **Swamy Atmananda vs Sri Ramakrishna Tapovanam [(2005) 10 SCC 51]**, the Supreme Court of India stated as follows with regard to the doctrine of *res judicata*:

*“[26] The object and purport of the principle of res judicata as contended in Section 11 of the Code of Civil Procedure is to uphold the rule of conclusiveness of judgment, as to the points decided earlier of fact, or of law, or of fact and law, in every subsequent suit between the same parties. Once the matter which was the subject-matter of lis stood determined by a competent court, no party thereafter can be permitted to reopen it in a subsequent litigation. Such a rule was brought into the statute-book with a view to bring the litigation to an end so that the other side may not be put to harassment. [27] The principle of res judicata envisages that a judgment of a court of concurrent jurisdiction directly upon a point would create a bar as regards a plea, between the same parties in some other matter in another court, where the said plea seeks to raise afresh the very point that was determined in the earlier judgment.”*

88. I am also guided by the words of the court in the English case of **Henderson -vs- Henderson (1843-60) ALL E.R.378**, relied on by Counsel for the Attorney General, in which the Court stated with regard to *res judicata*:

*“...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 parties to open 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 case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the*

*parties, exercising reasonable diligence, might have brought forward at the time.”*

89. In the case of **Okiya Omtatah Okoiti & Another –vs- The Attorney General and Another Petition No. 593 of 2013** the Court (Lenaola J), in considering the application of the *res judicata* doctrine in constitutional petitions, observed as follows:

*“Whereas these principles have generally been applied liberally in civil suits, the same cannot be said of their application in constitutional matters. I say so because, in my view, the principle of res judicata can and should only be invoked in constitutional matters in the clearest of cases and where a party is re-litigating the same matter before the Constitutional Court and where the Court is called upon to re-determine an issue between the same parties and on the same subject matter. While therefore the principle is a principle of law of wide application, therefore it must be sparingly invoked in rights-based litigation and the reason is obvious.”*

90. However, the Learned Judge issued a caution in the case of **Wycliffe Gisebe Nyakina – vs- Attorney General and Another Petition No. 403 of 2014** when he stated as follows:

*“... While the Courts in constitutional litigation must apply the principle of res judicata sparingly, they must also be vigilant to guard against litigants who are clearly evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the same Court...”*

91. In the present case, it has been argued on behalf of the respondents that the present petition raises the same issues and involves the same parties as were involved in previous litigation before courts of competent jurisdiction. These cases were in the High Court of Kenya, the Industrial Court by way of a petition alleging violation of constitutional rights that was initially filed in the High Court and thereafter transferred to the Industrial Court where it was heard and determined, and a reference to the East African Court of Justice. To determine whether the present petition is *res judicata*, it is useful to set out in some detail the pleadings and determination of the cases.

92. In its decision in **Emmanuel Mwakisha Mjawasi and 748 Others v Attorney General East African Court of Justice Civil Appeal No 4 of 2011** delivered on 27<sup>th</sup> April 2012 the Court expressed itself as follows:

*“...The Appellants are Kenyan citizens and former employees of the defunct East African Community (EAC) that collapsed in 1977. Subsequent to the dissolution of the defunct EAC in 1977, the Partner States executed a Mediation Agreement on 14 May, 1984, for the division of the assets and liabilities of the defunct Community. Under that Mediation Agreement, each Partner State undertook the responsibility to pay out of its share of the defunct Community’s assets, the pensions and other terminal benefits of its respective nationals who had been employed by the EAC and its institutions prior to the division date of the assets. The division dates were different for each of the existing institutions as indicated in article 1 (i) of the Mediation Agreement. However, the latest such division date was 30 June 1977... Interestingly, the Kenyan Government devised a somewhat novel way of dealing with the situation which arose as the consequence of the Mediation Agreement. In this regard, the ex-employees who were still in active service on the division date were given the option to take their EAC pension directly; or to join the Kenyan Public Service, including its Parastatals and State corporations. Through this latter option, many ex-employees of the defunct EAC were absorbed into the employ of the Kenyan Public Service. Conversely, those who took the option to retire were paid at once all their benefits, including additional pensions on the basis that their offices had been abolished in the EAC. It was the Appellants’ case before us and in the Court below that even though they were absorbed into the Kenyan Public Service and other State agencies and were eventually paid their terminal dues by those organizations, they have not, however, been paid their corresponding dues for the services they rendered to the East African Community; yet they lost their employment at the EAC pursuant to the abolition of their offices. The Appellants, therefore, averred that they are entitled to be paid by the Kenyan Government their EAC terminal benefits in accordance with their individual records for the services they rendered to the defunct East African Community before the division date -- including their pensions, additional pensions, provident fund, severance allowances, gratuity, redundancy, payment in lieu of notice, repatriation expenses, loss of office, benefits outstanding, accumulated leave, salary in lieu of notice, real value and compound interest until full payment. It is common knowledge that the Appellants instituted two suits in the High Court of Kenya, which were later consolidated.”*

93. The court considered the petitioners’ claims in the reference leading to the appeal before it, which included loss of office benefits, pension emoluments, outstanding/ accumulated leave, repatriation expenses, real value and 7% compound interest until payment in full, concluding that while it did not have jurisdiction in the matter, the petitioners appeared to

have a genuine and legitimate basis for their grievance of injustice against the Kenyan State concerning the issue of their pensions.

94. The reference to two cases before the High Court in Kenya by the East African Court of Justice was doubtless with regard to the case of **Samuel Amugune and 7 Others (suing on behalf of themselves and other employees of the former East African Community (number 105 persons) –vs- Attorney General Civil Suit No 1879 of 1997** consolidated with **Christopher Maloba and William Nasubo (suing on behalf of themselves and over 1000 former employees of the Defunct East African Community and its Institutions) –vs- Attorney General Civil Case No. 743 of 2002**. In its judgment delivered on 8<sup>th</sup> October 2004 in which it dismissed the plaintiffs’ claim, the High Court ruled that the issue raised in the suits had been addressed in the East African Mediation Agreement Act, 1984.

95. Not satisfied with that decision, the plaintiffs filed an application for review dated 28<sup>th</sup> January 2013. The application was brought under the provisions of section 3, 3A, 1A and 1B of the Civil Procedure Act, Order 9 rule 9 and Order 45 Rule 1 of the Civil Procedure Rules 2010. The main orders sought were to review the decision of Lenaola J on the basis that the plaintiffs have since discovered new evidence which was not within their knowledge and could not be produced at the time judgment was rendered. In a ruling delivered on 29<sup>th</sup> November 2013 dismissing the application, the court stated as follows:

*“...In the supporting affidavit of the applicants, they state that they have come across information that warrants a review of the court’s judgment and intervention by the court in the interest of justice... Under order 45 rule 1 of the Civil Procedure Rules a party may seek a review on grounds that it has discovered new and important evidence that was not within his knowledge or could not be produced by him at the time when the decree or order was passed, or on account of some mistake, or error apparent on the face of the record, or for any other sufficient reason. The applicants give details of information that they have come across but do not explain why the said evidence was not produced at the time of the hearing... I note that the judgment the applicants seek a review of was delivered on 8<sup>th</sup> October 2004, 9 years ago. The applicants do not explain the delay in filing this application nor do they state when they came across the information or how this information affects the decision that was given by the court. It is not this court’s duty to look at the paragraphs and conclude that the information therein is sufficient to seek a review or warrant an intervention. The grave error apparent on the face of the record has also not been explained by the*

*applicants. In my view if the applicants were dissatisfied with the Judgment of the court they should have appealed.”*

96. In **Emmanuel Mwakisha Mjawasi and Others –vs- Attorney General Industrial Court of Kenya Cause No. 43 of 2010**, the Industrial Court considered issues related to the claims by former employees of the East African Community. The court observed in its judgment that the petition was originally filed as a constitutional petition in the High Court on 3<sup>rd</sup> September 2012 as Petition No. 384 of 2012 but was transferred to the Industrial Court on 5th October 2012. It then set out the parties to the petition and the prayers sought therein as follows:

*“By a petition dated 14<sup>th</sup> August 2012 supported by the affidavit of Emmanuel Mwakisha Mjawasi sworn on 14<sup>th</sup> 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."*

97. The court then went on to observe as follows:

*"...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 8<sup>th</sup> 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 29<sup>th</sup> 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 27<sup>th</sup> April 2012. The Petitioners thereafter decided to file this petition... 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.*

98. The Industrial Court then set out the orders which the plaintiffs had sought from the High Court, which were:

*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.*

99. The Industrial Court then set out the facts that Lenaola J had found to be undisputed, as well as the issues framed for determination, and his determination of the matter, to wit: that those who retired on the division date were paid while the state made provisions for those who were absorbed in the Kenya civil service and corporations in Section 2 of the Pensions Act by providing that service under the community would be considered in computing pensions payable upon their retirement to public servants, including the Plaintiffs. The court also found that the Government had complied with the East African Mediation Agreement Act, a fact he found was admitted by the plaintiffs' witnesses and through the enactment of the **East African Community Mediation Act**, and it therefore dismissed the plaintiffs' claim.



100. After thus analyzing the decision of Lenaola J, the Industrial Court found that the prayers that the petitioners were seeking before it had been determined by the **High Court in Nairobi High Court Civil case No.1879 of 1997** and are therefore *res judicata*. The court expressed itself as follows in dismissing the matter:

*“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... 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.”*

101. I observe in passing that the application dated 28<sup>th</sup> January 2013 to review the decision of Lenaola J which I have referred to above may have been prompted by the decision of the Industrial Court.

102. What emerges from the decisions set out above, however, is that the issue of payment of the pension and provident funds and other amounts claimed by the petitioners and other employees of the defunct East African Community and corporations thereunder has been the subject of litigation for the last 17 years, and there are at least three decisions that dealt with it. As noted earlier, the petitioners in this case have sought to separate their claim from that of other employees of the former East African Community and its corporations on the basis that they were employed by the defunct East African Airways Corporation. It is however, evident that the cases before the Court, like the East African Mediation Agreement Act, related to **all** the employees, those of the Community and its corporations such as the defunct **East African Airways Corporation**. This is particularly noteworthy from the particulars of non-compliance in HCCC No 1879 of 1997

***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.***

103. 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.

### **Whether this Suit is Statutorily Time Barred**

104. Having found that the petition is *res judicata*, I believe I need not go further to determine the fifteen other issues identified by the parties as falling for determination. However, I deem it appropriate to consider briefly the last two of the five preliminary issues identified by the parties.

105. The fourth of the five preliminary issues relates to the question of limitation. While the respondents argue that the petition is time-barred pursuant to Section 4 of the Limitation of Actions Act, having been filed more than 30 years after the cause of action arose, the petitioners contend that there is no limitation with respect to constitutional petitions.

106. 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 and 109 Others –vs- 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.

107. With regard to the other claims such as loss of office, leave allowances, and repatriation expenses, assuming they had not been paid, it appears from the petitioners' depositions that they would have been recoverable in the winding up proceedings of the defunct East African

Airways Corporation, **Winding Up Petition No. 1 of 1977**. That being the case, one is left wondering why the petitioners, who include the former Corporation Secretary of the Corporation, **Mr. S.K Bhullar**, a lawyer by training, would have let the matter lie for 30 years and only raise it, judging from the documents annexed to the petitioners' affidavits, in 2007 or thereabouts, and have to rely on documents retrieved from the Kenya National Archives thirty years after the Corporation they worked for was placed under liquidation. That is assuming, as they allege, they were not paid at all, and they were not party to the 1997 litigation by **Samuel Amugune & Others**.

108. I must agree with the respondents that even if the issues raised in this petition had not been *res judicata*, it would have been difficult not to find that they had long been statute barred. As their claim is based on the provisions of the East African Mediation Agreement Act of 1984, then section 4(1)(d) of the limitations Act bars their claim. It provides as follows:

*(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—*

*(a) actions founded on contract;*

*(b) actions to enforce a recognizance;*

*(c) actions to enforce an award;*

*(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;*

*(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.*

109. While the petitioners have sought to escape the issue of limitation by alleging fraud in order to bring themselves within the ambit of section 26 of the Limitation of Actions Act, I have not been able to find any basis for the allegations of fraud. They have also alleged part payment and a promise by the respondent to pay. However, the payment they allude to, so far as can be gathered from their pleadings and submissions, was in the early eighties; while the promise to pay they allude to was made by the state in 2012 to make an *ex gratia* payment, one that is made without legal obligation.

110. The lapse of time perhaps explains the choice of vehicle selected by the petitioners, a petition alleging violation of constitutional rights under the 2010 Constitution. Which brings me to the final issue which I deem appropriate to consider in this matter.

### **Whether The New Constitution Of Kenya, 2010 Applies Retrospectively**

111. The petitioners have alleged violations of their rights under various Articles of the Constitution. They submit that their rights under **Article 27** have been violated in that they have been discriminated against by the respondents' action in recommending the awarding of loss of benefits payment to former East African Airways employees in Uganda and Tanzania while not making similar payments to Kenyan employees. They also claim violation of **Article 41**, alleging that their rights to fair labour practices were violated as they were issued with extremely minimal payments in the period immediately after the demise of the Corporation.

112. They contend, further, that the respondents have violated **Article 40 (1)** as they have “...*have on many occasions carried themselves out in a manner that has the effect of taking away the petitioners right to property.*” They also allege that they have been subjected to inhuman and degrading treatment and violation of their right to dignity guaranteed under Article 28 and 29 of the Constitution. It is also their contention that they have been subjected to modern day slavery in violation of Article 30, and that they have been excluded from the right to enjoy or benefit from the national values and principles of Governance as enshrined under Article 10 of the Constitution.

113. It is noteworthy that the allegations of violation of constitutional rights were the subject of the petition before the Industrial Court in **Emmanuel Mwakisha and Others**. The court did not address itself to the merits of the claims of constitutional violations as it found that the issues raised in the petition were *res judicata*, and that clothing the issues in constitutional garb was of no avail. However, even had the issues in dispute been live, the position in law, as has been found in decisions both of the High Court and the Supreme Court, is that the provisions of the Constitution do not have retrospective application - see **Samuel Kamau Macharia & Another -vs- Kenya Commercial Bank Limited & 2 Others Supreme Court of Kenya Application No. 2 of 2011 [2012] eKLR** and **High Court Petition No. 438 of 2013 - National Conservative Forum -vs-Attorney General**.

114. It is true that the petitioners are entitled to the rights set out in the Constitution of Kenya 2010. They cannot, however, invoke its provisions to cover a situation and cause of action that arose more than 30 years ago; that has been the subject of previous decisions of courts of competent jurisdiction; and which from the evidence, related to claims that were addressed by statute more than 30 years ago.

115. Much as one may sympathise with the petitioners' sense of grievance that has brought them to this and other courts several times, it is not possible to assist them without doing violence to long established principles of law. This is particularly so when one bears in mind the fact that the issues that they now raise before the court were provided for in statute three decades ago.

### **Disposition**

116. Earlier in this Judgment, I expressed my disquiet about the timing of the petitioners' claim, thirty years after the cause of action arose, which is when the pension and provident funds for the East African Community GFS and Corporations were provided for in the **East African Mediation Agreement 1984**; 27 years from the date the domestic legislation intended to give effect to the Agreement, the **East African Community Mediation Agreement Act, 1987**, was enacted by the Parliament of Kenya; and 37 years from the date the East African Airways Corporation was put under receiverships in 1977.

117. I am also concerned about the conduct of the state agencies involved, the 1<sup>st</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents. It was submitted by Mr Opondo for these respondents that on realization of the assets of the Corporation, the Official Receiver, with the assistance of the advising accountants, declared and paid out dividends to creditors, including former employees, seven times; and that a number of the former employees have not collected their dividend cheques to date. It was also the Official Receiver's averment that the names of these persons are contained in the advising accountants' final report to the Official Receiver and Liquidator dated March 1988; and that these monies are still in the Corporation's liquidation account kept by the Official Receiver at National Bank.

118. The question is who these persons who have never collected their cheques are, whether the petitioners are among them and whether the funds held at National Bank belong to former

employees of the East African Community and its Corporations or their descendants who have no idea that their entitlements are still lying, unclaimed, with the state.

119. This Court cannot convert the petitioners' statutory and employment claims that accrued in 1977 and 1984 to constitutional rights under the 2010 Constitution. However, they have one right under the Constitution which they can enforce, and in my view are entitled to. This is the right to information under Article 35.

120. For the sake of the 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 Receiver's 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.*

121. I believe publication of such information will assist the office of the Official Receiver in performing its duties to the public by making payment to those of the former employees or the beneficiaries of their estates who may not have collected their entitlements, and put an end to this long outstanding matter.

122. I am grateful to the Counsel for the parties for their extensive pleadings and submissions, and for their diligence in presenting their respective cases. I appreciate also their patience with the court in light of the time it took to comb through their voluminous pleadings, submissions and authorities in order to arrive at this judgment.

123. With regard to costs, given the nature and history of this matter, I direct that each party bears its own costs of the petition.

**Dated, Delivered and Signed at Nairobi this 9<sup>th</sup> day of December 2014**

**MUMBI NGUGI**

**JUDGE**

**Mr Enonda instructed by the firm of Enonda, Makoloo, Makori & Co. Advocates for the Petitioner**

**Mr Opondo instructed by State Law Office for the 1<sup>st</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Respondent**

**Mr A Gichuhi instructed by the firm of Wamae & Allen & Co. Advocates for the 2<sup>nd</sup> – 6<sup>th</sup> Respondent**



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