



Kabui v Teacher Service Commission & 2 others (Constitutional Petition E390 of 2024) [2025] KEHC 2868 (KLR) (Constitutional and Human Rights) (6 March 2025) (Ruling)

Neutral citation: [2025] KEHC 2868 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION E390 OF 2024

AB MWAMUYE, J

MARCH 6, 2025

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLES 27, 40, 41, 43 AND 47 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTION 6 OF THE PENSIONS ACT, CAP 189, LAWS OF KENYA

AND

IN THE MATTER OF RULE 181 (2) OF THE TEACHERS SERVICE COMMISSION CODE OF REGULATIONS FOR TEACHERS, 2015

BETWEEN

SUSAN WANJIKU KABUI PETITIONER

AND

TEACHER SERVICE COMMISSION 1ST RESPONDENT

DIRECTOR OF PENSIONS 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. The Petitioner, Susan Wanjiku Kabui, was a member of the Teacher’s Service Commission, whose registration number was TSC/303610 from 19th May, 1990 to 13th September, 2017 when she was dismissed from service.
2. She claims that she was employed when she was 24 years old and dismissed at the age of 51 years during which the commission made deductions from her salary to the National Social Security Fund.



3. The Petitioner alleges that she has been denied her pension benefits on account of her dismissal. She further claims that Section 6 of the Pension Act and Rule 182(2) of the Teachers Service Commission Code of regulations for Teacher's 2015, are in contradiction to section 5(1) of the Pension Act, thus depriving her of her right to social security and economic dignity and therefore discriminatory towards her.
4. The Petitioner proceeded to institute the present Petition dated 5th August, 2024 seeking the following orders:
 - A. A declaration that the interpretation and application of Section 6 of the *Pensions Act*, Cap 189 Laws of Kenya and Rule 181 (2) of the Teachers Service Commission Code of regulations for Teacher's 2015, in denying pension benefits to the Petitioner is unconstitutional and invalid.
 - B. A declaration that the Petitioner herein is entitled to her pension benefits under *the Constitution* of Kenya, 2010.
 - C. An order directing the 1st and 2nd Respondents to compute, declare and file in court an account of the Petitioner's pension or such other due compensation under the Pension Act, Chapter 189 and file such computation in court.
 - D. An order directing the 2nd Respondent to henceforth pay the dues computed above and in failing, the said sum to earn interest at court rates until payment in full.
 - E. The 1st Respondent to pay the Petitioner the costs of this petition.
 - F. Any other relief that this Honourable Court may deem just and fit to grant.
5. The 2nd and 3rd Respondents, in response to the Petition, filed a Notice of Preliminary Objection dated 15th August 2024 seeking that the Petition be struck out with costs, which objection was based on the following reasons:
 - a. That this Honourable Court lacks jurisdiction to entertain this Petition as the issues raised primarily concern an employer- employee dispute, which falls under the exclusive jurisdiction of the Employment and Labour Relations Court (ELRC) as provided under Article 162(2) of *the Constitution* of Kenya, 2010, and Section 12 of the *Employment and Labour Relations Court Act*, 2011;
 - b. That the Petitioner ought to have filed this Petition in the Employment and Labour Relations Court or through an ELRC Petition, as the matters in dispute relate to employment and labour relations, and the remedies sought are best addressed by the specialized court;
 - c. That this Petition is an abuse of court process and is contrary to the Doctrine of Constitutional Avoidance. Although a court can take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved.
6. The 2nd and 3rd Respondents reiterated the contents above in their written submissions dated 11th November, 2024.
7. The 1st Respondent filed written submissions dated 16th October 2024 to the effect that the jurisdiction of the Employment and Labour Relations court is not limited to ordinary claims but extends to constitutional disputes as well, as long as the subject matter emanates from an employer- employee relationship or is premised on an employment contract. It further submitted that any claim emanating from an employment relationship regardless of its nature, form or particulars falls on the Employment



and Labour Relations Court, not the Constitutional court. They took the position that the present Petition should be struck out for want of jurisdiction.

8. The Petitioner on the other hand filed written submissions opposing the Preliminary Objection dated 8th November 2024 where she stated that the High Court has jurisdiction to determine constitutional matters as outlined under Article 23 (1) of *the Constitution*. She further stated that the substantial issue under consideration by this court is whether the provisions of the Pension Act and the Teachers Service Commission Code of Regulations for Teachers, 2015, are inconsistent with *the Constitution*.
9. I have carefully considered the final submissions as well as the affidavits filed herein besides the Petition itself. From the Applications, the Affidavits and the Written Submissions it emerges that the issue for determination are as follows:
 - i. Whether this Court has Jurisdiction to entertain this Petition
 - ii. Whether the Petitioner has violated the Doctrine of Constitutional Avoidance

ISSUES FOR DETERMINATION

Whether this Court has Jurisdiction to entertain this Petition

10. With regard to the first issue, jurisdiction is a fundamental matter in the dispensation of justice. The Supreme Court in the case of Samuel Kamau Macharia v Kenya Commercial Bank & 2 others [2012] eKLR discussed the issue of jurisdiction in the following terms:

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...”
11. Whenever the issue of jurisdiction is raised due to the existence of a dispute resolution process that is provided under statute, the Court should examine the nature of the case and the reliefs sought to determine whether or not the aggrieved party would get redress elsewhere.
12. In the case of Owners of Motor Vessel ‘Lilian S’ v Caltex Oil Kenya Limited [1989] KLR 1 Nyarangi J. (as he then was) held:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matters then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step.”
13. Article 162 (2) establishes courts with the status of the High Court to hear and determine disputes relating to –
 - a. Employment and labour relations; and
 - b. the environment and the use and occupation of, and title to, land.
14. Section 12 of the Industrial Court Act, sets out the jurisdiction of the court as follows: -
 - 12(1) The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162 (2) of *the Constitution* and the provisions



of this Act or any other written law which extends jurisdiction to the court relating to employment and labour relations including: -

- a. Disputes relating to or arising out employment between an employer and an employee.
- b. Disputes between an employer and a trade union;
- c. Disputes between an employer's organization and a trade union organization.
- d. Disputes between trade unions.
- e.

15. The Supreme court in the case of Albert Chaurembo Mumba & 7 Others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 Others (suing on their own behalf and on behalf of the Plaintiffs and other Members/ Beneficiaries of the Kenya Ports Authority Pensions Scheme) [2019] eKLR stated that:

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“(146) In our view, once a member leaves the employment of a Sponsor, by becoming a Pensioner, there is no longer a relationship of employer- employee that exists between such a Pensioner and the Sponsor. The relationship that exists in that case becomes that of trustee and beneficiaries (members) of a trust and that relationship is governed by the Retirement Benefits Act, Trustee Act Cap 167 of the laws of Kenya and the general common law on the law of trusts. It is important to note that nowhere in the Employment and Labour Relation Court Act is there jurisdiction conferred on the Employment and Labour Relations court to resolve issues between trustees of a pension scheme (pensioners)

(148) From the foregoing, we are inclined to agree with the Court of Appeal based on our understanding of Section 12(2) of the Employment and Labour Relations Court Act which states:

An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organization, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.

We do not see how a pensioner falls within the listed category of persons and parties that can make an application or institute proceedings before the court. From the foregoing it is thus clear that the Employment and Labour Relations Court had no jurisdiction to hear and determine a dispute that relates to trustees of a pension scheme and members of the scheme particularly where the said members are no longer employees of the Sponsor. Besides, the trust so established as a pension scheme retains autonomy from both the Sponsor and the employees hence its regulation by the Authority.

16. In matters jurisdiction, the Court is guided by the law. The present claim is clearly one in respect to pension which the Petitioner claims she should have received even upon dismissal from employment and not on enforcement of her rights under the respective contract of service. The fact that this case is about pension dues and the binding decision of the Supreme court clearly demonstrates that this matter is not for the Employment and Labour Relations Court and is in the right forum.



Whether the Petitioner has violated the Doctrine of Constitutional Avoidance

17. Constitutional avoidance has been defined as a preference of deciding a case on any other basis other than one which involves a constitutional issue being resolved. The Doctrine of avoidance was fortified in *Sports and Recreation Commission v Sagittarius and Anor* 2001 (2) ZLR 501 (S) to which Ebrahim JA stated:

“...Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights...”

18. The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved. In that regard, the Supreme Court stated in *Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others* that the principle of avoidance means that a court will not determine a constitutional issue when a matter may properly be decided on another basis.

19. It is important to note that every legal dispute is capable of either direct or indirect application of the Bill of Rights. Every dispute is essentially a constitutional issue when one looks at it. This arises necessarily because of the principle of constitutional supremacy. One needs to be aware however of the singleness of the legal system. This is embodied in the fact that the supremacy of *the Constitution* does not detract from the usefulness of the rest of the body of law. In essence all other laws give full expression to the ideals of *the Constitution* until found to be inconsistent to it.

20. The Constitutional question is a vital question in determining whether the Petition herein is properly before this Court. In the case of *CNM v WMG* [2018] eKLR, the court weighed in on the constitutional question as follows:

“A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute. When determining whether an argument raises a constitutional issue, the Court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider constitutional rights or values.

The question of what constitutes a constitutional question was ably illuminated in South African Case of *Fredricks & Others vs MEC for Education and Training, Eastern Cape & Others* in which Justice O’Regan recalling the Constitutional Court’s observation in *S vs Boesak* notes that: -

“*The Constitution* provides no definition of “constitutional matter.” What is a constitutional matter must be gleaned from a reading of *the constitution* itself: if regard is had to the provisions of... *the Constitution*, as well as issues concerning the status, powers and functions of an organ of state..., the interpretation, application and upholding of *the Constitution* are also constitutional matters. So too...is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of rights, and to the other detailed provisions of *the Constitution*, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in



the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.

Put simply, the following are examples of constituting constitutional issues; The constitutionality of provisions within an Act of Parliament; the interpretation of legislation, and the application of legislation. At the heart of the cases within each type or classification is an analysis of the same thing- the constitutionally entrenched fundamental rights. Therefore, the classifications are not discreet and there are inevitably overlaps, but the classifications are nonetheless useful theoretical tools to organize an analysis of the nature of constitutional matters arising from the cases before court.”

21. Considering the Petition herein and going by the above arguments and examining the disputes herein keenly, it is my view that the dispute herein is a constitutional issue as to the constitutionality of Section 6 of the Pension Act and Rule 181 (2) of the code. The Petitioner has filed the instant Petition as she believes that her Constitutional Rights have been infringed upon. She is seeking an interpretation of *the Constitution* and whether the impugned provisions violate the spirit of *the Constitution*.
22. The High Court under Article 165 (3) (b) has jurisdiction to determine the question whether a right or fundamental freedom in the Bill of rights has been denied, violated, infringed or threatened. It has also been granted jurisdiction under subsection (d) (i) and (ii) to determine the question whether any law is inconsistent with or in contravention of *the Constitution* and also jurisdiction to determine the question whether anything said to be done under the authority of *the Constitution* or of any law is inconsistent with, or in contravention of *the Constitution*. I therefore find that the instant Petition does not fall under constitutional avoidance and should proceed to determination before this Court.
23. Consequently, in the circumstances, I find the Preliminary Objection in relation to the Court’s jurisdiction has no merit and I dismiss it accordingly. I direct that the Petition therefore proceeds before this court.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 6TH DAY OF MARCH, 2025.

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BAHATI MWAMUYE

JUDGE

