

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KAKAMEGA**  
**CONSTITUTIONAL PETITION NO. E001 OF 2024**

**IN THE MATTER OF ARTICLES 21(1), 22, 23, 41, 47, 159(2)(E)  
162 AND 165 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA  
(SUPERVISORY JURISDICTION AND PROTECTION OF  
FUNDAMENTAL RIGHTS AND FREEDOM OF THE  
INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE**

**RULES 2013**

**AND**

**GEORGE WAMBUGU KOINANGE ..... PETITIONER**

**VERSUS**

**COUNTY GOVERNMENT OF BUSIA ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF BUNGOMA....2<sup>ND</sup> RESPONDENT**

**(BEFORE HON. JUSTICE DAVID NDERITU)**

**JUDGMENT**

**I. INTRODUCTION & PLEADINGS**

1. The petitioner commenced these proceedings by way of a petition dated 19th March 2024 through R. E. Nyamu & Company Advocates seeking for the following reliefs –

- a) *A declaration that the respondent's failure to forward to the 2<sup>nd</sup> respondent IPPD information and person file immediately upon the transfer of the petitioner contravened Article 41 of the Constitution of the Republic of Kenya and violates the petitioners right to fair labour practices and the right to reasonable working conditions.*
- b) *A declaration that the failure by the 2<sup>nd</sup> respondent to reimburse the 1<sup>st</sup> respondent salaries paid to the petitioner while working for the 2<sup>nd</sup> respondent is unfair labour practice that violates Article 41 of the Constitution and violates the petitioners right to fair labour practices, to fair remuneration and the right to reasonable working conditions.*
- c) *An order of mandamus be issued compelling the 1<sup>st</sup> and 2<sup>nd</sup> respondent do comply with their obligation and ensure that the petitioners IPPD information and personal file is handed over to 2<sup>nd</sup> respondent within 30 days from the date to the and the 2<sup>nd</sup> respondent do place the petitioner on its payroll and re assign the petitioner duties forthwith.*
- d) *An order of mandamus be issued compelling the respondents to jointly pay the petitioner salary arrears for the month of June 2018 – December and 2019 salary arrears from the month of June 2022.*
- e) *In the alternative of prayers (c) and (d) herein the respondents*

***be condemned to pay the petitioner salary arrears for the month of June 2018 to December 2019 and further compensation in terms of gross salary at the rate of Ksh. 98,000 per month from July 2022 up to 2037 being the year that the petitioner is expected to retire.***

***f) The respondent be condemned to pay costs of this petition to the petitioner.***

***g) Any other relief this honourable court may deem fit to grant.***

2. The petitioner pleaded that he is qualified clinical officer registered under certificate of registration of 24th January 2006.
3. The petitioner pleaded that on 29th June 2009 he was appointed to serve as a clinical officer by the Public Service Commission and this appointment was subsequently confirmed on 26th January 2012. He was upon recruitment by the Commission posted to Teso North District Hospital that now falls within the jurisdiction of the 1st respondent.
4. On 11th September 2012 the petitioner was released on transfer to work with the 2nd respondent and he was based at Kimilili District Hospital whereto he reported immediately and commenced duty.
5. Vide a letter dated 14th September 2012 the Medical Superintendent of Kimilili District Hospital requested the Teso North District Hospital to release the petitioner's personal file and records, which request was either ignored and or neglected. The same request was

again made by the County Secretary of the 2nd respondent on 30th May 2018 but again no response was received from the County Secretary of 1st respondent.

6. As at 18th June 2018 the requested file and records had not been received from the 1st to the 2nd respondent and yet the petitioner continued receiving his salary from the 1st respondent.
7. On 18th January 2019 the 1st respondent demanded that unless a sum of Kshs3,275,366/= paid to the petitioner as salary was refunded by the 2nd respondent the 1st respondent shall not release the personal file containing the employment records and the IPPD of the petitioner.
8. On its part, the 2nd respondent failed, refused, and or neglected to refund the sum of Kshs3,275,366/= as demanded by the 1st respondent as above. As at the time of filing of the petition the 2nd respondent had stopped assigning duties to the petitioner and no salary is paid to him.
9. It is pleaded that both the respondents mishandled and mismanaged the transfer of the petitioner from the 1st to the 2nd respondent and the said mismanagement amounts to unfair labour practice under ***Article 41 of the Constitution***. It is further pleaded that such conduct offends the petitioner's right to fair administrative action in ***Article 47 of the Constitution***.
10. The petitioner avers that he filed this petition in exercise of his

constitutional rights under *Articles 21, 22, 23, 162(2), & 165 of the Constitution* and that this court (ELRC) has the requisite jurisdiction to hear and determine the subject matter.

11. It is pleaded that the petitioner is entitled to a gross monthly salary of Kshs98,000/= yet he has not been paid a penny since July 2022.
12. The petition is supported with the affidavit sworn by the petitioner on 19th March 2024, reiterating and affirming the contents of the petition summarized above, with several annexures thereto.
13. A preliminary objection (PO) on the jurisdiction of the court to entertain the petition was raised by the 1st respondent in a notice dated 24th May 2024 but the same was dismissed in a ruling dated and delivered on 24th October 2024 (Keli J).
14. Through the County Attorney, the 1st respondent filed a response to the petition dated 6th December 2024. It is pleaded that the petitioner worked for the 2nd respondent from the date of devolution of health services but the 1st respondent continued to pay his salary thereby incurring a deficit of Kshs3,275,366/= that is a liability payable by the petitioner.
15. It is pleaded that the 2nd respondent should refund the above monies paid to the petitioner while he was all along working for the 2nd respondent. It is stated that it is only then that a Certificate of Last Pay, the IPPD, and other employment records of the petitioner may be released. It is denied that the 1st respondent has mishandled and

- or mismanaged the transfer of the petitioner to the 2nd respondent or violated the rights of the petitioner in **Article 41 of the Constitution**.
16. It is pleaded that it is the 2nd respondent who mishandled and mismanaged the transfer and exchange of the personal file and employment records of the petitioner by failing to refund the monies paid to the petitioner in salary as stated above.
  17. It is pleaded that the petition has no merits against the 1st respondent and that the same does not meet the threshold in **Anarita Karimi Njeru V Republic (1976-1980) KLR 72**.
  18. In response to the petition the 2nd respondent through Saende Law Advocates filed a replying affidavit sworn by Joseph Kisindai, the director of human resources, on 27th January 2025.
  19. It is deposed that the petitioner remains and has always been an employee of the 1st respondent. It is deposed that the petitioner never transferred from the 1st to the 2nd respondent since his IPPD information and personal file and records were not transferred as per the established procedure of an employee moving from one county government to another. It is further deposed that no contract or letter of employment was executed between the petitioner and the 2nd respondent. It is further deposed that no duties were ever assigned to the petitioner.
  20. It is deposed that there exists no employer-employee relationship between the petitioner and the 2nd respondent. It is deposed that the

2nd respondent has not violated the alleged constitutional rights of the petitioner and that he has no claim against the 2nd respondent whatsoever.

21. In response to the foregoing, the petitioner filed a supplementary affidavit that he swore on 7th February 2025. It is deposed that the petitioner is an employee of the 2nd respondent as acknowledged and admitted in letters dated 14th September 2012 and 24th March 2017 annexed to the supporting affidavit to the petition.
22. It is further deposed that on 21st March 2018 the Medical Superintendent of Webuye County Hospital approved his annual leave as an employee thereof. The said approval is annexed to the supporting affidavit and it is deposed that the same confirms the employer-employee relationship between him and the 2nd respondent.
23. It is deposed that both the respondents mishandled and mismanaged his transfer resulting in great prejudice and violation of his rights as pleaded in the petition.

## **II. SUBMISSIONS**

24. On 6th November 2024 the court with concurrence from counsel for the parties *inter alia* directed that the petition be canvassed by way of written submissions.
25. Counsel for the petitioner Mr Nyamu filed written submissions dated 18th December 2024 and supplementary submissions dated

7th February 2025. Mr. Mabacha for the 1st respondent filed submissions dated 1st July 2024 and Mr. Kangogo for the 2nd respondent filed submissions dated 7th February 2025.

26. In his submissions, counsel for the petitioner submitted that the respondents mishandled and mismanaged the transfer of the petitioner from the 1st to the 2nd respondents and subjected him to unfair labour practices in violation of his rights under **Article 41 of the Constitution**.
27. It is submitted that both the respondents failed, refused, and or neglected to take appropriate steps in facilitating his exit from the 1st into the 2nd respondent. It is submitted that the petitioner had no control and or part to play in that process in regard to the exchange of the information and documentation that was required for effecting the said transfer. It is submitted that the respondents failed to place the petitioner in the payroll of the 2nd respondent and as such the 1st respondent continued to pay his monthly salary.
28. It is submitted that it is upon the respondents to settle the issue of the salary paid to him by the 1st respondent while he was working for the 2nd respondent and that that is an issue the respondents ought to settle without subjecting the petitioner to unfair labour practices and wrongful and unfair administrative action by failing to allocate him duties and failing to pay his monthly salary.
29. It is further submitted that the petitioner has not been subjected to

any disciplinary proceedings or any lawful administrative action as to deny him work and salary.

30. Counsel for the 1st respondent submitted that the petitioner owes to the 1st respondent a sum of Kshs3,275,366/= erroneously paid to him in salary while he was actually working and serving with the 2nd respondent. It is further submitted that the 1st respondent demanded refund of the above monies from the 2nd respondent vide a letter dated 18th January 2019 so that it could issue the Last Pay Certificate and release the personal file and records of employment of the petitioner but the said demand has not been responded to.
31. It is submitted that had the 2nd respondent cleared the said liability the 1st respondent would have undertaken its part in facilitating the transfer of the petitioner and submitted the personal file and records of employment of the petitioner, including the Last Pay Certificate.
32. Counsel for the 1st respondent identified the following three issues for determination –
- i. Whether the petitioner proved his case against the 1<sup>st</sup> respondent to the required standard.*
  - ii. Whether the 1<sup>st</sup> respondent violated the petitioner’s rights and fundamental freedoms under Articles 41, and 47 of the Constitution.*
  - iii. Whether the petitioner is entitled to the reliefs sought in the petition.*

33. On the first issue it is submitted that the petitioner is obligated by the law not only to cite with precision and accuracy the constitutional rights and provisions that are alleged to have been violated, breached, and or threatened, but must also detail the infringements thereof with accuracy and prove the same. In this regard counsel cited *Anarita Karimi Njeru V Republic (supra)*, *Mumo Matemu V Trusted Society of Human Rights Alliance & 5 Others (2012) eKLR*, & *Stephen Nyarangi Onsuma & Another V George Magoha & 7 Others (2014) eKLR*.
34. It is submitted that the petitioner failed to prove his case to the required standard as demanded under *Sections 107, 108, & 109 of the Evidence Act*. In this regard counsel cited *Communications Commission of Kenya & 5 Others V Royal Media Services & 5 Others (2014) eKLR*.
35. It is submitted that the petitioner has neither demonstrated nor proved a case against the 1st respondent. It is argued that what the 1st respondent is waiting for is refund of the monies alluded to above by the 2nd respondent and then it shall promptly release all records of employment of the petitioner to the 2nd respondent. It is submitted that being a public body the 1st respondent ought to and must account for the monies erroneously paid to the petitioner in salary when he had already left its employment and then can only be done once the monies paid are refunded.

36. It is submitted that the 1st respondent has had reasonable and justifiable grounds for refusing to release the said records owing to the failure by the 2nd respondent to clear and settle the said deficit that is clearly and evidently due and payable.
37. Following up on the foregoing, counsel for the 1st respondent submitted that the petitioner has failed to demonstrate and prove that it violated his constitutional rights as pleaded and claimed.
38. It is further submitted that the petitioner is not entitled to any of the claimed reliefs as against the 1st respondent. It is re-emphasized that the petitioner failed to prove any wrongdoing on the part of the 1st respondent and it thus follows that no relief is awardable against it.
39. Notwithstanding the ruling of Keli J on the PO cited elsewhere above in this ruling, counsel for the 1st respondent argues that the court lacks jurisdiction over the subject matter submitting that the subject matter herein is about transfer, remuneration, and terms and conditions of service of the petitioner and that the same ought to be handled by the Public Service Boards of the two respondents under **Sections 56, 57, & 77 of the County Governments Act** or the Public Service Commission under **Section 87 of the Public Service Commission Act**.
40. Counsel cited several decisions in support of the argument that the petitioner ought to have exhausted the foregoing procedure before approaching the court. He cited ***Shem Onywera V County***

*Government of Kisii (2018) eKLR & Martin Kabuthi Mwangi V County Government of Laikipia (2019) eKLR* amongst other decisions.

41. It is further submitted that the subject matter herein is time-barred under **Section 90 (now Section 89) of the Employment Act** as the same was filed outside the limited time of three years. It is submitted that since the alleged transfer of the petitioner from the 1st to the 2nd respondent took place in 2018 the period of three years expired in 2021 before the petition was filed. It is submitted that the petition was filed to circumvent the limitation of the three years but in clear abuse and violation of the court process.
42. It is further argued that applying the **doctrine of constitutional avoidance** the petitioner's claim is a simple employment dispute relating to his transfer and terms and conditions of his employment. It is submitted that the petitioner ought to have filed an ordinary employment and labour relations cause as opposed to filing a constitutional petition to defeat the limitation. The court is urged to be persuaded by the reasoning in **Augustine Gakure Monyo V County Government of Murang'a (2016) eKLR** and find that no case has been established against the 1st respondent.
43. On the other hand, counsel for the 2nd respondent isolated the following issues for determination –
- i. *Whether the petitioner and the 2<sup>nd</sup> respondent were in an*

*employer-employee relationship;*

ii. *Whether the 2<sup>nd</sup> respondent has violated the petitioner's fundamental right and freedom;*

iii. *Whether the petitioner is entitled to the relief sought in the petition.*

44. On the first issue it is submitted that applying control, economic reality, or integration tests, there is no established or proven employer-employee relationship between the 2nd respondent and the petitioner. It is submitted that no contract of employment has been proved in line with **Section 9 of the Employment Act**. In that regard counsel cited ***Stanley Mungai Muchai V National Oil Corporation of Kenya (2012) eKLR***.

45. It is submitted that the petitioner did not transfer his services from the 1st to the 2nd respondent. It is submitted that the petitioner did not avail a letter of appointment, payroll records, or any other official communication confirming and evidencing his appointment with the 2nd respondent.

46. It is further submitted that the 1st respondent failed and or refused to submit employment records of the petitioner and as such the 2nd respondent could not allocate any duties to the petitioner and or pay his salary. It is submitted that the 2nd respondent could not legally bind itself to the employment of the petitioner without proper records. Counsel cited ***Kenya County Government Workers Union***

*V County Government of Nakuru (2017) eKLR* in this regard.

47. On the second issue it is submitted that since there is no established and proven employer-employee relationship between the 2nd respondent and the petitioner the issue of violation, breach, or abuse of his constitutional rights under the Articles of the Constitution cited in the petition does not arise. Counsel cited *Kenneth Karisa Kasemo V Kenya Bureau of Standards (2013) eKLR* in support of this argument.
48. It is submitted that the petitioner was and has always been an employee of the 1st respondent and has no claim whatsoever against the 2nd respondent.
49. On reliefs it is submitted that since the petitioner has failed in establishing and proving his employment with the 2nd respondent, there is no liability and or orders that may issue against it. It is further submitted that an order of mandamus may only be issued to compel a public body to enforce a lawful duty or obligation yet the petitioner has failed to prove such a duty on the 2nd respondent. It is submitted that the petitioner is not in the payroll of the 2nd respondent and hence the issue of salary arrears does not arise.
50. In the supplementary submissions by counsel for the petitioner it is submitted that the petitioner was initially an employee of the 1st respondent but transferred his services to the 2nd respondent as explained and pleaded in detail in the petition and the affidavit in

support thereof. It is submitted that the 2nd respondent admitted the fact of that employer-employer relationship in letters dated 14th September 2012 and 23rd March 2017 availed by the petitioner as exhibits.

51. It is submitted that the petitioner has proved his case against both the respondents and the court is urged to grant to him the reliefs sought as per the prayers in the petition.

### **III. ISSUES FOR DETERMINATION**

52. The court has gone through the petition, the supporting affidavit and the annexures thereto, the response to the petition by the 1st respondent, the replying affidavit by the 2nd respondent, and all the submissions filed by counsel for the respective parties. In the considered view of the court the following issues commend to themselves to the court for determination –

- a) Is the subject matter hereof within the purview and jurisdiction of this court?*
- b) Has the petitioner proved his case against the respondents to the required standard?*
- c) Is the petitioner deserving of the reliefs sought?*
- d) Costs.*

### **IV. JURISDICTON**

53. In a notice of preliminary objection dated 24th May 2024 by the 1st

respondent, the following issues were raised for determination by the court –

1. *THAT to the extent that the petition is concerned with **the alleged failure to transfer the petitioner’s IPPD information and forward his personal file** this court lacks jurisdiction to hear and determine this matter in the first instance as petitioner has not exhausted the **remedies** available to him under **Section 77 of the County Governments Act** which provides that a person dissatisfied with a decision of the County Public Service Board should appeal to the Public Service Commission.*
2. *THAT this court lacks jurisdiction to hear this matter in view of the **doctrine of exhaustion of statutory remedies and dispute resolution and enforcement mechanisms**.*
3. *THAT to the extent that the petition I concerned with **a contract of or for service of employment** this court lack jurisdiction to hear and determine this matter as it is time barred under **Section 90 of the Employment Act** which provides that such matter should be commenced within 3 years next after the act.*
4. *The petitioner’s petition does not meet the constitutional threshold enunciated in **Anarita Karimi Njeru-versus-Republic (1976-1980) KLR 1272** hence it lacks jurisdiction*

*cause of action against the 1<sup>st</sup> respondent and should be dismissed in limine*

54. In a ruling dated and delivered on 24th October 2024 the court (Keli J) concluded that ***“The court finds no merit in any of the grounds raised in the Notice of Preliminary Objection dated 24th May 2024 and the same is dismissed with costs to the Petitioner.”***
55. The above ruling and holding was neither appealed nor reviewed and as such the same stands and hold to this day. In the circumstances, that aspect of the petition is *res judicata*. It is paradoxical that counsel for the 1st respondent in the written submissions called upon the court to make a new ruling on the same issue. That invitation is declined as no application for review of the order by Keli J has been made.
56. Further, it is the finding and holding of this court that the claim by the petitioner crystallized upon the 2nd respondent failing to pay his monthly salary and allocate him work in 2022. He filed this petition in court in March 2024, well within the three years of limitation and or within reasonable time. ***Article 159(2)(d) of the Constitution*** and ***Section 3 of the Employment and Labour Relations Court Act*** calls upon this court to be more concerned with substance rather than concentrating on procedural technicalities. As it shall be demonstrated hereunder, the petitioner has pleaded and proved violation of his constitutional rights and there is no room for

manipulating the claim on technicalities.

57. In the circumstances, the court finds that the petition was filed within time and the same is properly before this court for the hearing and determination.
58. In any event, this court agrees with the ruling by Keli J on all fours. It is not denied that the petitioner was an employee of the 1st respondent until about 11th September 2012 when he transferred his services to the 2nd respondent. As it shall be demonstrated below, the petitioner has since worked in the employ of the 2nd respondent and hence there existed an employer-employee relationship between the petitioner and the 1st respondent up to 11th September 2012 and thereafter with the 2nd respondent to this day.
59. The subject matter of the petition and what the petitioner is complaining about is that the respondents have failed, refused, neglected, mishandled, and mismanaged his said shift from the 1st to the 2nd respondent to the extent that he is no longer receiving a salary and or being assigned duties by the 2nd respondent. As far as the court understands the petitioner's case, he has no qualms with the change of the employer. What the petitioner is asking the court to do is to call the respondents to order to facilitate the said change through proper procedure and documentation.
60. The undisputed evidence on record is that when the petitioner changed the employer the 1st respondent did not submit his records

to the 2nd respondent as per the established procedures, policies, and guidelines that apply in such a move. Instead, the 1st respondent continued to pay to the petitioner his monthly salary notwithstanding that he was working and serving with the 2nd respondent.

61. The unrebutted evidence on record is that the petitioner qualified with a diploma in clinical health and he was registered a clinical officer and issued with a certificate dated 24th January 2006. Vide a letter dated 29th June 2009 signed for the Permanent Secretary for Medical Services the petitioner was posted to serve at Kocholia District Hospital, Teso, Busia County, the 1st respondent. His reporting to work was confirmed by the Provincial Director of Medical Services, in the then Western Province, in a letter dated 16th July 2009.
62. The above appointment of the petitioner was confirmed vide a letter signed for the Permanent Secretary dated 26th January 2012.
63. The evidence on record by the petitioner, which is not disputed and or rebutted by the respondents, is that he worked for the 1st respondent until 11th September 2012 when he left to join the 2nd respondent.
64. Vide a letter dated 14th September 2012 addressed to the Provincial Director of Medical Services in the then Western Province, the Medical Superintendent at Kimilili District Hospital situate within

the territory of the 2nd respondent confirmed that the petitioner had reported to duty on the said date. In the same letter the Permanent Secretary in the Ministry of Health was copied and requested to change the pay-point of the petitioner to Kimilili District Hospital and the details of the petitioner in the payroll were supplied. In the same breath, the Medical Superintendent Teso North District Hospital was copied and requested to forward the petitioner's personal file and records to the new employer and station for retention.

65. Further, in proving that he is an employee of the 2nd respondent the petitioner annexed a letter dated 16th March 2017 and an annual leave approval signed for the Medical Superintendent Webuye County Hospital dated 21st March 2018 authorizing him to proceed on annual leave for the days stated therein.
66. Vide a letter dated 30th May 2018 the County Secretary and Head of Public Service of the 2nd respondent wrote to his equal in the 1st respondent confirming that the petitioner had worked with the 2nd respondent since August 2012 and requesting that his personal file and all other documents be submitted to the 2nd respondent. The foregoing letter was followed up with a reminder dated 18th January 2019. From the evidence on record the 1st respondent failed, refused, and or neglected to heed to the request.
67. The petitioner attached copies of all the foregoing letters and

correspondences to his supporting affidavit. No documentary evidence was availed and produced by the respondents to the contrary or to rebut those availed by the petitioner as summarized above.

68. By July 2022 the 2nd respondent stopped allocating duties to the petitioner and the 1st respondent stopped paying his monthly salary. Subsequently, the petitioner filed this matter in court in March 2024.
69. For many reasons, I have not enjoyed writing this judgment. This is a case that demonstrates the inertia, incompetence, and inefficiency that subsists in many of our public institutions in this great Republic of Kenya. It is also a case that demonstrates the lack of commitment and coordination between two Counties bordering each other, in the management of public finances and human capital. Further, it is a matter that demonstrates the lack of empathy and concern by two respondents for one of their employees who has served reasonably well without a bad disciplinary record. It is a matter that had to come to court for the indifference, incompetence, inefficiency, neglect of duty, and or lack of concern on the part of the concerned officers within the two respondents.
70. The evidence on record confirms and proves that the petitioner was an employee of the 1st respondent as a clinical officer from 2009 to 11th October 2012 when he joined the 2nd respondent. It is shameful and an abuse of the court's intelligence that the 2nd

respondent, with all the foregoing evidence on record, had the audacity to file a replying affidavit sworn by its director of human resources totally denying this obviously established and proven fact as per the documentary evidence on record as stated above. The 2nd respondent neither availed documents in rebuttal to those availed and produced by the petitioner as stated above nor were the persons who authored the said letters and correspondences confirming the petitioner's employment called as witnesses or to swear affidavits to the contrary.

71. It is this deceitful and annoying culture of denying the obvious truth that has contributed to piling of cases in our courts at all levels creating backlog of cases to almost unmanageable levels. The net effect is that lots of time and public resources are applied to unnecessary litigation in defending obviously straightforward issues instead of resolving the same.
72. How, for example, can the concerned officers of the 1st respondent explain to the citizens of the great County of Busia that they continued paying to the petitioner a salary from September 2012 to June 2022 when he was working for the County of Bungoma? How can anyone explain how a simple request to forward the personal file of the petitioner from the 1st respondent to the 2nd respondent has not happened from September 2012 to date? How can anyone explain and or justify the fact that over the said period the 1st

respondent paid to the petitioner salary amounting to Kshs3,275,366/= notwithstanding that clear correspondences and reminders were sent by the 2nd respondent confirming that the petitioner had joined them?

73. Likewise, it is not denied by the 2nd respondent that the 1st respondent paid the petitioner's salary while he was in the employment of the 2nd respondent. What then would have been so difficult in the relevant officers from both the respondents calling for a meeting and settling the matter amicably without subjecting the innocent employee to such suffering and thereby avoiding litigation?
74. The point the court is making is that this is one matter that needed not come to court had the concerned officers of the two respondents applied their minds and efforts into resolving the same. It is a simple and straight-forward matter. All that was required was for the 1st respondent to submit and forward the employment records of the petitioner to the 2nd respondent as soon as he left their employment and stop paying his salary as he was no longer its employee. Alternatively, after squandering that initial opportunity and misapplying financial resources in the tune of Kshs3,275,366/=: the two respondents ought to have resolved the issue amicably by agreeing on how the 2nd respondent was to settle the liability. Thereupon, the employment records of the petitioner would have been transmitted to the 2nd respondent smoothly without subjecting

the petitioner to suffering and anguish. The unnecessary costs of this litigation should have been avoided.

75. While this judgment is not intended to serve as a forum for educating or dressing down the concerned officers from the two respondents, this matter raises serious fundamental issues as to the efficiency and dedication of all those who have clearly and evidently mishandled and mismanaged the process.
76. As far as the court has scrutinized and analyzed the pleadings, evidence, and submissions herein, no fault may be attributed to the petitioner. The petitioner reported to the 2nd respondent and has been serving therewith since 2012. There are no disciplinary proceedings against him or any other lawful process terminating his services or suspending him from duty. He cannot be blamed for the systematic failure, inertia, and decay on the part of the two respondents to do the right thing.
77. Flowing from the foregoing, the court finds and holds that the petitioner has been subjected to unfair labour practices by both the respondents against the clear provisions of **Article 41 (1) & (2)(a)(b) of the Constitution**. The 1st respondent has failed, refused, and or neglected to submit the petitioner's records of employment to the 2nd respondent while the 2nd respondent has stopped allocating to him any duties and withheld payment of his monthly salary at the gross rate of Kshs98,000/= - as pleaded and not disputed by the

respondents.

78. Further, the withholding of his monthly salary and refusal and or failure by the 2nd respondent to allocate the petitioner duties violates **Article 47 of the Constitution** as such action amounts to unfair administrative action.
79. Further, it is the finding and holding of the court that the petitioner pleaded and proved his case with precision and commensurate evidence was availed and produced to the requisite standard as envisaged in **Anarita Karimi Njeru V Republic (supra) & Mumo Matemu V Trusted Society of Human Rights Alliance (supra)** among many other precedents.
80. The court has said enough in demonstrating that the petitioner has proved his case to the required standard.

## **V. RELIEFS**

81. In prayer (a) the petitioner is seeking for a declaration that the failure by the 1st respondent to forward his employment records to the 1st respondent violated his right to fair labour practices under **Article 41 of the Constitution**. The court has found and held as much in the foregoing part of this judgment.
82. Prayer (b) is for a declaration that the failure by the 2nd respondent to reimburse the 1st respondent of all salaries and remuneration paid to him while working for the 2nd respondent violates fair labour practices under **Article 41 of the Constitution**. The law, logic, and

commonsense dictates that an employer should pay an employee for services rendered. It is thus obvious that the 2nd respondent ought to have paid salaries and remuneration to the petitioner for the entire period since he joined its workforce in September 2012.

83. However, this petition is not between the respondents. It is the petitioner who filed it against both the respondents and as such orders issued should be for or against the petitioner as against both or either of the respondents (jointly and or severally). There is no way that the petitioner may in his own petition litigate on disputes between the respondents which the respondents themselves or either of them have not asked or invited the court to hear and determine.
84. What is clear though, and the court should be clear on this, is that the salaries paid to the petitioner by the 1st respondent as he served with the 2nd respondent cannot and should not be demanded from and or refunded by the petitioner. It is upon the two respondents to agree or litigate – if they so wish – on how the 2nd respondent should refund the monies to the 1st respondent.
85. For all the foregoing reasons prayer (b) is denied.
86. Prayer (c) is for the court to issue an order of mandamus compelling the respondents to work together to ensure that the records of employment of the petitioner are transmitted from the 1st to the 2nd respondent including the IPPD and the personal file within 30 days of this judgment and for the 2nd respondent to place the petitioner in

its payroll and commence allocating duties to him forthwith.

87. ***Section 12 of the Employment and Labour Relations Court Act*** provides as follows –

- 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 of employment between an employer and an employee;***
  - b. disputes between an employer and a trade union;***
  - c. disputes between an employers' organisation and a trade unions organisation;***
  - d. disputes between trade unions;***
  - e. disputes between employer organizations;***
  - f. disputes between an employers' organisation and a trade union;***
  - g. disputes between a trade union and a member thereof;***
  - h. disputes between an employer's organisation or a federation and a member thereof;***
  - i. disputes concerning the registration and election of trade union officials; and***

*j. disputes relating to the registration and enforcement of collective agreements.*

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

*3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders*

- i. interim preservation orders including injunctions in cases of urgency;*
- ii. a prohibitory order;*
- iii. an order for specific performance;*
- iv. a declaratory order;*
- v. an award of compensation in any circumstances contemplated under this Act or any written law;*
- vi. an award of damages in any circumstances contemplated under this Act or any written law;*
- vii. an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or*
- viii. any other appropriate relief as the Court may deem fit*

*to grant.*

*4) In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just.*

*5) The Court shall have jurisdiction to hear and determine appeals arising from –*

*a) decisions of the Registrar of Trade Unions; and*

*b) decisions of any other local tribunal or commission as may be prescribed under any written law.*

88. It is not correct for the respondents' counsel to submit that prerogative orders may only issue in judicial review proceedings. Such compelling or prohibiting or quashing orders effectively amount to mandatory orders of injunction or specific performance. The court has no difficulties in issuing this order and the same shall be issued in the terms below.

89. Prayer (d) is seeking for an order of mandamus compelling the respondents to jointly pay to the petitioner salary arrears for the period from June 2018 to December 2019 and then from June 2022. As pleaded, this prayer is neither clear nor specific. Exactly for how many months has the petitioner not been paid to date? However, it is not difficult to establish the months for which he has not been paid based on the payments "erroneously" made to him by the 1st respondent. The court shall order that the arrears due and payable shall be paid by the 2nd respondent, the current employer, calculated

at the gross rate of Kshs98,000/= that has not been disputed by the respondents. The 1st respondent cannot be condemned to meet the said arrears as it is no longer the employer of the petitioner.

90. Prayer (e) is in the alternative to (c) and (d) above seeking that the respondents be ordered to pay to the petitioner salary arrears for the month of June 2018 to December 2019 and further pay salary from July 2022 to 2037 at the rate of Kshs98,000/=. It is the Petitioner's case that he is supposed to retire in 2037 upon attaining the mandatory age of retirement.

91. For avoidance of doubt, the petitioner is and remains a lawful employee of the 2nd respondent. There is no evidence of suspension, dismissal, or termination in any form or manner. There is also no evidence on record of any disciplinary proceedings pending against him by the said employer. For no apparent, logical, reasonable, or lawful cause the 2nd respondent has failed, refused, and or neglected to pay to the petitioner his monthly salary notwithstanding that he is no longer paid by the 1st respondent. The employer has also, for no apparent reason, failed and refused to allocate duties to the petitioner. This conduct on the part of the 2nd respondent is the height of impunity and unfair labour practices and should be condemned and discouraged in the strongest terms possible.

92. It is for the foregoing reasons that the 2nd respondent shall be and is

hereby ordered to pay to the petitioner all salary arrears since he joined as its employee in September 2012 to date less the sum of Kshs3,275,366/= paid to the petitioner by the 1st respondent as repeatedly stated in the foregoing paragraphs. Commonsense and logic should dictate that the sum of Kshs3,275,366/= should then be remitted to the 1st respondent in reimbursement of the salary paid to the petitioner when he had already left the employ of the 1st respondent and joined the 2nd respondent.

93. As opined elsewhere in this judgment this is one litigation that the respondents, jointly and severally, should have avoided had their respective officers engaged and sorted out the straightforward issues raised by the petitioner. It is one matter that should have spared the court precious judicial time and saved the citizens of the two great counties lots of money in legal fees for this unnecessary litigation.
94. However, the petitioner had the reason and right to approach the court in the manner that he did after his efforts to persuade the respondents to act and do the right thing had fallen on deaf ears and met with deafening silence. In the circumstances, the respondents are jointly and severally ordered to meet the costs of the petitioner in this ligation.

## **VI. ORDERS**

95. Flowing from the foregoing the court makes the following orders –

***a) The failure by the 1st respondent to forward to the 2nd***

*respondent the IPPD information and personal file immediately upon transfer of the petitioner contravened Article 41 of the Constitution and violates the petitioner's right to fair labour practices of fair remuneration and reasonable working conditions.*

- b) Orders of mandatory injunction and specific performance be and are hereby issued compelling the respondents, jointly and severally, to ensure that the petitioners IPPD information, the personal file, and any other necessary document including a certificate of last pay, is immediately transmitted from the 1st respondent to the 2nd respondent and in event within 30 days of this judgment.*
- c) Orders of mandatory injunction and specific performance be and are hereby issued compelling the 2nd respondent to pay to the petitioner all salary arrears due and payable to him for the period from September 2012 to the month of this judgment less the Kshs3,275,366/= paid to him by the 1st respondent which monies should be applied to reimburse the 1st respondent. This shall be done within 30 days of this judgment.*
- d) The 2nd respondent be and is hereby ordered and compelled to include and incorporate the petitioner into its payroll within the said 30 days of this judgment and*

*continue paying his monthly salary as and when the same falls due and to immediately and forthwith allocate duties and work to the petitioner.*

*e) The respondents shall jointly and severally meet the petitioner's costs for these proceedings.*

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT  
KAKAMEGA THIS 9<sup>TH</sup> DAY OF OCTOBER, 2025.**

.....  
**DAVID NDERITU**  
**JUDGE**