



REPUBLIC OF KENYA



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**Rotich v Registrar of Trade Unions & 2 others (Petition E051 of 2024)
[2025] KEELRC 2721 (KLR) (6 October 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2721 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E051 OF 2024**

JK GAKERI, J

OCTOBER 6, 2025

IN THE MATTER OF ALLEGED CONTRAVENTION OF THE CONSTITUTION

AND

**IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 22, 23, 27, 28, 35,
41, 43, 47, 162 & 258 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF VIOLATION OF THE PETITIONER'S RIGHTS
TO FAIR ADMINISTRATIVE PROCESS, PRINCIPLES OF PUBLIC
SERVICE DIGNITY AND PROTECTION FROM DISCRIMINATION**

AND

**IN THE MATTER OF RULE 4 AND 10 OF THE CONSTITUTION
OF KENYA [PROTECTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS] PRACTICE AND PROCEDURE RULES, 2013**

AND

IN THE MATTER OF SECTION 47 OF FAIR ADMINISTRATIVE ACTION ACT 2012

IN THE MATTER OF LABOUR RELATIONS ACT OF 2007

IN THE MATTER OF SECTION 5[1] AND [2] OF THE EMPLOYMENT ACT OF 2007

AND

IN THE MATTER OF THE DOCTRINE OF LEGITIMATE EXPECTATION

IN THE MATTER OF SECTION 80 OF THE PUBLIC SERVICE COMMISSION ACT

AND

IN THE MATTER OF THE KUPPET CONSTITUTION OF 2011

AND

IN THE MATTER OF ARTICLE 12B OF THE KUPPET CONSTITUTION OF 2017



AND
IN THE MATTER OF SECTION 27 OF THE LABOUR RELATIONS ACT OF 2007

BETWEEN

PAUL KIPCHUMBA ROTICH PETITIONER

AND

THE REGISTRAR OF TRADE UNIONS 1ST RESPONDENT

**KENYA UNION OF POST PRIMARY EDUCATION TEACHERS 2ND
RESPONDENT**

**NATIONAL SECRETARY GENERAL OF KENYA UNION OF POST PRIMARY
EDUCATION TEACHERS 3RD RESPONDENT**

JUDGMENT

1. The instant Petition was filed together with a Notice of Motion dated 17th December, 2024 under certificate of urgency seeking interim Orders pending the hearing and determination of the Motion and Petition.
2. When the matter came up on 20th December, 2024 the court directed service and response within 21 days and *inter partes* hearing on 21st January, 2025 on which date none of the parties was present and the motion dated 17th December, 2024 was dismissed for non-attendance.
3. On 7th February, 2025, Mr. Akello for the 2nd and 3rd respondents and Mr. Khadullo for the Petitioner were present. The court granted Mr. Akello 21 days to file his response and a mention slated for 27th February, 2025 on which date Mr. Akello and Mr. Khadullo were present.
4. Mr. Khadullo informed the court that his instructions were that the Petition as was had been overtaken by events as the impugned constitution had been registered but was not certain and sought Mr. Akello's confirmation. Mr. Akello on the other hand sought 7 days to respond and was accorded 5 and a mention slated for 1st April, 2025 when only Mr. Ogendi holding brief for Khadullo was present and who prayed that since the respondents had not responded, the Petition be determined based on the pleadings on record.
5. On 7th May, 2025, Mr. Khadullo submitted that although the respondents had filed Grounds of Opposition and a Replying Affidavit dated 24th March, 2025, they had taken too long and other developments had taken place.
6. He submitted that the instant Petition sought to stop the Registrar of Trade Unions from registering the proposed constitution of KUPPET on the ground that the process was flawed and *the constitution* had been registered and gazetted.
1. Counsel reported that other Petitioners filed a suit in Nyeri, Petition E005 of 2025 and obtained stay Orders restraining the respondents from implementing the constitutional changes. Counsel sought consolidation of the instant Petition with the Nyeri Petition a request Mr. Nyamagwa holding brief for Miss Akello contested as the Petition referred to by Mr. Khadullo was not before the court and he was unaware of it.



7. That Mr. Khadullo had not made any application for consolidation of the suits. Counsel sought directions on the way forward.
8. Parties were accorded 21 days, as requested to file and exchange submissions but by 21st July, 2025 only the petitioner had filed and served. The respondent had not owing to indisposition of counsel and was accorded 5 days but none of the counsels was in court on 28th July, 2025 when the matter was reserved for judgment.
19. In his Petition dated 17th December, 2024 the Petitioner avers that the 2nd respondent union was founded 1997 by Secondary School teachers who were dissatisfied with KNUT and although it replicated the KNUT Constitution, a new one was promulgated in 2011, which made provision for alteration and amendments but did not provide for retirement age for its officers as the Teachers Service Act, 2012 would be applicable as were the provisions of the [Public Service Commission Act](#) and the [Employment Act](#).
10. That in 2012 the union colluded with the Registrar of Trade Unions and inserted the retirement age of officials at 65 years unlawfully as it extended the retirement age of the unions officials beyond the age provided by the [Public Service Commission Act](#).
11. The Petitioner averred that the alteration of [the Constitution](#) was non-consultative and the Petitioner was not consulted and it was unlawful and unconstitutional as it was inconsistent with the provisions of Section 27 of the [Labour Relations Act](#) because it was not discussed by the National Delegates Conference and no resolutions was adopted.
12. That the Annual Delegates Conference held on 20th December, 2024 was intended to sanitize illegal acts of the respondent and Article 12B was unlawful.
13. Strangely, the instant Petition is not grounded on the provisions of [the Constitution](#) of Kenya but on the provisions of the [Public Service Commission Act](#), [Labour Relations Act](#), legitimate expectation and Article 47 of [the Constitution](#) of Kenya.
14. The Petitioner prays for:
 1. A declaration that Article 13(b)(iii) of the KUPPET Constitution is unconstitutional.
 2. A declaration that registration of the KUPPET Constitution while containing Article 13 is unconstitutional.
 3. An Order of mandamus directing the 1st respondent to delete Article 13(b)(iii) of the KUPPET Constitution.
 4. Costs of this Petition be borne by the respondents.

Respondent's case

15. Only the 2nd and 3rd respondents filed responses to the Petition.
16. In their Grounds of Opposition dated 24th March, 2025, the 2nd and 3rd respondents averred that the Petition was fatally defective *ab initio* as the process it sought to stop was undertaken in 2024 as the Annual Delegates Conference took place on 20th December, 2025 and was thus frivolous, vexatious and an abuse of the court process.
17. The respondents contended that the substratum of the Petition which challenged [the constitution](#) of the 2nd respondent was *sub judice* in



1. Nairobi ELRC PET. No. E044/2024 – Nduma Nderi J.
 2. Nairobi ELRC PET. No. E 019/2025 – Hellen Wasilwa J.
 3. Nyeri ELRC PET. No. E005/2025 – O. Makau J.
 4. Nairobi ELRC PET. No. E093/2024 – Hon. R. Thyala.
18. That the Petitioners have been moving from court to court seeking ex parte interim court orders under Certificate of Urgency and no Orders had been given save in Nyeri ELRC PET. No. E 005/2025.
 19. That in the instant case, the Petitioner abandoned the motion after the court declined to grant interim Orders leading to its dismissal.
 20. The respondents argued that the Petition did not meet the threshold in Anarita Karimi Njeru V Republic and Mumo Matemtu cases as espoused in the Mutunga Rules and the matter fell within Section 12 of the *Employment and Labour Relations Court Act* and was for dismissal.
 21. The Replying Affidavit sworn by Moses Nthurima on 24th March, 2025 rehashed the contents of the Grounds of Opposition of even date save that the Petition disclosed no cause of action against the 3rd respondent as he was the Secretary General and C.E.O of the union.

Petitioners submissions

22. On sub judice, counsel submitted that the issues in controversy were not the same although the cases were similar.
23. That the instant Petition was challenging actions that took place 2017 and 2021 when *the constitution* was amended and the sub-judice rule did not apply.
24. Reliance was made on the decision in Kenya National Commission on Human Rights V Communications Authority of Kenya & 4 others [2018] eKLR to urge that the Petition related to democratization of trade unions.
25. The decisions David Ndii & Others V Attorney General & Others [2021] KEHC was also cited.
26. As to whether the Petition met the threshold of a Constitutional Petition, it was submitted that the facts in Anarita Karimi Njeru V Republic (Supra) and those of the instant suit were different and the principle in the case was distinguishable.
27. Counsel submitted that the instant suit met the threshold of a Constitutional Petition, and cited Mumo Matemtu V Trusted Society of Human Rights Alliance [2013] eKLR.
28. Reliance was also placed on *the Constitution* of Kenya (Protection of Rights and Fundamental Freedom's) Practice and Procedure Rules, 2013 to reinforce the submission.
29. As to whether the suit was a dispute between a member and a trade union, counsel submitted that it was not as the respondents actions violated rights and fundamental freedoms in *the Constitution* of Kenya.
30. Reliance was placed on the decision in Julia Mwenje Nyinkuri V Kenya County Government Workers Union [2021] eKLR.
31. As to whether the Petition disclosed violations of Constitutional rights of the Petitioner, counsel accused the respondents for having inserted clause 12B into the union Constitution in contravention of Section 27 of the *Labour Relations Act* and the change was not published in the Kenya Gazette.



32. That by changing retirement age to 65 years the respondents violated his right to equal treatment.
33. Reliance was placed on the sentiments of the court in Republic V Public Procurement Review Board & another Ex Parte Gibb Africa Ltd [2016] eKLR on fair administrative action, as well as Suchan Investment Ltd V Ministry of National Heritage & Culture & 3 Others [2016] eKLR on procedural fairness, to submit that the respondents acted in an opaque and unilateral manner.
34. Also relied upon was the doctrine of legitimate expectation to urge inter alia that the Petitioner aspired to ascend to national leadership of the union upon retirement of other officials.
35. Counsel placed reliance on the sentiments of the court in Republic V Kenya Revenue Authority Ex Parte Universal Corporation Ltd [2006] eKLR to submit that the amendment of the 2nd respondents Constitution was unconstitutional.
36. On reliefs, counsel submitted that rights were violated and the Petitioner was entitled to judgment in default as the respondents did not respond to the substantive issues.
37. Reliance was placed on rule 15(3) of the Mutunga Rules and the decision in James Kuria Kanyola V Attorney General & another [2018] eKLR on the effect of uncontroverted evidence.
38. The respondents did not file submissions even after being accorded extra time on 21st July, 2025, to do so.

Analysis and determination

39. This is the second Petition which the Petitioner is involved against the respondents. The earlier one which had two (2) Petitioners had been filed before internal disciplinary mechanisms had been invoked and exhausted and was accordingly dismissed.
40. The instant Petition is challenging an amendment to *the Constitution* of the 2nd respondent which introduced Clause 12B as per paragraph 17 & 19 of the Petition.
41. However, paragraph 23(c) refers to Section 13(b) and paragraph 28H (1) and (3) refers to Article 13(b) (iii) of the 2nd respondents Constitution.
42. Regrettably, neither the 2012 nor the 2017 version of the 2nd respondents Constitution has a section numbered 13(b)(iii). However, 12(b) exists in the 2017 version.
43. Strangely, the Petitioner is reticent as to when the alleged amendment was effected and the circumstances surrounding the amendment and why he did not challenge it at the time and waited until 19th December, 2024 when the instant suit was filed. His case is simply that the procedure was not followed.
44. Records availed by the Petitioner show that the alleged amendment was signed up by the Secretary General and National Chairperson of the 2nd respondent on 20th November, 2017, more than 7 years ago.
45. Regrettably, all the Orders sought save for costs relate to Article 13(b)(iii) of the 2nd respondents Constitution which the Petitioner did not highlight in the photocopied constitution of the 2nd respondent.



46. As to whether the instant Petition meets the threshold of a Constitutional Petition, the court is guided by the sentiments of the Court in *Anarita Karimi N. Njeru v Republic* (supra) where E. Trevelyn and A. R. W. Hanxcox JJ held:

“We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of a precision that of which he complains the provisions said to be infringed, and the manner in which they are alleged to be infringed”.

47. Similarly, and was correctly submitted by counsel for the Petitioner *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (herein after Mutunga Rules) set out the circumstances in which a person may institute a Constitutional Petition, and more so its contents under Rule 10.

48. A perusal of the Petition dated 17th December, 2024 reveals that while Part E indicates that the Petitioner’s right to fair administrative action was violated, contrary to Article 27 of *the Constitution* of Kenya, no other provision of *the Constitution* of Kenya is cited and the manner and extent of the alleged violation or the injury caused was not spelt out.

49. Contrary to counsel’s submission that the rule in *Anarita Karimi Njeru V Republic* (supra) is distinguishable, it is not, as the learned Judges were articulating how constitutional Petitions ought to be framed irrespective of the nature of the suit.

50. More significantly, reliance on the provisions of Section 80 of the *Public Service Commission Act* and Section 27 of the *Labour Relations Act* as the provisions violated by the respondents prior to citing the Constitutional provision shows that the grievance the Petitioner has against the respondents is not grounded on a Constitutional provision and raises no Constitutional issue as adverted to by counsel in his submissions, that the Petitioner had a legitimate expectation that the respondent’s Constitution would remain unchanged so that he could ascend to higher office when current holders retired.

51. This argument also reveals that the Petitioner’s grievance is rather personal as opposed to communal or corporate, and the respondents’ averment that it was a dispute between a member and a trade union as contemplated by Section 12(1) of the Employment and *Labour Relations Act* cannot be denigrated.

52. To the question whether the instant Petition meets the threshold of a Constitutional Petition, under *Anarita Karimi Njeru V Republic*, the court returns that it does not and on this ground alone the Petition fails.

53. As to whether the instant Petition is sub judice both the provisions of the *Civil Procedure Act* and case law are clear on the principle of sub judice.

54. Under Section of the *Civil Procedure Act*

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court, having jurisdiction in Kenya to grant the relief claimed.



55. In Republic V Paul Kihara Kariuki Attorney General & 2 Others ex parte Law Society of Kenya [2020] eKLR, Mativo J (as he then was stated):

“... there exists the concept of sub judice which in Latin means “under Judgement.” It denotes that a matter is being considered by a court or judge. The concept of sub judice that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit goes on. In such a situation, order is passed by the subsequent court to stay the proceeding and such order can be made at any stage”.

56. Similarly, in Kenya National Commission on Human Rights V Attorney General; I.E.B.C & 6 others Interested Parties (supra) the Supreme Court stated:

The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives”.

57. The salient elements of sub judice are that the matter in issue is directly and substantially in the previous suit.
58. In the instant suit, while the Petitioner admits that there are other cases as averred by the 2nd and 3rd respondents, three (3) in Nairobi and one (1) in Nyeri, before the Employment and Labour Relations Court and one (1) in the Magistrates Court at Nairobi, counsel argues that the issues in the suits were different.
59. Instructively, all Petitions filed after 20th December, 2024 appear to be challenging the decisions taken at the Annual Delegates Conference and in particular adoption of the amended Constitution of the 2nd respondent.
60. Nairobi Petition No. E044/2024 dated 4th April, 2025 and filed on 5th April, 2024 was challenging amendments of the 2nd respondent’s Constitution effected on 20th November, 2017 namely, Articles 8.2.0 (b), 8.6.0 (b), 12.0(b) and 13.0(b)(iii) and sought inter alia suspension of the articles above and orders to amend *the Constitution* further.
61. The matter is conspicuously similar to the instant Petition and it is discernible that Kisumu PET. No. E051 of 2024 developed from the umbrage of NAIROBI PETITION NO. E044 OF 2024 but customized for the Petitioner, which in the court’s view was a blatant abuse of the court process.
62. Unsurprisingly, the Petitioner temporarily abandoned the Petition after the court declined interim Orders and dismissed the Notice of Motion, as he had a fall-back position.
63. Notably, Nairobi Petition No. E044 of 2024 was marked as settled on 29th July, 2025 and withdrawn.



64. Nairobi Petition No. E019/2025 of which the Petitioner is party is challenging the conduct and decisions made during the Annual Delegates Conference at Sosa Resort, Vihiga and sought declarations and a permanent injunction to restrain the 2nd respondent from registering the amendments made on 20th December, 2024.
65. A mention was scheduled for 30th September, 2025.
66. Implementation of the amended Constitution of the 2nd respondent was temporarily stayed in NYERI ELRC PET. No. E005 of 2025 on 25th March, 2025.
67. It is evident that the membership and officials of the 2nd respondent had engaged in forum shopping individually or corporately seeking favourable orders and obtained them in the suit before the ELRC at Nyeri and promptly sought the transfer of Nairobi Petition E019 of 2025 to Nyeri to consolidate the gains.
68. In the court's view the instant Petition is sub judice NAIROBI PET No. E044 of 2024 but having been marked as withdrawn on 29th July, 2025, it is only fair that the instant Petition be disposed of on merits.
69. In the instant case, it is clear as, adverted to above that the Petitioner filed the instant Petition while aware of the previous Petition filed in April 2024 and was aware of the reliefs sought and thus attempted to modify the reliefs sought in the instant suit but to no avail, which amounted to an abuse of the court process.
70. The foregoing is fortified by the sentiments of Mativo J (as he then was) in Kiambu Tenants Welfare Association V Attorney General and another [2017] eKLR as follows:
- “Thus, the multiplicity of actions on the same matter between the same parties even where there exist a right to bring the action is regarded as an abuse. The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right per se. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interfere with the administration of justice. Turning to this case, I find no difficulty in concluding that this Petition and the High Court appeal seeking substantially the same reliefs amount to gross abuse of court process and on this ground alone this petition fails”.
71. These sentiments apply on all fours to the instant Petition.
72. Finally, as to whether the Petitioner has proved his case as by law required, it is evident that other than copies of the two (2) versions of the 2nd respondent's Constitution dated 2010 and 2017 and a copy of an unsigned and undated consent in Nairobi Petition No. E044 of 2024, the Petitioner did not avail any other scintilla of evidence to prove his case.
73. The Petition contains no details on how and when the respondents surreptitiously amended and registered the alleged amendments. The Petitioner impassively mentions the period 2017 and 2021 but fails to demonstrate how the amendment was conducted in violation of *the Constitution* of Kenya or other laws and how his rights as the Petitioner were violated.
74. A letter from the Registrar of Trade Unions in response to the Petitioners inquiries would have embellished his allegations. Similarly, letter to the respondents on the amendments or a response on the matter would have been good evidence in support of the Petitioner's case or a Petition from members of the union challenging the amendments irrespective of when they were effected.



75. Thus, the court was unable to find the constitutional provisions allegedly infringed, manner and nature of the infringement as well as nature and extent of the injury suffered by the Petitioner. The deficiency of facts to prove the Petitioner's allegations is palpable. As held by Mativo J (as he then was) in the *Kiambu Tenants Welfare Association V Attorney General* (supra).

“...To my mind the burden of establishing all the allegations rests on the Petitioner who is under an obligation to discharge the burden of proof. All cases are decided on the legal burden of proof being discharged (or not). Lord Brandon in *Rhesa Shipping Co SA V Edmunds* remarked: -

“No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take.”

Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britestone Pte Ltd vs Smith & Associates Far East Ltd*:-

“The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”.

76. Section 107 of the *Evidence Act* provides: -

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person

77. Section 108 provides: -

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

78. Finally, on proof of particular fact(s) Section 109 provides: -

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

7. Needless to underscore, the degree of proof is dictated by the prescribed standard and in civil cases it is on a balance of probabilities, which means more probable than not. See *Miller V Minister of Pensions* [1947] 2 ALLER 372.

79. After careful consideration of the Petitioner's case, it is the finding of the court that the Petitioner failed to adduce sufficient evidence to prove his case against the respondents. The alleged infringement of Section 47 of *the Constitution* of Kenya and provisions of other statutes was not evidentiary demonstrated.

80. Further, and as adverted to elsewhere in this Judgment, the Petition does not meet the threshold in *Anarita Karimi Njeru V Republic* (supra) and as equally found, is an abuse of the court process.



81. The upshot of the foregoing is that the instant Petition is devoid of merit and it is dismissed with costs to the 2nd and 3rd respondents.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 6TH DAY OF OCTOBER, 2025.

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

