

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. E108 OF 2025

**IN THE MATTER OF ARTICLES 10, 19, 20, 21, 22, 23, 27, 28,
29, 41, 47, 73, 159, 232, 236 AND 258 OF THE CONSTITUTION
OF KENYA**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA
(PROTECTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

AND

**IN THE MATTER OF THE CODE OF REGULATIONS OF
TEACHERS, 2015**

-BETWEEN-

SELLA OKOLLA BARASA.....PETITIONER

- VERSUS -

TEACHERS SERVICE COMMISSION.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 13th November,

2025)

JUDGMENT

1. The petitioner filed the petition and supporting affidavit dated 03.06.2025 through Masika & Koross Advocates and prayed for:

- (i) A Declaration that the respondent's decision of failure or refusal to re-engage the petitioner into service upon reporting back in 2020 following her initial release to the County Government of Bungoma in 2016 contravened clear provisions of the Code of Regulations for Teachers and the same amounted to unlawful discrimination and unfair labour practice in violation of the provisions of Articles 27 and 41 of the Constitution.

- (ii) A Declaration that the respondent's decision of failure or refusal to re-engage the petitioner into service upon reporting back in 2020 following her initial release to the County Government of Bungoma in 2016 subjected her to psychological torture, indignity, cruelty and inhuman treatment in violation of her fundamental rights and

freedoms enshrined at Articles 28 and 29 of the Constitution.

- (iii) A Declaration that the respondent's decision vide letter Ref. TSC/NO: 373183/97 dated 7th November 2024 of purported transfer of the petitioner's service to the Public Service Commission (PSC) without prior appointment or acceptance by the said Commission left her hanging without employment and payment of her salary arrears since 9th September 2020 in express contravention of Regulation 166(1) & (2) of the Code of Regulations of Teachers.
- (iv) Consequently, an order of *Mandamus* do issue compelling the respondent to re-engage the petitioner back into the service with effect from 9th August 2020.
- (v) An order of *Mandamus* do issue compelling the respondent to with immediate effect pay the petitioner, in arrears, her gross salary with effect from 9th August 2020 until re-engagement, and continue paying her monthly salary upon posting or until proper transfer of her service.

- (vi) An order of financial compensation of an amount to be determined by the court for blatant violation of the petitioner's rights and fundamental freedom from discrimination, psychological torture, indignity, cruelty, inhuman treatment and unfair labour practices.
- (vii) An order that since the petitioner has stagnated in the current job group for 10 years (2011-2016 and 2020-2025), she be promoted to the next job group.
- (viii) An order that the costs consequent upon this petition be borne by the respondent in any event.

2. The petitioner's case was as follows:

- a. She is a registered High School Teacher employed by the respondent as a graduate teacher vide a letter referenced TSC/NO: 373183/2 dated 04.09.1996. On 20.03.1998, her employment was confirmed on permanent and pensionable terms through a letter referenced TSC/NO: 373183.
- b. In 2016, she was released to Bungoma County Government for a contract period of four (4) years and reported back to the respondent service in 2020 for posting to a public institution,

as advised in the respondent's release letter dated 14.09.2016. The Bungoma County Government released her back to the respondent for re-engagement through a letter dated 17.08.2020, with effect from 08.08.2020. Following the circumstances related to the COVID-19 pandemic, she physically delivered the county's release letter in December 2020 in the outside mail container, as no one was allowed into the building. She later delivered another letter in 2021 and had also been writing letters and visiting the Ministry of Education without receiving any response.

- c. When her lawyers made formal inquiries about her multiple correspondences, it turned out that the Ministry of Education (TVET) did not have her file and therefore could not trace any of her letters. On 30.07.2024, a perusal of her file at the respondent's offices revealed a letter dated 17.12.2021 that had the effect of summarily dismissing her from service on the alleged ground that she had failed to report back to the respondent within 30 days of her release from Bungoma County Government. The said letter had never been delivered

to her, no show cause letter was issued to her precedent to the said adverse letter, and there was no evidence that the CEO or respondent authorized such a decision.

- d. In its letter dated 26.11.2024, read with the letter annexure dated 07.11.2024, the respondent managed to void the purported letter dated 17.12.2021 by assuring her that her employment remained intact.
- e. Instead of posting her as indicated in its release letter to the Bungoma County Government, the respondent, in a letter dated 07.11.2024, purported to transfer her service to the PSC (Ministry of Education) without any prior appointment from the PSC. Assuming the PSC had appointed her, the respondent was enjoined to first re-engage her through reinstating her into the payroll and paying her salary arrears since 2020 before releasing her to the PSC by transferring her digital payroll data to the Ministry of Education.
- f. Her purported transfer of service to the PSC without prior appointment or acceptance by the said Commission has left her hanging without employment. The respondent's failure

and refusal to re-engage her back into its employ from 2020 to date, and to reinstate her into the payroll and posting, has subjected her to equal terms with a dismissed teacher.

- g. The Department of Technical and Vocational Education and Training (TVET) within the Ministry of Education has since advised her that even if PSC accepted the requested transfer of service, she would only be taken on board if she is in the current payroll of the respondent, which will be transferred to TVET for seamless continuation, otherwise it would amount to new employment attracting a different procedure.
- h. When the respondent released her to Bungoma County in 2016, the petitioner had been in Job Group M for five years since 2011, and was therefore due for promotion to Job Group P at the time, the position she would pick up on return in 2020.
- i. The total earnings she risks losing should this Honourable Court fail to intervene, amount to the value of the subject matter as follows:

- (a) Since the average salary and allowances (Commuter and House, among others) for Job Group P is Kshs. 150,000 per month, the petitioner would earn a gross salary of Kshs. 150,000 x 12 Months x 12 remaining years (2020 to 2032 by retirement date/time = 21,600,000/-.
- (b) Pension - Lump sum, calculated as a factor of total months worked and last basic salary. The last basic salary will be Kshs. 121,430 and total months worked 32 years (36-4) x 12 = 384 Months = 10,000,000/-.
- (c) Monthly Pension; based on the above total months and the last basic pay, yields Kshs. 72,858 per month x estimated 15 years =13,114,440/-.
- (d) The global value is 21, 600,000 + 10,000,000 + 13,114,440 = 44,714,440/-.

3. The petitioner particularised the violation of the Constitution of Kenya as follows:

- (i) The respondent's decision of failure or refusal to re-engage her into service upon her reporting back in 2020 from Bungoma County Government contravened the clear

provisions of the Code of Regulations for Teachers outside of the bounds and dictates of the national values and principles of governance and service of the rule of law, non-discrimination, good governance, responsiveness and prompt provision of service enshrined in Articles 10 and 232.

- (ii) The respondent's decision of failure or refusal to re-engage her also amounted to unlawful discrimination and unfair labour practices against her in violation of her rights and fundamental freedoms protected under Articles 27 and 41.
- (iii) The respondent's decision of failure or refusal to re-engage her further subjected her to psychological torture, indignity, cruelty and inhuman treatment in violation of her fundamental rights and freedoms enshrined in Articles 28 and 29.
- (iv) The respondent's decision to purportedly transfer her service to the PSC without prior appointment or acceptance by the said Commission left her hanging without employment and payment of her salary arrears, subjecting her to unfair labour

practices in violation of her rights and fundamental freedoms under Article 41.

(v) The purported transfer to PSC also violated her right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, as protected in Article 47 of the Constitution.

(vi) The respondent failed to be guided by the principles of leadership, integrity of objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by improper motives as under Article 73 due to its indifference to the plight of the petitioner.

4. The respondent's replying affidavit, sworn by Mollet Sango, (acting Director, Human Resource Management and Development) on 14.07.2025, and filed through Edwiq Musundi Advocate. They urged as follows:

a) Upon her employment by the respondent, the petitioner was posted to various institutions, with the last one being Shamberere Technical Training Institute.

- b) On 25.08.2016, the petitioner wrote to the respondent requesting to be released to the County Government of Bungoma for a period of two years. She was subsequently released with effect from 01.09.2016 with instructions to report to the respondent within 30 days of the end of her contract for posting to a public institution.
- c) When the petitioner's contract with Bungoma County Government terminated on 08.08.2020, she reported back to the respondent for posting on 07.12.2021, which was 16 months after the end of her contract, in breach of the respondent's instructions.
- d) On 27.07.2018, the respondent issued Circular No. 17/2018 transferring the technical training functions to the Ministry of Education. As a result, all TVET lecturers who were then in the employment of the respondent were transferred to the Ministry of Education, State Department for Vocational and Technical Training. Subsequently, the respondent has no mandate to post the petitioner, as this function lies with the Ministry of Education.

- e) Without prejudice to the above, the respondent had on 07.11.2024 written to the Permanent Secretary, Ministry of Education, indicating that it had no objection to having the petitioner absorbed by the Ministry of Education and posted to a technical institution.
5. In response to the respondent's replying affidavit, the petitioner filed a further/supplementary affidavit, sworn on 15.09.2025, averring that:
- a. The respondent's Circular No. 17/2018 dated 27.07.2018 and titled, *Transfer of Service for Trainers/Lecturers in Technical and Vocational Education and Training (TVET) institutions*, never transferred her employment contract to PSC (Ministry of Education-TVET). The said Circular transferred the services of 3,780 specific lecturers/teachers who were on the TSC payroll as at 30.06.2018, and she was not among them.
 - b. Further, the Principal Secretary for State Department of TVET responded to the respondent's purported letter of transfer of her service to TVET dated 07.11.2024,

confirming that the petitioner's contract was never transferred to TVET under the subject Circular or at all.

- c. Regulation 166(1) and (4) of the Code of Regulations for Teachers and the attendant Forty Sixth Schedule provide for the procedure of transfer of service upon prior offer of employment to a teacher by that other public institution, in this case, PSC.
- d. There is no evidence: that the PSC or Ministry of Education offered her any offer of employment; that she applied to the respondent for transfer of her service; that the respondent ever released her to report to the Ministry of Education/PSC on account of transfer of service; and that the respondent has ever processed her transfer of service documents (her payroll data and personal file) and submitted to TVET (Ministry of Education).
- e. In any case, the Court declared the said Circular No. 17/2018 dated 27.07.2018 as unconstitutional, null and void in its judgment of 01.03.2019 in *Nairobi ELRC Cause No. 85 of 2018* and *Nairobi ELRC Petition No. 97 of 2018*. The

respondent's averments, having been anchored and/or premised on the voided circular, its entire replying affidavit is of no probative value.

f. The respondent and petitioner, having amicably resolved the allegation of her late reporting when the respondent acceded to the fact that its letter concerning late reporting was irregular upon satisfactory explanation, and having taken a subsequent decision to re-engage her by seeking her absorption to the Ministry of Education-TVET, the respondent is estopped from claiming otherwise.

6. The parties filed their respective written submissions. The Court has considered the material on record and returns as follows.

7. To answer the **1st issue** for determination, the Court returns that the facts of the case are as pleaded for the petitioner. She was employed by the respondent until, at the instance of the petitioner, the respondent released her effective 01.09.2016 to 31.08.2018. The letter stated thus, "Should your contract be terminated or not renewed, you are advised to report to Teachers Service Commission within thirty (30) days for immediate

posting to a public institution. If you fail to report for posting or join other institutions without Teachers Service Commission approval you will forfeit all pension benefits accrued as per the provisions of the Pensions Act Cap. 189 and Code of Regulations for Teachers.” It appears that the petitioner’s contract was renewed and subsequently by letter of 17.08.2020, the Bungoma County Secretary released him effective 08.08.2020.

8. To answer the **2nd issue**, the Court finds that by her own pleading, the petitioner did not report to the respondent within 30 days from 08.08.2020, being by around 08.09.2020. The reason given by the petitioner is that she could not report within the 30 days because of the lockdown associated with the COVID-19 situation. It is the petitioner’s case that she subsequently delivered the release letter by the County Secretary in December 2020 in the outside mail container as no-one was allowed to enter the respondent’s premises. Her further case is that she delivered her further letter in mid-2021. The respondent’s case is that the petitioner’s contract with Bungoma County Government terminated on 08.08.2020 but she reported back to the respondent

for posting on 07.12.2021, which was 16 months after the end of her contract, in breach of the respondent's release instructions. The petitioner has not exhibited the copies of the letters she says she delivered to the respondent in December 2020 and in mid-2021. The Court observes that the contents of those letters and the specific dates they were actually delivered is not disclosed at all and the petitioner has offered no explanation why she made no effort to communicate with the respondent within the 30 days after the release. While the Court has taken judicial notice of the lockdown associated with COVID-19 situation which made it difficult for the petitioner to report to the respondent within the 30 days, it appears that the letters the petitioner says she delivered to the respondent in December 2020 and then in mid-2021 appear not to have been so delivered, on a balance of probabilities.

9. In any event, whether such letters were delivered or not, the Court finds that by reason of the lockdown associated with the COVID-19 situation, the parties' contract in the respondent's release letter requiring the petitioner to report within 30 days for posting by the respondent to a public institution was thereby

frustrated. The Court finds that the agreement to report within the 30 days was terminated due to the unforeseeable COVID-19 lockdown which made it impossible for either party to fulfill their obligations. The COVID-19 lockdown had not been due to the fault of either party and it was beyond their respective control and it made it impossible for either party to perform the agreement.

10. Accordingly, to answer the **3rd issue**, the Court returns that the contract that the petitioner would report to the respondent within the 30 days from 08.08.2020 for posting to a public institution was frustrated by reason of the unforeseeable COVID-19 situation. The consequence was that the contract automatically terminated and parties were thereby discharged from their respective obligations under that contract. It then appears to the Court that save for the already accrued obligations under the contract of service between the parties and prior to the release of the petitioner by the respondent to get into contract employment with the Bungoma County Government, there are no binding future obligations between the parties flowing from the frustrated contract requiring the petitioner to report to the respondent within

30 days for the respondent to deploy the petitioner to a public institution.

11. To answer the 4th issue, the Court returns that the earliest the petitioner reported to the respondent for posting after release by the County on 08.08.2020 was on, 07.12.2021. It is the respondent's case that the petitioner reported to the respondent on 07.12.2021. There is no reason to doubt the respondent's assertion in that regard. The petitioner wrote the letter dated 07.12.2021 and

addressed to the respondent's Secretary as follows:

“RE: REQUEST FOR POSTING

I write to request for posting having come to the end of contract with the County Government of Bungoma where I worked as a County Chief Officer from August 2016. Before then, I was a senior lecturer in job group M at Shamberere TTI in Kakamega County where I served as a registrar in acting position and Coordination for Performance Contracting among other duties. My teaching subjects were Chemistry and Mathematics.

I have been released by the county government and will be glad to resume my professional assignment and request to be deployed to for non-teaching duties in any TSC office where deemed fit. Alternatively I may be posted to any teacher training college since I hold Master's degree in Educational Psychology.

Thank you for continued support as we continue to empower and instill literacy skills in the population.

Attached please find copies of my letters of release.

Yours faithfully,

Signed

Sella Okolla Brasa (Mrs).”

12. The Court observes that the petitioner in that letter of 07.12.2021 does not mention about her letters she alleged she had delivered to the respondent in December 2020 and in mid-2021 and the Court upholds its earlier finding herein that on a balance of probability, the two letters were never delivered as alleged.

13. The respondent has as well shown as follows:

a) On 27.07.2018 the respondent issued a circular No. 17/2018 transferring the technical training functions to the Ministry

of Education with the effect that Technical and Vocational Education Training (TVET) lecturers who were in the employment of the respondent were transferred to the Ministry of Education, State Department for Vocational and Technical Training. Thus as at 07.12. 2021 the respondent had no authority to post TVET lecturers, the petitioner's cadre.

- b) The status quo of respondent's authority to transfer the TVET lecturers persisted until 18.04.2024 when Baari J delivered the judgment in Nyangongo & Another –Versus- Cabinet Secretary, Ministry of Education & 8 Others (2024) KEELRC 836 (KLR) declaring the circular No. 17/2018 of 27.07.2018 unconstitutional. Thus, is only after 18.04.2024 that the authority vested in the respondent to deploy the petitioner as a TVET lecturer and in alignment to the terms of the release letter.

14. Thus, the Court finds that the petitioner having not rebutted the respondent's account on authority to deploy TVET lecturers at all material times, the Court finds that the petitioner has not

established the basis for deployment on an earlier date as pleaded and claimed for her.

15. The 5th **issue** is on remedies. On 05.11.2025 the parties recorded a consent order thus:

a) The respondent to re-engage and deploy the petitioner not later than 01.12.2025 with full prevailing benefits and remuneration.

b) The issues to go to determination are:

- i. Whether the respondent should pay the petitioners salaries and allowances for the period 08.08.2020 (at end of secondment) to 01.12.2025, the redeployment date.
- ii. Whether the petitioner is entitled to compensation for breach of rights and fundamental freedoms
- iii. Issue of costs of the petition.
- iv. Whether the petitioner is entitled to automatic promotion from current grade to next job group effective date of re-engagement.
- v. Judgment on 13.11.2025 at 9.30 am or thereafter

16. The Court has found that by reason of the COVID-19 situation, the parties' agreement that the petitioner reports to the respondent within 30 days from 08.08.2020 for redeployment was frustrated. In any event, the evidence is that the earliest the petitioner communicated his release by the County and to the respondent was by the letter of 07.12.2021. In the circumstances, there evolved no obligation for the respondent to cause the petitioner to be an employee of the Ministry of Education at the time all TVET lecturers served under the Ministry of Education and at all material times. Throughout the material period the petitioner did not work for the respondent and free from the contractual obligations, the parties have negotiated a re-engagement per the consent order referred to earlier in this judgment. The Court upholds the respondent's case that the petitioner has not established violation of rights and fundamental freedoms as was alleged and further, there is no contractual or other basis for payment of remuneration from 08.08.2020 to the date of re-engagement. The Court repeats the salient findings made earlier in this judgment and returns that the petitioner is not entitled to

any remedy upon the issues agreed for determination. The Court further finds that each party will bear own costs of the suit in view of the findings of frustrated agreement, belated action on the part of the petitioner and the subsequent consent so that harmony between the parties is hereby promoted in view of the continued employed relationship.

In conclusion the petition is hereby determined accordingly with orders each party to bear own costs of the petition.

Signed, dated and delivered by video-link and in court at Nairobi this Thursday 13th November, 2025.

BYRAM ONGAYA, PRINCIPAL JUDGE