

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

PETITION NO. E010 OF 2025

(Before Hon. Justice Dr. Jacob Gakeri)

**IN THE MATTER OF ARTICLES 2, 10, 19, 20, 21, 22,
23, 27, 28, 41, 47 AND 258 OF THE CONSTITUTION
OF KENYA**

AND

**IN THE MATTER OF ALLEGED VIOLATION OF
FUNDAMENTAL RIGHTS AND FREEDOMS OF THE
PETITIONER**

AND

**IN THE MATTER OF THE EMPLOYMENT ACT, 2007,
THE FAIR ADMINISTRATIVE ACTION ACT, 2015 AND
THE EMPLOYMENT AND LABOUR RELATIONS COURT
ACT, 2011**

AND

**IN THE MATTER OF THE CONTRACT OF SERVICE
BETWEEN THE PETITIONER AND THE RESPONDENT
BETWEEN**

JEPHRICE ODERA

OMBIMA.....PETITIONER

VERSUS

**COUNTY GOVERNMENT OF
KISUMU.....RESPONDENT**

RULING

The Petitioner instituted the instant Petition on 30th June 2025 at 20:52pm.

The Petitioner's case is that she was employed as a cleaner II by the Municipal Council of Kisumu on 19th February 1990 and summarily dismissed on 10th February 2005 as confirmed vide letter dated 13th September 2025.

The dismissal followed a suspension effective 3rd March 2025 and was retired on public interest on 19th April 2010 without terminal dues.

The Petitioner further avers that the County Government of Kisumu reinstated her on 17th June 2014 and was neither paid salary and allowances for the period 10th February 2005 to 17th June 2014 nor terminal dues yet several of her colleagues who were reinstated were compensated for the lost period and income and thus alleges unequal and unfair treatment.

The Petitioner prays for:

- (a) *Declaration that the respondent violated the Petitioner's right under Articles 27, 28, 41 and 47 of the Constitution.*
- (b) *Declaration that the respondent's failure to pay compensation for the period 2005 to 2014 was discriminatory and violated the Petitioner's legitimate expectation.*
- (c) *An Order compelling the respondent to pay the Petitioner full back pay for the period 10th February 2005 to 17th June 2014.*
- (d) *General damages for breach of rights.*
- (e) *Declaration that the respondent breached the employment contract for failing to pay terminal dues.*
- (f) *An Order for payment of:*
 - (i) *Unpaid statutory deduction.*
 - (ii) *CBA arrears and salary increments.*
 - (iii) *Terminal benefits accrued upon retirement.*
 - (iv) *Interest on all outstanding sums at court rates.*
- (g) *Costs of this Petition and claim.*
- (h) *Any other relief the court may deem just and expedient to grant.*

The Petition and accompanying documents, summons and mention Notice dated 10th July 2025 were served upon the respondent on 15th July 2025 and the respondent entered appearance on 15th October 2025 and on even date filed a Notice of Preliminary Objection dated 15th October 2025 urging that the Petition be dismissed with costs for offending the provisions of Section 90 of the Employment Act, the Petition was an abuse of the court process as it was intended to circumvent the provisions of Section 90 of the Employment Act and was contrary to the doctrine of constitutional avoidance.

Directions on canvassing of the Preliminary Objection by way of written submissions were given on 16th October 2025 and parties had 10 days a piece to file and exchange written submissions.

Respondent's submissions

Concerning the doctrine of constitutional avoidance reliance was placed on the decisions in **Muli V Kenya Water Institute & 2 Others** [2023] KEELRC 942 (KLR), **Summaya Athmani Hassan V Paul Masinde Simidi & another** [2019] eKLR and **Abura V Coast Water Works Development Agency & 11 Others** and

Communication commission of Kenya & others V Royal Media Services Ltd & 5 others [2014] eKLR, to submit that where a statute has been enacted to give effect to a constitutional right, a litigant ought to ground a cause of action not on the Constitution but on the legislation. Counsel to urged that this ground alone was sufficient for the suit to be dismissed.

As regards Section 89 of the Employment Act, reliance was placed on **Mugoh V Teachers Service Commission & another** [2024] KEELRC 2702 (KLR) for the proposition that where a claim was disguised as a Petition, the court must interrogate the reason why, to urge that no reason had been given in this case.

Finally, on abuse of the court process, counsel submitted that the Petitioners attempt to litigate a statute barred claim as a Petition was an abuse of the judicial process.

Reliance was place on **Ndirangu V Nyandarwa County Government & another** [2025] KEELRC 1911 (KLR) and **Elizabeth Mburu V Kenya Breweries Ltd** [2014] KEELRC 56 (KLR).

Analysis and determination

It is common ground that a Preliminary Objection is a threshold issue and ought to be disposed of at the earliest possible opportunity after it is raised because of its potential to terminate the suit at that juncture.

The *locus classicus* articulation of what constitutes a Preliminary Objection are the sentiments of Law JA and Sir Charles Newbold P in the often cited decision of the Court of Appeal in **Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd** [1969] EA 696 where Law JA stated:

“... so far as I am aware , a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

And to the same effect, Sir Charles Newbold P stated:

“...a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any has

to be ascertained or what is sought is the exercise of judicial discretion...”

Granted that the respondent is challenging the instant Petition on the ground of limitation of actions, which is essentially a jurisdictional issue, the court is satisfied that the respondent’s Notice of Preliminary Objection meets the threshold of a Preliminary Objection.

In addition, the respondent cites the doctrine of constitutional avoidance which suggest that the Petitioner had not exhausted statutory framework of dispute resolution before invoking the court’s constitutional jurisdiction.

As to whether the instant Petition offends the provisions of Section 90 of the Employment Act, it is trite that a Constitutional Petition is not is subject to limitation of time as its purpose is to remedy a serious violation of rights or fundamental freedoms and the Petitioner is required to lay all the circumstances before the court to enable it exercise discretion judicially.

See in this regard **Daniel Kibet Mutai V 9 others V Attorney General** [2019] eKLR, **Wellington Nzioka**

Kioko V Attorney General and James Kanyita Nderitu V Attorney General & another Petition No. 180 of 2011.

It behoves the court to determine whether the instant Petition raises a constitutional issue or violation of the Petitioner's right or fundamental freedom not capable of being remedied under the operative legal framework on employment law.

A detailed analysis of the instant Petition, Supporting Affidavit of and the annexures leaves no doubt that all the alleged infringements and reliefs sought are employment matters and no constitutional issues had been isolated.

Clearly, a declaration that a particular provision of the Constitution of Kenya has been violated or infringed or compensation or damages thereof for the violation or infringement does not necessary make the attendant issue constitutional is the case of the instant Petition.

In the court's considered view, all the alleged violations and reliefs ought to have been litigated as a claim and perhaps the only reason why the suit is styled as a

Petition is to circumvent the provisions of Section 89 of the Employment Act.

The foregoing is fortified by the sentiments of the Court of Appeal in **Luka Chebii Mitei V National Social Security Fund Board of Trustees** [2022] KECA 974 (KLR) thus:

“There is also some merit in the argument raised by the respondent that the action brought by the appellant was a normal claim disguised as a Constitutional Petition. The reliefs sought by the appellant in the Petition (namely reinstatement or payment of Kshs.3.7 million comprising service pay 3 month’s notice, unpaid salary increments, pension benefits and 12 months damages for unfair termination) are remedies that are only available under Section 49 of the Employment Act, and pursuant to the limitation period imposed under Section 90 of the Act...”

These sentiments apply on all fours to the circumstances of the instant Petition.

This Petition does not meet the test in **Anarita Karimi Njeri V Attorney General** [1979] KECA 12 (KLR).

Stripped off the legal jargon, what is before the court is an employment dispute between the Petitioner and the respondent regarding recovery of dues after reinstatement [2005 - 2014] and other dues arising from the contractual relationship between the parties. The allegation of discrimination is also covered by Sections 5 of the Employment Act.

The sole reason for filing the suit as a Petition appears to have been to outmanoeuvre the provision of Section 89 of the Employment, which provides that:

Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.

Juxtaposing of the facts as alleged by the Petitioner against the provisions of Section 89 of the Employment Act, it is clear that the Petitioner's suit against the

respondent may not have been statute barred when the Petition was filed.

The reason for the foregoing finding is this.

After reinstatement on 17th June 2014, the Petitioner alleges that she retired from service on 1st July 2022 and instituted the instant suit on 30th June 2025.

However, the Petitioner did not avail any verifiable evidence of her retirement.

The second ground cited by the respondent is the doctrine of constitutional avoidance which postulates that where it is possible to decide a case without reaching a constitutional issue that should be done as observed in **Gabriel Mutava & 2 others V Managing Director Kenya Ports Authority & another** [2016] eKLR **Communication Commission of Kenya & 5 others V Royal Media Services & 5 others** Petition No. 14, 14A, B & C 2014, **S V Mhlungu** [1995] (3) SA 867 (CC) and **Ashwander V Tenne Valley Authority** 297 US 288, 347 [1936] among others.

In **Summaya Athmani Hassan V Paul Masinde Simidi & another** (supra) the Court of Appeal held:

*“We adopt and uphold the general principle in the persuasive authority in Barbara De Klerk (supra) that where legislation has been enacted to give effect to a constitutional right it is not permissible for a litigant to found a cause of action directly on the Constitution without challenging the legislation in question. That principle has been reinforced by the Supreme Court in **Communication Commission Case** (supra).*

In conclusion, we find that the alleged interdiction and termination of a contract of employment was not a constitutional issue and thus the Petition did not disclose a cause of action on the Constitution”.

Similarly, in **Gabriel Mutava & 2 others V Managing Director Kenya Ports Authority & another** (supra) the court held:

“On this score again, the trial court was right in its holding. In this County we have all along had legislation governing employment, the latest being the Employment Act, 2007. When the appellants filed their Petitions the pre-2007 Employment Act was in force. It is on this Act that the appellants should have anchored their claim.

...The court is mandated further by the constitution and the act to resolve all employment disputes expeditiously and its procedures have been rendered less technical...

This was purely a labour dispute that could have been resolved by the application of the Employment Act as well as the Regulations...”

The court discouraged trivializing of constitutional litigation.

Similar sentiments were expressed in other decisions including **Daniel N. Mugendi V Kenyatta University & 3 others** [2013] eKLR, **SA Naptosa & others V Minister of Education Western Cape & others** [2001] BLLR 338, **Re Application by Bahadur** [1986] LRC (Const) 297 and **Speaker of the National Assembly V James Njenga Karume** [1992] eKLR.

See also **Communications Commission of Kenya & 5 Others V Royal Media Services Ltd & 5 others** [2014] KESC 53 (KLR).

Flowing from the foregoing it is clear that the Petitioner has not demonstrated any reason(s) as to why the instant suit, which is a plain vanilla employment dispute could not be litigated as a claim as no constitutional issue had been isolated and demonstrated as dictated by **Anaritas case** (supra).

However, having found that the Petitioner's suit may not be statute barred after all and striking out the suit could remove the Petitioner from the seat of Judgment, it is only fair that the suit be heard and determined on merits.

There shall be no Orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT
KISUMU ON THIS 13TH DAY OF NOVEMBER 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