

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. E185 OF 2025

ENG. ANTONY TAWAYI WAMUKOTA.....PETITIONER

-VERSUS-

KENYA ELECTRICITY TRANSMISSION

COMPANY LIMITED.....1ST RESPONDENT

BOARD OF DIRECTORS OF KENYA ELECTRICITY

TRANSMISSION COMPANY LIMITED.....2ND RESPONDENT

THE ACCOUNTING OFFICER/CHIEF EXECUTIVE

OFFICER OF KENYA ELECTRICITY TRANSMISSION

COMPANY LIMITED.....3RD RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 13th November, 2025)

RULING

1. The respondents filed the notice of preliminary objection dated 30.09.2025 through Mwaniki Gachoka & Co. Advocates upon the following grounds:

- (i) The petition dated 22.09.2025 and the application of even date
- (ii) filed under certificate of urgency are incurably defective, a sham and incapable of sustaining judicial consideration.
- (iii) The respondents are a public body and public officers respectively, within the meaning of section 2 of the Public Service Commission (PSC) Act, 2017. As such, the petitioner ought to have sought redress in the first instance, regarding his suspension, with the Public Service Commission pursuant to section 74(1), (2) and (5) of the PSC Act, as read with Regulation 8 of the PSC (State Corporations and Public Universities) (Disciplinary and Appeals Procedures) Regulations 2025 and Regulation 68 of the PSC Regulations, 2020.
- (iv) The jurisdiction of this Honourable Court has therefore been prematurely invoked in a blatant contravention of the doctrine of exhaustion by the petitioner's failure to pursue all obligatory remedies.

(v) Accordingly, the grounds for ousting the court's jurisdiction, as outlined above, have now acquired the status of settled law, affirmed by numerous decisions of both the Court of Appeal and this Court.

(vi) In the circumstances, the petition ought to be dismissed *in limine* with costs to the respondents.

2. In response, the petitioner filed the grounds of opposition dated 10.10.2025 through Sikuta & Associates Advocates. He opposed the respondents' preliminary objection upon the grounds as follows:

- i) The preliminary objection is an abuse of the court process, based on a misconception of the law and facts, but meant to fritter away judicial economy.
- ii) The preliminary objection is opposite to the petitioner's claim and/or suit, such that whereas the petitioner's claim stems from a wrongful, illegal and unconstitutional compulsory leave, the respondents are lost, gone off tangent and are addressing the issue of the petitioner's suspension,

which is not the case in the instant suit. Compulsory leave and suspension are completely different issues.

- iii) Even if it were a suspension, which is not the case, the petitioner holds that the compulsory leave meted out against him is unconstitutional, illegal, wrongful and has infringed and/or violated his right to fair administrative action as provided under Article 47 of the Constitution and the resultant Fair Administrative Action Act. As such, this Honourable Court is properly clothed with the requisite jurisdiction to determine the instant suit, as the Court has previously held in Wamukota v Kenya Electricity Transmission Company Limited & 2 others (Petition E213 of 2023) [2023] KEELRC 3068 (KLR) (30 November 2023) (Ruling) that, *“If a party has to establish alleged constitutional violations entailing interpretation and application of the constitutional provisions, then the BEST way to approach the Court would be by a constitutional petition as was done in the instant suit.”*

- iv) Since compulsory leave is not provided anywhere in the respondents' Human Resource Manual, the only applicable law in the instant case would be the PSC Regulations, 2020 and which the respondents have violated by sending the petitioner on a three-month compulsory leave as opposed to the maximum 30 days. Regulation 62 provides that, *“The authorised officer of a public body may, with the written approval of the Commission, send on compulsory leave for a period not exceeding thirty working days a public officer in a public body in which an investigation is being conducted, where it is feared that the officer may influence or interfere with the investigation. (2) The authorised officer shall notify in writing the officer being sent on compulsory leave of the reasons for the decision and the duration of the compulsory leave. An officer on compulsory leave shall be entitled to full pay and benefits. (3) Compulsory leave shall not be counted as part of an officer's annual leave.”*
- v) The petitioner alleges violation of his constitutional right to fair administrative action, fair hearing and fair labour

practices, among others, to which the PSC is not a sufficient forum to resolve, as the dispute involves interpretation of the Constitution. Under Article 23(1) and Article 165(5) of the Constitution, this Honourable Court, and not the PSC, has jurisdiction to interpret the Constitution in respect of matters related to Employment and Labour Relations in Kenya.

- vi) Pursuant to Articles 22, 162(2) and 165(5)(b) of the Constitution, this Honourable Court enjoys the exclusive original jurisdiction to hear and determine the instant petition.
- vii) The Honourable Court is properly clothed with Jurisdiction to intervene in an administrative procedure where it is established that the procedure relied on by the employer offends fairness, or due process by not upholding the rules of natural justice, or if the procedure is in breach of the employer's human resources and procedures policy, as is in the instant case.

- viii) In a case where an administrative action is meted against an employee, like in the present case, and the employee feels that the process is marred with irregularities or stage-managed towards their dismissal, the Court will intervene not to stop the process altogether but to put things right.
- ix) The unconstitutional compulsory leave offends the provisions of Article 201(d) on principles of public finance, which provides that, “*Public money shall be used in a prudent and responsible way.*” Sending the petitioner on an unlawful compulsory leave of three months on full pay is nothing but imprudent spending of public money, hence unconstitutional.
- x) It is now trite law that the Court would intervene in an employer’s administrative process where:
- a) An employee establishes that the employer is proceeding in a manner that contravenes the provisions of the Constitution or legislation; or
 - b) The employer is in breach of the employer’s human resource policy; or

- c) If the process is manifestly unfair and offends the rules of natural justice.
- xi) This Honourable Court is clothed with the requisite jurisdiction to hear and determine the application and petition as both raise issues that fall within the ambit of the Employment & Labour Relations Court (ELRC) as stipulated under section 12 (1) and (3) of the Employment & Labour Relations Court Act, No. 20 of 2011.
- xii) The compulsory leave meted against the petitioner was unprocedural, illegal, irregular, unlawful, unconstitutional and offends his right to fair labour practices, fair administrative action and fair hearing as set out under Articles 41, 47 and 50 of the Constitution respectively, hence the compulsory leave remains a nullity and void *ab initio*.
- xiii) The US Supreme Court in **Norton v. Shelby County, 118 U.S. 425 (1886)** held that an unconstitutional decision is not a law, it confers no rights, it imposes no duties, it affords no

protection, creates no office and it is in legal contemplation as inoperative as though it had never been passed.

3. The parties filed their respective submissions. The Court has considered the parties' respective positions and returns as follows:

- a) To answer the **1st issue**, it appears to the Court that the preliminary point is not based upon a pleaded fact that is not disputed as is settled trite law, in that regards. As was submitted for the respondents, in **Mukhisa Biscuits Manufacturing Co. Limited –Versus- West End Distributors (1969) E.A 696**, a proper preliminary objection must raise a pure point of law which is argued on the assumption that all the facts pleaded by the other party are correct and cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. As urged for the petitioner, the respondents at paragraph 2 of the notice of preliminary objection alleged that the petitioner's case is regarding his suspension but a fact the petitioner denies as not pleaded. The petitioner urges that his case is about a compulsory leave as imposed

by letter dated 19.09.2025. The Court has perused the record and indeed the petitioner has not pleaded about a suspension but a compulsory leave as submitted by Counsel for the petitioner. The preliminary objection should collapse upon that finding.

b) The 2nd **issue** is whether, even if the dispute is about the compulsory leave, the petition should fail because the petitioner has not complied with section 74 of the Public Service Commission Act, 2017. The section on appeals states as follows:

(1) Any person who is dissatisfied or affected by a decision made by an authorized officer or other authority in exercise or purported exercise of disciplinary control against any public officer under this Act may appeal to the Commission.

(2) An appeal under subsection (1) shall be made in writing within ninety days from the date of the decision appealed against: Provided that the Commission may consider an

appeal that was made out of time if, in the opinion of the Commission, the circumstances warrant such consideration.

(3)The Commission shall not entertain an appeal by a public officer or a representative of a public officer, in respect of a particular decision, more than once.

(4)Despite the right of appeal conferred on a public officer by this section, disciplinary action shall not be deferred or suspended pending the determination of the appeal.

(5)After considering an appeal, the Commission may—

(a)uphold the decision;

(b)set the decision aside;

(c)vary the decision as it considers to be just;

(d)give such directions as it may consider appropriate with respect to the decision;

(e)direct the refund, reinstatement of remuneration or release of any withheld payments due to the public officer as it considers to be just;

(f)direct that disciplinary action be taken against any public officer who has failed to discharge a duty that was the public officer's responsibility to perform in relation to the disciplinary case and the concerned public body has suffered a loss; or

(g)make any other appropriate decision in view of the circumstances of the case.

(6)Where the Commission sets aside a decision under subsection (5) (b), the public officer shall revert to the previous status held and receive the attendant benefits as though the decision set aside was never made.

c) It is submitted for the respondents that Regulation 8 of the Public Service Commission (State Corporations and Public Universities) (Disciplinary Appeals Procedures) Regulations, 2025 provides as follows:

(1)A person who is dissatisfied with the disciplinary control decision of a state corporation or public university may appeal to the Commission against that decision.

(2)A person who wishes to appeal against the disciplinary control decision of a state corporation or public university shall only do so after exhausting the internal processes of the state corporation or public university.

d) It is submitted for the respondents that the applicant has failed to comply with the said section 74 and regulation 8 so that the Court's jurisdiction is being invoked prematurely.

e) For the petitioner it is submitted that he had already been taken through a disciplinary process by the 2nd respondent about the same impugned tender process and he was absolved as not culpable. Thus the compulsory leave imposed for three months effective 19.09.2025 as against the petitioner is unfair, unlawful and unconstitutional. It is also urged that in any event a compulsory leave is capped at 30 working days as provided under regulation 62 of legal notice No.3 of 2020, legal notice No.3 of 2020 which provides as follows:

1) The authorised officer of a public body may, with the written approval of the Commission, send on compulsory

leave for a period not exceeding thirty working days a public officer in a public body in which an investigation is being conducted, Where it is feared that the officer may influence or interfere with the investigation.

(2) The authorised officer shall notify in writing the officer being sent on compulsory leave of the reasons for the decision and the duration of the compulsory leave.

(3) An officer on compulsory leave shall be entitled to full pay and benefits.

(4) Compulsory leave shall not be counted as part of an officer's annual leave.

The Court observes that the regulation is under Part IX on Disciplinary Control.

f) It is submitted for the petitioner that the 2nd respondent is circumventing its own decision exculpating the petitioner from any wrong doing with respect to the allegations levelled or subject of the investigation referred to in the letter of compulsory leave.

g) It is further submitted for the petitioner that the Public Service Commission in exercise of the appellate jurisdiction lacks and is not vested with the jurisdiction to determine whether the compulsory leave is lawfully and constitutionally imposed or not. It is urged that such jurisdiction is vested in the Court.

h) The Court has considered the parties' submissions. The Court finds that the compulsory leave as imposed is a decision made in the disciplinary process. The petitioner says that he is challenging the compulsory leave because it is for a term beyond the permissible period and that it is with respect to matters for which he has already been exculpated. The compulsory leave was imposed on 19.09.2025 to lapse on or about 19.12.2025. The petitioner had alongside filed the petition with an application dated 22.09.2025 seeking protective interim orders with respect to the impugned compulsory leave. Without answering the petition and the application substantively, the respondents filed the instant preliminary objection. The Court finds that

want of exhausting the statutory appellate process would not in any event bar the petitioner from questioning the legality and constitutionality of the manner the alleged investigations and their purpose and as justifying the impugned compulsory leave.

i) Thus, Rule 56 (5) on alternative dispute resolution (ADR) of the ELRC (Procedure) Rules provides as follows:

(5)Where the Constitution, a written law, collective bargaining agreement, contract of service, policy, or other instrument provides for alternative dispute resolution mechanisms—

(a)a person being party to a dispute may file a suit and seek appropriate interlocutory relief pending exhaustion of such alternative dispute resolution mechanisms or pending determination of the suit;

(b)want of exhaustion of such alternative dispute resolution mechanisms shall not operate as a bar to a suit for application for interim orders or alleging unconstitutionality

or unlawfulness of the action, omission, decision or other matter in dispute pending such exhaustion; and,

(c) a suit filed prior to exhaustion of such alternative dispute resolution mechanisms may be stayed and not struck out on account of such exhaustion.

j) It therefore appears to the Court that the existence of an appellate statutory procedure did not operate as a bar to the petitioner seeking an interim order in terms of the pending application or even as a bar to the petition alleging that impugned compulsory leave and the manner it has been imposed was unconstitutional and unlawful.

k) Accordingly, in the circumstances of the petition and application, the petition and the application are not barred for want of exhaustion of the appellate statutory procedure.

While making the finding, the Court has considered its judgment in **Kubasu –versus- Kenya Electricity Transmission Company Limited and 2 others (petition E143 of 2024) (2024) KEELRC 13243 (KLR)** where the Court stated thus, “....The Court has reproduced the

pleadings and the case as urged for the petitioner. The Court has as well reproduced the reliefs. As urged for the respondents, the claim is for unfair summary dismissal with attendant reliefs and nothing more. The mere enumeration of the provisions of the Bill of Rights and the Constitution without pleaded particulars of threatened or actual constitutional violations and failing to provide required evidence to establish the same makes the petition chained with the doctrine of constitutional avoidance. As submitted for the respondents the petitioner fails to plead by setting out with reasonable degree of precision that which the petitioner complains, the provision of the Constitution said to be infringed, and the manner the provisions are said to be infringed as was held in **Anarita Karimi Njeru –Versus- Republic (1979) eKLR**. The Court finds that the instant petition provides little or no particulars as to the allegations of the violation or threatened violation of the enumerated provisions of the Bill of Rights. The submissions made for the respondents are upheld in that regard and the claim as

pleaded is truly and falls as an ordinary action for alleged unfair summary dismissal.” The ground for objection in the instant case is different and the findings were in the final judgment and the court found that the petitioner therein ought to appeal to the Commission per the statutory appellate procedure. The Court further found that the petition therein had been trapped by the doctrine of constitutional avoidance. Those are circumstances which are completely different from the instant dispute where the petitioner has as well alleged double jeopardy.

In conclusion, the preliminary objection is hereby dismissed with costs in the cause and parties to take directions for the expeditious determination of the pending application and the main petition.

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

**BYRAM ONGAYA
PRINCIPAL JUDGE**