

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. E390 OF 2024

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS OR
FUNDAMENTAL FREEDOMS UNDER ARTICLES 27,40,41,43, AND 47 OF THE
CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF SECTION 6 OF THE PENSIONS ACT, CAP 189, LAWS OF KENYA

AND

**IN THE MATTER OF RULE 181 (2) TEACHERS SERVICE COMMISSION CODE OF
REGULATIONS FOR TEACHERS, 2015**

BETWEEN

SUSAN

WANJIKU

KABUI.....PETITIONER

VERSUS

TEACHERS SERVICE COMMISSION.....1STRESPONDENT

DIRECTOR OF

PENSIONS.....2NDRESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

INTRODUCTION AND BACKGROUND

1. This Judgment resolves a Constitutional Petition that strikes at the heart of a long-standing and contentious principle in public service: the forfeiture of pension benefits upon dismissal from service. The Petitioner, Susan Wanjiku Kabui, a teacher who served the 1st Respondent for twenty-seven years before her dismissal, mounts a formidable challenge against Section 6 of the Pensions Act, Cap 189, and Regulation 181(2) of the Teachers Service Commission Code of Regulations for Teachers, 2015. She contends that these provisions, in automatically stripping a dismissed employee of all pension claims, operate as a draconian penalty that violates the constitutional rights, particularly the right to property, fair administrative action, and social security.
2. The Petitioner therefore seeks the following reliefs from this court:
 - a. *A declaration that the interpretation and application of Section 6 of the Pensions Act, Cap 189 Laws of Kenya and rule 181 (2) of the Teachers Service Commission Code of Regulations for Teachers, 2015, in denying pension benefits to the Petitioner, is unconstitutional and invalid.*
 - b. *A declaration that the Petitioner herein is entitled to her pension benefits under the Constitution of Kenya, 2010.*
 - c. *An order directing the 1st and 2nd Respondents to compute, declare and file in court an account of the Petitioner's pension or such other due compensation under the Pensions Act, Chapter 189 and file such computation in court.*
 - d. *An order directing the 2nd Respondent to henceforth pay the dues computed above and in failing, the said sum to earn interest at court rates until payment in full.*

- e. The 1st Respondent to pay the Petitioner the costs of this petition.*
 - f. Any other relief that this Honourable Court may deem just and fit to grant.*
- 3. The factual substratum upon which this legal battle is fought is not a matter of significant dispute. The Petitioner was registered as a teacher by the 1st Respondent under TSC No. 303610 and commenced her employment on the 1st of May 1990. For over a quarter of a century, she served in the public teaching service, during which period monthly deductions were made from her salary towards her pension, with matching contributions from her employer, as mandated by the governing regulations.
- 4. This long-standing service relationship was severed on the 13th of September 2017, when the 1st Respondent issued a letter of dismissal. The stated reason for this dismissal was desertion of duty, specifically, the Petitioner's failure to report back to her station at Amboni Primary School after a period of annual leave. It is crucial to underscore that the Petitioner, in these proceedings, does not contest the validity, fairness, or procedural propriety of this dismissal. Her grievance is not with the act of dismissal per se, but with its consequences.
- 5. The crystallizing event for this Petition occurred years later. On the 27th of February 2024, the Petitioner, through a letter, formally requested the 1st Respondent to process and remit her pension benefits. The 1st Respondent, in its response dated the 19th of June 2024, issued a definitive refusal. This refusal was explicitly predicated on the combined operation of Section 6 of the Pensions Act and Regulation 181(2) of the Code of Regulations for Teachers (CORT), which mandate the forfeiture of pension claims by a dismissed officer.

It is this legal edifice, and its application to her, that the Petitioner now asks this Court to dismantle on constitutional grounds.

THE PETITIONER'S CASE

6. The Petitioner's case, as articulated in her Petition and Supporting Affidavit, is founded on the assertion that her pension rights had crystallized into a protected proprietary interest. She avers that upon attaining the age of fifty years and completing over ten years of pensionable service, she met the eligibility criteria for pension, and this right became absolute and indefeasible.
7. She contends that the automatic forfeiture of this accrued right under Regulation 181(2) of the CORT constitutes an arbitrary deprivation of property, violating Article 40 of the Constitution. She further argues that this forfeiture, applied without any individualized assessment or proportionality analysis, offends the principles of natural justice and the right to fair administrative action under Article 47.
8. A central argument advanced by the Petitioner is the alleged internal contradiction within the Pensions Act. She posits that Section 5(1), which grants an "absolute right to pension and gratuity," is rendered nugatory by Section 6 and Regulation 181(2), which restrict this right only to those who retire. This, she argues, creates a discriminatory and unjust situation, as it deprives her of the right to social security and economic dignity, despite her years of service and contributions to the pension scheme.
9. Additionally, the Petitioner pleads violations of her right to fair labour practices under Article 41 and her right to social security under Article 43. She

frames the denial of her pension as a denial of the economic security she laboured for over three decades to secure.

THE 1ST RESPONDENT'S CASE

10. The 1st Respondent, the Teachers Service Commission, has opposed the Petition through its Grounds of Opposition and Replying Affidavit sworn by Christine Odhiambo Ogony on 9th September. It is contended that the Petition is founded on a misinterpretation of Section 6 of the Pensions Act and Regulation 181(2) of the CORT, and therefore discloses no justiciable cause of action. It is averred that these provisions expressly bar dismissed officers from receiving pension benefits. The Respondent contends that the Petitioner's denial of pension was a lawful consequence of her dismissal.
11. Further, it is averred that Section 6 of the Pensions Act and Regulation 181(2) of the CORT enjoy a presumption of constitutionality. It is further stated that Section 5(1) of the Act does not contradict these provisions, as it is expressly subject to lawful limitations contained in Section 6. The Petitioner is said to have failed to discharge the burden under Article 24(3) to show any constitutional violation.
12. It is also asserted that legitimate expectation cannot arise where the law expressly bars pension entitlement for dismissed officers. It is emphasized that pension is not an absolute right but a privilege earned upon honourable retirement. The Respondent therefore prays that the Petition be dismissed as the dismissal was lawful and fully compliant with constitutional and statutory requirements.

13. On its grounds of opposition, it is argued that the Petition is contrary to the binding employment contract and the Code of Regulations for Teachers, which govern the parties' relationship. Regulation 82 of the CORT is cited as expressly providing that a dismissed teacher forfeits all pension claims. The Respondent maintains that the Petitioner falls within this category and cannot now seek benefits denied by contract and law.
14. It is further asserted that Sections 5 and 6 of the Pensions Act do not support the Petitioner's claim. While Section 5 confers a general pension right, subsection (2) affirms the Government's power to dismiss without compensation, and Section 6 outlines qualifying circumstances that exclude dismissed employees. It is argued that any right under Section 5 is lawfully limited under Section 5 (2) in accordance with Article 24 of the Constitution.
15. It is the 1st Respondent's case that pension is not an inherent or constitutional entitlement but arises only upon lawful retirement and in compliance with statutory provisions. Both the Pensions Act and the Code of Regulations for Teachers prohibit payment of pension to dismissed employees, leaving the Petitioner with no proprietary claim. The Respondent therefore prays that the Petition be dismissed with costs.

THE 2ND AND 3RD RESPONDENTS' CASE

16. The 2nd and 3rd Respondents filed Grounds of Opposition but did not file separate submissions. Their position aligns with that of the 1st Respondent. They affirm that the Petitioner, having been lawfully dismissed, is statutorily barred from claiming pension under Regulation 181(2) of the CORT and Section 6 of the Pensions Act. They emphasize that retirement is a *conditio*

sine qua non for pension eligibility and that the Petitioner has not demonstrated any violation of her constitutional rights.

17. The Petition was canvassed by way of written submissions and non-compliance; the parties filed their respective written submissions.

THE PETITIONER'S SUBMISSIONS

18. In her written submissions, the Petitioner crystallized her arguments around three main issues. First, on whether she qualified for pension benefits, she submitted that under Section 5(3) of the Pensions Act, benefits vest after ten years of pensionable service. Having served for twenty-seven years and attained the age of fifty-one, she argued that her right had not only vested but had crystallized into a property right protected under Article 40 of the Constitution.
19. Second, on the infringement of her rights, she submitted that the impugned provisions operate to arbitrarily deprive her of this vested property right without due process or compensation. She reiterated that the automatic and blanket nature of the forfeiture under Regulation 181(2) is antithetical to fair administrative action under Article 47. She further submitted that the differentiation between retirees and dismissed employees is discriminatory and violates Article 27. Reliance was placed on the decision in ***Coalition for Reforms and Democracy (CORD) v Attorney General; International Institute for Legislative Affairs & Katiba Institute (Interested Parties) [2019] KEHC 10892 (KLR)*** to buttress her arguments on infringement of her constitutional rights particularly under Article 40 of the Constitution.

20. Third, on the reliefs sought, the Petitioner urged the Court to find that she was duly qualified for pension and to grant the orders directing the computation and payment of her benefits, together with costs.

THE 1ST RESPONDENT'S SUBMISSIONS

21. The 1st Respondent's submissions were comprehensive and structured. On the preliminary issues, it submitted that the Court should down its tools as the Petition was filed outside the statutory limitation period and, in any event, this Court lacked jurisdiction in favour of the Employment and Labour Relations Court. Reliance was placed on the decisions in ***Clement Ernest Murengo v Principal Secretary Treasury & another [2016] eKLR*** and ***Nairobi Industrial Court Petition No. 19 of 2014: John Miriti Mbarire v A.G*** to support their arguments. Further reliance was placed on the decision in ***James Muriithi Ng'otho & 4 Others v Judicial Service Commission (2012)*** to buttress the point that limitation is a jurisdictional issue that cannot be cured by Article 159 of the Constitution.

22. It was further submitted that the ELRC has the jurisdiction to entertain the instant dispute and not this court and relied on ***Kenya Tea Growers Association & 2 others v The National Social Security Fund Board of Trustees & 13 others [2024] KESC 3 (KLR)*** to buttress this position.

23. On the merits, the 1st Respondent submitted that the Petitioner was not entitled to pension benefits. It argued that the Petitioner's position that Section 6 of the Pensions Act and Regulation 181 (2) of the CORT contradict Section 5 (1) of the Pensions Act is misleading. It is argued that Section 5(1) and Section 6 are not in conflict but operate in a complementary manner.

24. Further it was submitted that pension is not a gratuity or unconditional entitlement, but a statutory benefit subject to compliance with governing provisions. It was argued that an employee can only assert a proprietary interest in pension once he or she has attained eligibility criteria under the law and when the payment under the benefit has crystallized. It relied on ***Kenneth Njoroge Gitau v Attorney General & another [2012] eKLR*** in support of the above arguments.
25. On Constitutionality of Section 6 of the Pensions Act and Regulation 181 (2) of the CORT, it was submitted that this Court lacks jurisdiction to declare an “interpretation” of a statute or a regulation unconstitutional since all statutes enacted under the authority of Parliament enjoyed the constitutional doctrine of presumption of constitutionality/legality of statutes. It relied on the decisions in ***Susan Wambui Kaguru & 4 others v Attorney General & Another [2012] KEHC 551 (KLR)***, ***Ndyanabo v Attorney General (2001) 2 EA 485*** and ***Kamau & 35 others v Commissioner General, Kenya Revenue Authority & another [2022] KEHC 10284 (KLR)*** in support of its arguments.
26. On the constitutional violations, it was submitted that the limitation imposed by the law was reasonable and justifiable under law. It applied uniformly to all dismissed officers and served the legitimate purpose of upholding discipline and accountability in public service. It further submitted that the Petitioner had not rebutted the presumption of constitutionality enjoyed by all legislation.

THE 2ND AND 3RD RESPONDENTS’ SUBMISSIONS

27. The 2nd and 3rd Respondents did not file separate written submissions. Their legal stance is encapsulated in their Grounds of Opposition, wherein they adopted the arguments advanced by the 1st Respondent on the applicability of the Pensions Act and the COURT, and the lack of merit in the constitutional challenge.

ANALYSIS AND DETERMINATION

28. A distillation of the parties' pleadings and submissions reveals the following issues as central to the resolution of this dispute:

- a. Whether this Petition is statute-barred by dint of Section 90 of the Employment Act, 2007.**
- b. Whether this Court possesses the requisite subject-matter jurisdiction to hear and determine this Petition.**
- c. Whether Section 6 of the Pensions Act and Regulation 181(2) of the Teachers Service Commission Code of Regulations for Teachers are inconsistent with the Constitution and therefore invalid, for purportedly violating:**
 - i. The right to property under Article 40;*
 - ii. The right to fair administrative action under Article 47;*
 - iii. The right to equality and freedom from discrimination under Article 27;*
 - iv. The right to fair labour practices under Article 41; and*
 - v. The right to social security under Article 43.*

29. With the preliminary objection on limitation and jurisdiction having been determined, the Court now turns to the substantive constitutional questions at the heart of this Petition. The Petitioner's case requires this Court to undertake a meticulous and layered constitutional analysis, examining each alleged violation of fundamental rights against the specific provisions of the Pensions Act and the Teachers Service Commission Code of Regulations.

Whether the Impugned Provisions Violate the Right to Property under Article 40

30. The Petitioner's most compelling argument is that the forfeiture of her pension constitutes an arbitrary deprivation of property, protected under Article 40 of the Constitution. This argument hinges on the characterization of her pension entitlement as a "vested right" that had crystallized after twenty-seven years of service and her attainment of the age of fifty. To assess this, the Court must engage in a nuanced dissection of the nature of pension rights within a statutory public service scheme.

31. It is imperative to distinguish between a mere expectancy and a vested, enforceable right. The Petitioner's contention finds superficial support in the broad language of Section 5(1) of the Pensions Act, which states that "every officer shall have an absolute right to pension and gratuity." However, this provision cannot be read in isolation. The entire architecture of the Pensions Act reveals a more complex scheme. Section 6 of the same Act acts as the operative provision, meticulously outlining the specific circumstances under which this "absolute right" becomes payable. These circumstances are exclusively modes of retirement or other specific exits like abolition of office

or medical incapacity. Dismissal for misconduct is conspicuously absent from this list.

32. The Court of Appeal, in the binding precedent of ***Teachers Service Commission v Henry Kamau Ngare & another [2020] KECA 217 (KLR)***, addressed this very point with definitive clarity. The court held that " *Clearly, under that regulation, retirement is an indispensable condition for eligibility for pension. It is a sine qua non or conditio sine qua non for eligibility for pension.*"
33. This legal principle establishes that the completion of years of service and the attainment of a certain age is necessary, but not sufficient, conditions. The sufficient condition is a lawful exit via one of the pathways prescribed in Section 6. Until this event occurs, the right to draw the pension remains contingent and inchoate. It is an accrued *expectancy*, not a right in possession.
34. The Petitioner's reliance on the Supreme Court decision in ***Coalition for Reforms and Democracy (CORD) v Attorney General & 2 others (supra)*** is, with respect, contextually misplaced. The CORD case concerned the protection of benefits for individuals who had already retired, that is, individuals who had met the condition precedent in Section 6 and for whom the pension had transitioned from an expectancy to a crystallized, payable asset. The Supreme Court's robust protection of pension as "property" was articulated in that specific context. It does not extend to an employee who, like the Petitioner, was dismissed before fulfilling the statutory condition for payment. Her contributions, while creating a compelling moral claim, did not, in the eyes of the law as it currently stands, transmute into a proprietary interest protected by Article 40 at the point of dismissal.

35. Consequently, the Respondent's act of applying the forfeiture clause was not a "deprivation" of property, but the application of a pre-existing statutory consequence to a contingent interest that never matured.

Whether the Impugned Provisions Violate the Right to Fair Administrative Action under Article 47

36. The Petitioner argues that the automatic forfeiture of her pension, without an individualized assessment, constitutes unfair administrative action. Article 47 guarantees the right to administrative action that is lawful, reasonable, and procedurally fair. The central question here is whether the Respondent's decision was administrative action in the sense contemplated by the Article and, if so, whether it met the required standard.

37. The Respondent's decision was not an exercise of broad discretion. It was a ministerial act, a direct application of the clear and unambiguous mandate of Regulation 181(2) of the CORT, which states without equivocation that "a teacher who is dismissed from service shall forfeit all claims that relate to pension and gratuities." Where a public officer's duty is defined by a specific statutory command, compliance with that command cannot be said to be unreasonable or procedurally unfair. The fairness was embedded in the disciplinary process that led to the dismissal itself, a process the Petitioner accepted.

38. This court will rely on the decision of the Court in ***Otieno v Teachers Service Commission [2024] KEELRC 1630 (KLR)*** wherein the court, while handling a similar matter, stated as follows;

'On payment of gratuity and Pension pay, the Respondent submitted that since the claimant was dismissed lawfully, he is not entitled to any pension as provided for under Section 5(2) and 6 of the Pensions Act as read with Regulations 160(2) and 181(2) of the Code of Regulations for Teachers (CORT), 2015. To support this, they relied on the case of Teachers Service Commission V Henry Kamau Ngari & Another [2020] ekr, where the Court held that;- "The case of Abdul Majid Cocker vs. Director of Pensions on which the learned Judge relied does not aid Mr.

Ngari's cause in our view. In that case the Court was clear that a "person who is eligible for pension" cannot be deprived of it. In the circumstances of the present case, and as already stated, Mr. Ngari was not eligible for pension given the circumstances under which he left teaching service. There is merit therefore in the complaint by TSC that the Judge erred in holding that Mr. Ngari was eligible for pension."Accordingly, that the claimant is bound by all laws including the law seeking for forfeiture of pension on dismissal. In any case that the claimant did not object to any laws on employment, therefore he is stopped from alleging that any section of the law is unconstitutional.

39. The subsequent application of the pension forfeiture was a fixed, legal consequence, not a fresh administrative decision requiring a new layer of procedural safeguards. To require an additional hearing on the application of a clear statutory rule would be to elevate form over substance and introduce

inefficiency into the administrative process. Therefore, the Court finds no violation of Article 47.

Whether the Impugned Provisions Violate the Right to Equality and Freedom from Discrimination under Article 27

40. The Petitioner contends that treating dismissed employees differently from retired employees amounts to unfair discrimination. The test for a violation of Article 27, as elucidated in cases such as ***SBM & another v Attorney General [2022] KEHC 13920 (KLR)***, involves establishing a differentiation based on a specified or unspecified ground and demonstrating that the differentiation is not fair or is not rationally connected to a legitimate purpose. While quoting the celebrated case of ***Harksen v Lane NO [1997] ZACC 12; 1998 (1) SA 300(CC); 1997(11) BCLR 1489(CC)***, the court had the following to say;

“Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:

i. Firstly, does the differentiation amount to ‘discrimination? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

ii. If the differentiation amounts to ‘discrimination’, does it amount to ‘unfair discrimination’? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness

will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).“Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.”

41. The differentiation in this case is based on the mode of exit from public service. This is an objective and relevant criterion, not one rooted in immutable personal characteristics or prejudice. The state has a compelling and legitimate interest in maintaining discipline, integrity, and accountability within its public service. The teaching service, in particular, demands the highest standards of conduct and reliability. The forfeiture clause in Regulation 181(2) serves as a significant deterrent against gross misconduct and upholds the principle that public office is a trust. It creates a consequential distinction between an officer who fulfills their contract until honourable retirement and one whose service is terminated for a fundamental breach of duty.

42. This distinction is rationally connected to the legitimate aim of preserving the integrity of the public service. To equate the two categories for pension purposes would, in effect, nullify the disciplinary consequence of dismissal in relation to pension benefits and could undermine the very fabric of accountability. The differentiation, while creating a harsh outcome for the Petitioner, is based on an intelligible differential and has a rational nexus with

a legitimate state objective. It therefore does not constitute unfair discrimination under Article 27.

Whether the Impugned Provisions Violate the Rights to Fair Labour Practices and Social Security under Articles 41 and 43

43. The Petitioner further invoked her right to fair labour practices under Article 41 and her right to social security under Article 43. There is no doubt that these rights are fundamental. However, the Constitution itself, in Article 24, acknowledges that rights and fundamental freedoms are not absolute and may be limited by law, provided the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.

44. The limitation imposed by Section 6 of the Pensions Act and Regulation 181(2) of the CORT is prescribed by law. Its purpose, to uphold discipline and deter serious misconduct in the public service, is legitimate and of considerable importance. The critical question is one of proportionality. Is the limitation proportionate to its purpose? The Petitioner's dismissal was for desertion of duty, a serious act of misconduct that represents a clear abdication of her professional responsibilities. The consequence of total forfeiture of pension is undoubtedly severe.

45. However, the law has drawn a bright line: dismissal for misconduct leads to forfeiture. This bright-line rule, while harsh in its application, serves the important public interest of maintaining a clear and predictable disciplinary framework. It is a long-standing legislative policy choice that reflects a balance between protecting employees' future security and safeguarding the public

interest in a responsible civil service. The Petitioner has not demonstrated that this specific limitation is so grossly disproportionate that it fails the test of justifiability under Article 24.

The Presumption of Constitutionality and the Burden of Proof

46. Underpinning the entire analysis is the fundamental principle of the presumption of constitutionality of legislation. As articulated by the Court of Appeal of Tanzania in ***Ndyanabo v Attorney General (supra)***, a decision consistently followed in Kenyan Courts, every statute is presumed constitutional until the contrary is proved. The burden rests heavily on the petitioner to rebut this presumption.

47. In this case, while the Petitioner has raised genuine and weighty concerns about the justice of the outcome in her specific situation, she has not discharged the heavy burden of demonstrating that the impugned provisions are in themselves so devoid of a rational basis, so arbitrary, or so grossly disproportionate as to be manifestly unconstitutional.

48. The provisions represent a clear, if severe, legislative policy that has been part of the legal framework governing public service for decades. The Court's role is not to substitute its own policy judgment for that of the legislature, but only to intervene where a clear constitutional transgression is shown. That threshold has not been met here.

49. This case presents a profound human tragedy. The Petitioner dedicated twenty-seven years of her life to the public teaching service, only to see her expectation of a pension extinguished following her dismissal. The Court is not insensible to the severe hardship this entails. However, the constitutional

jurisdiction of this Court is triggered by a violation of the law, not by sympathy for a party's predicament.

50. After a thorough, issue-by-issue analysis of the Petitioner's constitutional claims, the Court finds that the legal framework established by Section 6 of the Pensions Act and Regulation 181(2) of the CORT, while producing a stern outcome, operates within the bounds of the Constitution. The Petitioner's right to property was not violated as the pension had not crystallized; the administrative action was an application of a clear law; the differentiation between retirees and dismissed employees is rational and non-discriminatory; and the limitations on her rights to fair labour practices and social security are justifiable in an open and democratic society.

51. Accordingly, for these detailed and cumulative reasons, this court finds that the Petition dated 5th August, 2024 fails on its merits and is hereby dismissed in its entirety with no orders as to costs.

Orders accordingly. File closed accordingly

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20TH DAY OF NOVEMBER
2025.**

BAHATI MWAMUYE MBS

JUDGE

In the presence of: -

Counsel for the Petitioner – Mr. Gichuki Nderitu

Counsel for the 1st Respondent – Mr. Jusa hb Mr. Anyuor

Counsel for the 2nd and 3rd Respondent – Ms. Opio

Court Assistant – Ms. Lwambia