

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT NAIROBI

ELRC PETITION NO. E148 OF 2025
(Before Hon. Lady Justice Hellen Wasilwa, J)

JOSIAH WAFULA
BARASA.....PETITIONER

VS

PRINCIPAL SECRETARY
MINISTRY OF DEFENCE.....1ST
RESPONDENT

THE HON ATTORNEY GENERAL.....2ND
RESPONDENT

ABSA BANK OF KENYA LTD.....3RD
RESPONDENT

RULING

1 The Petitioner/Applicant filed a Notice of Motion dated 15th July 2025 seeking orders **THAT**: -

1. spent
2. *pending the hearing and determination of this Application inter-partes, this Honourable Court be pleased to issue an interim conservatory order restraining the 3rd Respondent, whether by itself, its agents, servants or employees, from appropriating, attaching, offsetting, withholding, deducting or in any way dealing with the Petitioner's pension funds credited into his bank account for the purposes of recovering any outstanding loan amounts.*

3. *pending the hearing and determination of the Petition herein, this Honourable Court be pleased to issue a conservatory order restraining the 3rd Respondent from appropriating, attaching, offsetting, withholding, deducting or in any way utilizing the Petitioner's pension funds to recover the outstanding loans, and to maintain the status quo.*
4. *pending the final determination of the Petition herein, this Honourable Court be pleased to issue an Order restraining the 3rd Respondent from registering the Petitioner as a loan defaulter with any credit reference bureau (CRB) in relation to the said loans while the insurance claim remains unsettled.*
5. *the Honourable Court be pleased to direct the 3rd Respondent to preserve the Petitioner's pension funds credited in his account and not to deal with the same in any manner prejudicial to the Applicant until the final determination of this Petition.*
6. *the costs of this Application be provided for.*
7. *this Honourable Court be pleased to issue any other order it deems just, fair and expedient in the circumstances.*

Petitioner/Applicant's Case

- 2 It is the Petitioner's case that he has a valid and meritorious petition disclosing serious constitutional violations by the Respondents.

- 3 The Petitioner avers that he has been medically discharged from the Kenya Defence Forces and is entitled to full pension and disability benefits.
- 4 The Petitioner avers that the loan facilities he took from the 3rd Respondent were covered under valid loan protection insurance policies meant to discharge the outstanding obligations in the event of permanent disability.
- 5 It is the Petitioner's case that the 1st Respondent has failed, refused and/or neglected to issue an official letter confirming his discharge on medical grounds despite numerous requests, thereby preventing the processing of the insurance claim.
- 6 The Petitioner avers that the 3rd Respondent intends and threatens to unlawfully attach or offset his pension to settle the outstanding loan balance contrary to the insurance arrangement and the Petitioner's right to property and social security.
- 7 The Petitioner contends that his pension is protected retirement income meant solely for his sustenance and medical upkeep and should not be subjected to unauthorized deductions.
- 8 It is the Petitioner's case that the 3rd Respondent is restrained by this Court, he will suffer irreparable harm and grave prejudice which cannot be adequately compensated by damages.

- 9 The Petitioner avers that prior to his discharge, he had been arraigned before a Court Martial where charges were withdrawn expressly because of the same disability (Major Depressive Disorder and Hypertension) that rendered him unfit for service.
- 10 He avers that the Kenya Defence Forces through the National Treasury has already processed and cleared disability pension in his favour, which could not have been done unless his discharge was indeed on medical grounds.
- 11 It is the Petitioner's case that he was prematurely discharged in November 2023 at the age of 45 years, yet under his contract of service his colour service was due to lapse at the age of 56 years in 2032. It is therefore misleading for the Respondents to allege that he exited on completion of colour service, when he had 11 more years to serve.

1st and 2nd Respondents' Case

- 12 In response to the Application, the Respondents filed a replying affidavit dated 11th September 2025 sworn by Grace Ajierh, an advocate of the High Court of Kenya, practicing as such in the Ministry of Defence as a Staff Officer.
- 13 The Respondents aver that the Petitioner was discharged on account of completion of colour service in the military and effectively retired from serving in the Kenya Defence

Forces. He was granted his ninety days terminal leave and the official last date of service was on 22nd November 2023 having served for a duration of twenty-one (21) years.

- 14 It is the Respondents' case that prior to effecting the Petitioners discharge from the service on retirement, a medical board was convened as is standard procedure for all service personnel exiting the military in order to ascertain medical status upon exit and he was found to be suffering from hypertension and depressive disorder for which he was awarded 5% and 30% disability pension.
- 15 The Respondents assert that the Petitioner's service benefits were processed in accordance with the Kenya Defence Forces (Pensions and Gratuities) (Officers and Service Members) Regulations 2021 whereby in addition to the lump sum and monthly pension for the 21 years of service in the Kenya Defence Forces, the Petitioner was granted 35% disability pension to be effected by the National Treasury.
- 16 The Respondents aver that 1st Respondent discharged its duty of ensuring the Pension benefits are properly remitted through the National Treasury and as such are not liable to whatever undertakings the Petitioner had with the 3rd Respondent in his individual capacity.
- 17 The Respondents assert that there was no apparent error in the reason for discharge as alleged by the Petitioner as

he was properly discharged upon completion of his service and not on medical grounds as alleged.

3rd Respondent's Case

18 In opposition, the 3rd Respondent filed a replying affidavit dated 26th November 2025, sworn by its Secured Lending Team Leader, Samuel Njuguna.

19 The Respondent avers that it is factually incorrect for the Applicant to assert that he was discharged from service on medical grounds whereas the 1st Respondent has since asserted that he was discharged after the completion of his service. Therefore, the the contemplated loan protection insurance is untenable and unavailable and cannot be relied upon to settle the funds advanced to him.

20 It is the Respondent's case that the Applicant is admittedly in default and that the application and petition are overtaken by events as the funds received have already been applied to offset the debt.

21 The Respondent avers that the proceeds from his pension were received in his current account and debited to his loan account with the bank having invoked its right to combine accounts.

Petitioner/Applicant's Submissions

22 The Petitioner submitted that he has shown that he served the Kenya Defence Forces for over 21 years until his medical discharge on 22nd November 2023; and that his

discharge was wrongly recorded as “completion of colour service”, instead of medical discharge, contrary to his medical records and pension documents which reflect disability compensation.

- 23 The Petitioner submitted that at the time of discharge, the Petitioner was 45 years old, yet his colour service completion would have been at 56 years, the standard retirement age under military regulations. The erroneous discharge therefore cut short his service by 11 years, depriving him of his legitimate career progression and benefits.
- 24 The Petitioner submitted that despite repeated requests, the 1st Respondent has failed to issue a corrected discharge letter and Certificate of Service. Without the corrected discharge letter, the 3rd Respondent’s loan insurance claim cannot be processed, exposing his pension to illegal appropriation.
- 25 It is the Petitioner’s submission that the Respondents’ actions violated his constitutional rights to property; fair labour practices; social security; and fair administrative action enshrined under Articles 40, 41, 43(1)(e), and 47. Additionally, the 1st Respondent’s omission further contravenes Section 51 of the Employment Act, which mandates every employer to issue a Certificate of Service upon termination.

- 26 He submitted that the Petitioner has already received his pension benefits amounting to Kshs. 3,175,637.50, credited to his account with the 3rd Respondent. These funds constitute his sole source of income, particularly given his medical incapacity and early retirement. If the 3rd Respondent offsets these funds, he will be rendered destitute and unable to support himself or his dependants.
- 27 It is the Petitioner's submission that Section 3 of the Pensions Act expressly protects pension from attachment or seizure except as permitted by law. He cited ***Joseph Sitati Mbayi v. Kenya Power & Lighting Co. Ltd [2019] eKLR***, the Court held that unlawful interference with pension violates the constitutional right to social security under Article 43.
- 28 The Petitioner thus submitted that his case meets the threshold of irreparable harm, as monetary damages cannot remedy the deprivation of his social security.
- 29 The Petitioner submitted that he only seeks to safeguard his pension funds until the discharge classification and insurance claim issues are resolved. The Respondents stand to suffer no prejudice if the funds are preserved, while he faces severe hardship if they are not.
- 30 The Petitioner submitted that the 1st Respondent's refusal to issue a proper discharge letter has broader implications for public confidence in government institutions and the protection of servicemen's welfare. Granting the orders

sought will reinforce the constitutional values of human dignity, fairness, and accountability under Article 10 of the Constitution.

- 31 The Petitioner submitted that the pension was taken by the 3rd Respondent after ignoring his multiple written notifications, as evidenced in the letters produced in court, informing the Bank of the contested discharge classification and the pending insurance process. Having acted in disregard of communication already brought to its attention, the 3rd Respondent cannot rely on its own unlawful action to defeat judicial oversight.
- 32 It is the Petitioner's submission that what the 3rd Respondent describes as "overtaken by events" is in fact the very violation requiring preservation and intervention. Courts have repeatedly held that once unlawful action has occurred, a conservatory order may still issue to preserve what remains and prevent future harm.
- 33 The Petitioner submitted that the 3rd Respondent reliance on **S S S v E M K [2017] KEHC 8933 (KLR)** is distinguishable from the instant suit on three grounds: First, the Petitioner's funds constitute disability pension, not ordinary pension. Disability pension is specifically designed to support incapacitated officers and attracts heightened constitutional protection under Articles 26, 28, 43, and 54 of the Constitution; Second, the offset was conducted without notice, without a hearing, and in disregard of prior correspondence, thereby violating Article

47 on fair administrative action. Even assuming the Bank had a contractual right to set-off, no contractual term can override the Constitution; Third, set-off cannot be invoked where the Bank has acted in bad faith, where the underlying obligation is tied to an insurance policy, or where the debtor has demonstrated that the insurance claim is pending due to the employer's administrative failures.

34 It is the Petitioner's submission that the 3rd Respondent's attempt to appropriate his pension stems from the 1st Respondent's administrative delay. He did not default willfully, nor was he negligent; rather, his financial difficulties were triggered by the government's refusal to provide mandatory documents that directly affect his rights under Articles 40, 41, 43 and 47 of the Constitution.

1st and 2nd Respondents' Submissions

35 The Respondents submitted that they are strangers to the application as neither are party to the dealings between the Petitioner/Applicant and the 3rd Respondent against whom the above listed orders are sought.

36 The Respondents submitted that the Petitioner/Applicant was enlisted into the Kenya Defence Forces on 3rd August 2002, however, he was discharged from service on 22nd November 2023 having concluded his duration of colour service in the military and effectively retired from serving in the Kenya Defence Forces. The Petitioner is therefore no

longer a service member within the regular forces of the Kenya Defence Forces.

- 37 The Respondents submitted that prior to effecting the Petitioner/Applicant's discharge from service, a medical board was convened as is the standard procedure for all service personnel exiting the military in order to ascertain medical status upon exit. The exiting medical board established that the Petitioner/Applicant Petitioner was suffering from a condition that warranted an additional 35% disability pension pursuant to the Kenya Defence Forces (Pensions and Gratuities) (Officers and Service Members) Regulations, 2021.
- 38 It is the Respondents' submission that consideration and granting of 35% disability pension did not translate to mean the Petitioner/Applicant was discharged from service on medical grounds.
- 39 The Respondents submitted that the Petitioner's service benefits were then processed in accordance to the Kenya Defence Forces (Pensions and Gratuities) (Officers and Service Members) Regulations, 2021. Subsequently, the requisite documentation to that effect was forwarded to the Military Pensions Liaison Officer at the National Treasury as appropriate for remittance of his dues and the Petitioner/Applicant has confirmed receipt of the same at his bank account held with the 3rd Respondent.

- 40 The Respondents submitted that the Petitioner/Applicant was procedurally discharged from service on completion of colour service back in November 2023 in line with existing terms and conditions of service in the Kenya Defence Forces and issued with his requisite discharge certificate which discharge procedure has not been faulted.
- 41 It is the Respondents' submission that Application is a mere afterthought by the Petitioner/Applicant seeking to avoid settling his financial obligations with the 3rd Respondent upon the disbursement of his pension funds into his account held by the said 3rd Respondent.
- 42 I have examined all the averments and submissions of the parties herein. The issues raised by the petitioner relate to whether his pension can be used to offset an outstanding loan or not. The issue raises pertinent legal issues which should be considered within this petition in order to ensure ends of justice.
- 43 The petitioner indeed has a prima facie case established but the orders sought will determine the entire petition without according the parties an opportunity to be heard. In the circumstances, I grant an order that the status quo be maintained pending hearing and determination of the entire petition. The money held as pension be kept in the account pending hearing and determination of this petition.

Dated, Signed and Delivered Virtually at Nairobi this 14th Day of January, 2026.

**HELLEN WASILWA
JUDGE**

ORIGINAL