



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT KISII

PETITION NO. E011 OF 2025

IN THE MATTER OF: THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF:
ARTICLES 3(1), 10, 28, 41, 47(1) AND 50 OF THE CONSTITUTION

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF: THE RIGHT
TO HUMAN DIGNITY; THE RIGHT TO FAIR LABOUR PRACTICES;
THE RIGHT TO FAIR ADMINISTRATIVE ACTION; AND THE RIGHT
TO FAIR HEARING

BETWEEN

ELISHA ONGERE
alias ELISHA
PETITIONER

ONGERE DICKSON.....

VERSUS

TEACHERS SERVICE COMMISSION.....**1ST**

RESPONDENT

FREDRICK OLUOCH.....**2ND**

RESPONDENT

JOSEPH NYANGAYA.....**3RD**

RESPONDENT

BOB NYANGAYA.....**4TH**

RESPONDENT

RULING

1. The Petitioner instituted the present proceedings by way of a Petition dated 12th September 2025 and filed in court on 26th September 2025. He alleged that the Respondents violated his constitutional rights to human dignity, fair labour practices, fair administrative action, and a fair hearing. By way of background, the Petitioner contended that he was posted to Otel Mixed Secondary School as a Deputy Principal on or about 10th August 2021. He averred that on 19th November 2021, a Form One student at the school tragically passed away after allegedly consuming ethanol from the school laboratory. Following the incident, the Petitioner alleged that the 3rd and 4th Respondents pressured him to

pay the deceased student's parents a sum of Kshs. 300,000/- as compensation. Upon his refusal, the Petitioner claimed that the 3rd and 4th Respondents vowed to cause his interdiction by the 1st Respondent. The Petitioner further asserted that in the aftermath of these events, he raised complaints regarding the conduct of the school principal, which he claimed had led to a general decline in discipline and academic standards. He contended that instead of addressing those concerns, he was served with a notice to show cause accusing him of incitement, failure to discipline students, and other related charges. He was subsequently interdicted and subjected to a disciplinary hearing. Before the outcome of the hearing was communicated to him, he was transferred to St. Mark's Obambo Secondary School. He was thereafter informed that although the disciplinary committee had found him guilty, he had been let off with a warning, a decision which was later upheld on appeal.

2. According to the Petitioner, the whole disciplinary process infringed on his constitutional rights. He contended, among other things, that he was never served with any letter of

complaint triggering the disciplinary proceedings; that he was not accorded adequate time to respond to the notice to show cause; that the notice to show cause was vague and imprecise; that his written and oral submissions were ignored; that the same committee which heard his disciplinary case also sat on appeal; that the interdiction letter lacked specificity as to the charges against him; and that the appellate decision did not disclose the reasons for dismissing his appeal.

3. As a consequence of the foregoing, the Petitioner averred that he suffered and continued to suffer loss and damage, including a tarnished professional reputation, emotional, psychological, and mental anguish, humiliation during the disciplinary proceedings where he was branded an activist and alarmist, and financial hardship arising from withheld salaries. On the basis of those allegations, the Petitioner sought the following reliefs:

- (a) A declaration that the entire disciplinary proceedings violated his rights to human dignity, fair labour practices, fair administrative action and a fair hearing.

- (b) An order of certiorari quashing the entire disciplinary proceedings.
- (c) An award of general and/or exemplary damages, together with interest thereon at court rates from the date of judgment until payment in full, for violation of his constitutional rights.
- (d) Payment of Kshs 393,621/- plus interest at court rates, being half salary withheld during the interdiction period.
- (e) Payment of Kshs. 28,131.05 in unexplained overpayment recovery from his February 2023 salary.
- (f) Payment of Kshs. 262,414.10 being unpaid salary for the months of November 2022 and March 2023.
- (g) Costs of the petition.

4. In response, the Respondents raised a preliminary objection dated 5th November 2025. They contended that the Petition was time barred under section 89 of the Employment Act and further offended the doctrine of constitutional avoidance. They also asserted that the Petition was bad in

law, frivolous, vexatious, an afterthought, and an abuse of the court process.

5. The Petitioner opposed the preliminary objection by way of grounds of opposition dated 1st December 2025. He maintained that the objection was incompetent for lack of a replying affidavit to anchor it. He further argued that petitions seeking enforcement of fundamental rights and freedoms were not subject to statutory limitation periods. He insisted that the Petition met the threshold for constitutional pleadings and urged the court to dismiss the preliminary objection as frivolous, a delay tactic, and an abuse of the court process.

6. The Preliminary Objection was canvassed by way of written submissions.

Respondents' Submissions

7. On limitation, the Respondents submitted that the claims relating to withheld salaries, recovery of alleged overpayments, and damages constituted claims for continuing injuries which ought to have been brought within

one year of cessation, as provided under section 89 of the Employment Act. They pointed out that the Petitioner's employment ended on 30th June 2023, whereas the Petition was filed on 12th September 2025, more than one year later. In support of this position, reliance was placed on **G4S Security Services (K) Limited v Joseph Kamau & 468 others [2018] eKLR**, for the proposition that claims for continuing injuries not instituted within one year are time barred. The Respondents further submitted that the court lacked jurisdiction to entertain the Petition due to limitation, citing **Beatrice Kahai Adagala v Postal Corporation of Kenya [2015] eKLR**, where the court stated that section 90 of the Employment Act is couched in mandatory terms. They also relied on the case of **Kenya Electrical Trades & Allied Workers Union v Kenya Power & Lighting Company Ltd [2015] eKLR**, where it was held that jurisdiction is fundamental and a court has no power to entertain matters outside its jurisdiction.

8. With regard to the doctrine of constitutional avoidance, the Respondents submitted that the issues raised in the Petition could be adequately addressed under the Employment Act.

They relied on **Gabriel Mutava & 2 others v Managing Director, Kenya Ports Authority & another [2016] eKLR**, **Peter Ndegwa Nderitu v Teachers Service Commission [2019] eKLR**, and **Josephat Ndirangu v Henkel Chemicals (EA) Limited [2013] eKLR**, for the principle that disputes should not be elevated to constitutional questions where there exist alternative statutory remedies. In light of the foregoing, the Respondents urged the court to strike out the Petition for being time barred and for failing to raise any genuine constitutional issue.

Petitioner's Submissions

9. In response, the Petitioner submitted that the preliminary objection was fatally incompetent as there was no response to the petition to anchor it, contrary to proper legal drafting practice. He asserted that without a replying affidavit the preliminary objection hangs in the air. On limitation and jurisdiction, the Petitioner contended that the preliminary objection only addressed the claims relating to continuing injuries and left out the prayers seeking redress for violation of constitutional rights. He further submitted that there were

disputed factual issues as to when time began to run, particularly because he was challenging the appellate decision rendered on 21st October 2022. He maintained that there is no statutory limitation period for enforcement of constitutional rights, although the court may consider whether there has been inordinate delay. In support of this position, he relied on the case of **Pascal Barasa Olaimo & 75 others v Attorney General [2019] KEELRC 947 (KLR)**, and asserted that the Petition was not time barred. With respect to the doctrine of constitutional avoidance, the Petitioner submitted that the Petition met the threshold of precision and particularity set out in **Anarita Karimi Njeru v Republic [1979] eKLR** and **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR**. He emphasized that the alleged violations were specifically pleaded and particularized at paragraph 32 of the Petition.

10. The Petitioner further submitted that this Court had jurisdiction to hear and determine the Petition pursuant to Article 162(2)(a) of the Constitution, as read together with section 3(1) of the Employment and Labour Relations Court

Act. He asserted that, in the absence of a substantive response to the Petition, the Respondents were improperly employing the preliminary objection as a sword to win the case rather than a shield, which was unjust and contrary to public interest. In support of this argument, he relied on the case of **Independent Electoral and Boundaries Commission v Cheperenger & 2 others [2015] eKLR**. In conclusion, the Petitioner urged the court to dismiss the preliminary objection with costs.

Disposition

11. The Court is urged to determine the matter *in limine* and in opposition to the preliminary objection raised, the Petitioner asserts the Respondents have no anchor for their objection since no reply to the Petition was filed. The Petitioner asserts that in petitions seeking the enforcement of fundamental rights and freedoms are not subject to limitation. The Respondent on the other hand asserts the Petition is time barred and offends the doctrine of constitutional avoidance.

12. The doctrine of constitutional avoidance holds that when there is a remedy in civil law, a party should pursue that remedy and not elevate the dispute to the constitutional platform. Courts should be wary of permitting parties to circumvent statutes enacted for enforcement of rights and obligations by attempting to raise matters before a constitutional court instead of the appropriate fora. In this case, the Petitioner has a dispute which hardly rises to a constitutional level and therefore had no business invoking the constitutional arm of this Court. This dispute as far as the Court has discerned was a pure payment dispute which the Employment Court could have handled without invoking its constitutional jurisdiction. I am entirely in agreement that if a dispute can be resolved on non-constitutional grounds or through other mechanisms, this Court should refrain from entertaining the Petition.

13. The second issue that arises in the objection is the question of limitation of action. The question of limitation in this Court is anchored on section 90 of the Employment Act in so far as disputes that can be articulated before the Employment Courts are concerned. The section makes

provision that any claim relating to an employment dispute should be presented within 3 years save for matters that are continuing harm which ought to be presented within 12 months. The Petitioner from all accounts is seeking payment of his salary. In determining whether the preliminary objection is well founded, the Court has to weigh the harm sought to be addressed and the forum the applicant has chosen. In this case, the Petitioner had a right to his pay - i.e. salary. Is salary a fundamental right? I hazard to say no. Fundamental rights include the right to equality which encompasses equality before the law, prohibition of discrimination on grounds of race, religion, sex or place of birth, equality of opportunity in employment, freedom of speech and assembly, the right to movement within the bounds of the nation, the right and freedom to engage in peaceful protest and to picket and so on. These fundamental rights are the backbone of individual liberties ensuring citizens are treated with dignity by the state.

14. The Petitioner had a right to receive pay but that was an employment dispute and cannot be elevated to the level of

Fundamental Rights requiring constitutional protection. The Petitioner could have filed a claim before the Employment Court within a year as the failure to pay salary was a continuing wrong which the Employment Act limits an aggrieved party to 12 months. This is rational given that the employee who does not receive pay ought to at the earliest opportunity bring an action for recovery of salary due. The matter of forced compensation to another parent for the death of a child is not a matter for this Court as the Employment and Labour Relations Court is to hear and determine disputes relating to employment and labour relations, and connected purposes. The foregoing is ample proof that the Court is not moved appropriately given the lapse of time when the injuries to the Petitioner are stated to have occurred - the year 2021 and the filing of a claim in late 2025 does not aid the Petitioner. As the Petitioner and the 1st Respondent are still in a relationship of employer and employee and the imposition of costs would impair or negatively affect the relationship given the power dynamics here, the preliminary objection succeeds with the result that the Petition is struck off, albeit with no order as to costs.

Orders accordingly.

Dated and delivered at Kisumu this 21st day of January

2026

**Nzioki wa Makau, MCI Arb.
JUDGE**

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