



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Oyugi v Teachers Service Commission & 3 others (Petition
E015 of 2025) [2026] KEELRC 216 (KLR) (29 January 2026) (Ruling)**

Neutral citation: [2026] KEELRC 216 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

PETITION E015 OF 2025

K OCHARO, J

JANUARY 29, 2026

**IN THE MATTER OF: THE SUPREMACY OF THE
CONSTITUTION, THE PRESERVATION
OF ITS VALUES AND PRINCIPLES,
INCLUDING THE VALUE OF
LEADERSHIP AND INTEGRITY &
PUBLIC SERVICE**

AND

**IN THE MATTER OF: THE CONSTITUTIONALITY OF THE
ONGOING RECRUITMENT OF THE
CHIEF EXECUTIVE OFFICER,
TEACHERS SERVICE COMMISSION**

AND

**IN THE MATTER OF: CONSTITUTIONALITY OF SECTION
16(2) OF THE TEACHERS SERVICE
COMMISSION ACT**

ELRC MOMBASA RULING PETITION E015 OF 20251

AND

**IN THE MATTER OF: VIOLATIONS AND/OR THE
THREATENED VIOLATIONS OF
ARTICLES 1, 2, 10, 19, 20, 21, 24, 27, 73,
232(G), (H) AND (I) OF THE
CONSTITUTION**



BETWEEN

THOMAS MOSOMI OYUGI PETITIONER

AND

THE TEACHERS SERVICE COMMISSION 1ST RESPONDENT

THE NATIONAL ASSEMBLY 2ND RESPONDENT

THE CABINET SECRETARY, MINISTRY OF EDUCATION . 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. The Petitioner initiated the action herein through a petition dated 25th May, 2025, for the enforcement of human rights, wherein he claimed against the Respondents, the reliefs set out as follows;
 - a. A declaration that section 16[2] of the *Teachers Service Commission Act* is unconstitutional, null, and void.
 - b. A declaration that the ongoing recruitment exercise of the Secretary/Executive Officer of the Respondent [as advertised on 6th May 2025] is unconstitutional, null and void.
 - c. An order of prohibition prohibiting the Respondent, in particular the 1st Respondent, from implementing or acting upon the impugned Section 16[2] of the *Teachers Service Commission Act*.
 - d. An order of certiorari quashing the advertisement of 6th May, 2025, regarding the recruitment of Secretary /Chief Executive Officer, Teachers Service Commission.
 - e. An order of prohibition prohibiting the Respondent, in particular the 1st Respondent, from continuing with the recruitment exercise of the Secretary /Chief Executive Officer of the 1st Respondent [as advertised on 6th May 2025].
 - f. Any other relief this Court deems fit.
2. Contemporaneously with the petition, he filed a Notice of Motion application dated 25th May 2025, expressed to be predicated on the provisions of Article 159 of the *Constitution*, Sections 3, 12, 13 and 20 of the *Employment and Labour Relations Court Act*, Rules 44 and 45 the Employment and Labour Relations Court (Procedure) Rules, 2024, seeking;
 - a. An order that this matter be certified urgent and service be dispensed with in the first instance.
 - b. A conservatory order do issue staying, suspending and restraining the Respondents from implementing or continuing with the ongoing recruitment exercise of the Secretary/Chief Executive Officer of the 1st Respondent (as advertised on 6th May, 2025) pending the inter-partes hearing and determination of this Application.



- c. A conservatory order do issue staying/suspending the implementation of section 16(2) of the [Teachers Service Commission Act](#) pending the inter-partes hearing and determination of this matter.
 - d. A conservatory order staying/suspending the implementation of the ongoing recruitment exercise of the Secretary/Chief Executive Officer of the 1st Respondent (as advertised on 6th May, 2025) pending the inter-partes hearing and determination of this Petition.
 - e. Any other orders the Court considers necessary to ensure that the ends of justice are served.
3. The application is supported by the grounds set out on the face of it and in the supporting affidavit sworn by the Petitioner/ Applicant on 25th May 2025.
 4. In response to the application, the First Respondent filed a Counter-Affidavit sworn by Dr. Jamleck Muturi John on 5th June 2025. The Second, and Third and Fourth Respondents each filed notices of preliminary objection, all centred on jurisdictional grounds, dated 5th June 2025 and 7th June 2025, respectively.
 5. Additionally, the 1st Respondent filed a Notice of Motion Application date 3rd June 2025 expressed to be under the provisions of Articles 47, 159, 258, and 259 of the [Constitution](#) of Kenya, Sections 12 and 20 of the [Employment and Labour Relations Court Act](#), and Rule 74 of the Employment and Labour Relations Court [Procedure] Rules, 2024, seeking orders that;
 - i. This Application be certified urgent, and service thereof be dispensed with in the first instance.
 - ii. This Honourable Court be pleased to set aside, discharge and/or vacate its orders issued on 26th May 2025, directing that the status quo with regard to the recruitment process of the 1st Respondent's Secretary/Chief Executive Officer, as at 5:10 pm on 27th May 2025, be maintained.
 - iii. The costs of this application be provided for.
 6. The application is based on the grounds set out in the face thereof, and the supporting affidavit sworn by Dr. Jamleck Muturi John on 3rd June 2025.
 7. Regarding the disposal of the two applications and the preliminary objections, this Court directed that all matters be addressed through written submissions submitted concurrently. The Court established deadlines for the parties to submit their respective submissions. These directives were duly adhered to.

The Objections

8. The 1st Respondent raised two grounds in their preliminary objection: this court lacks jurisdiction under the law to entertain, interrogate, and determine the Application and the Petition, as the issues raised do not fall under Section 12[1][a]-[f] of the [Employment and Labour Relations Court Act](#). Furthermore, the Application and the Petition offend the Court of Appeal's precedent in *Moi Teaching and Referral Hospital & 3 others v Gikenyi B & 152 others* [2025] KECA 937 [KLR], and the Application and the Petition are bad in law, frivolous, vexatious, and amount to a gross abuse of the Court process.
9. The 3rd and 4th Respondents, through their preliminary objection, argue that this Court lacks jurisdiction to hear and decide the petition because it does not fall within the provisions of Section 12 of the [Employment and Labour Relations Court Act](#). They also assert that the petition and the current application are frivolous and constitute an abuse of the Court process.



10. The 2nd Respondent bases their preliminary objection on the following ground that, based on the harmonised reading and application of the Constitution, and section 12 of the Employment and Labour Relations Act, the Court does not have jurisdiction over this matter.

The 2nd Respondent's submissions on their preliminary objection

11. Counsel for the 2nd Respondent submits that it is trite law that the jurisdiction of a tribunal or court is derived from the Constitution, statute or by principle laid out in judicial precedent. The jurisdiction of the Employment and Labour Relations Court is set out under Section 12 of the Employment and Labour Relations Act. It sets out the specific matters over which the court has adjudicatory jurisdiction.
12. Further, subsection 2 stipulates the persons who can lodge an application, claim, or complaint, and against whom. The class of persons mentioned in the provision may be represented before the Court either in person, an advocate duly authorised to practice law under the Advocate Act, or a duly appointed and authorised Trade Union Official. There is no provision for any other representation.
13. To support the foregoing submissions, Counsel placed reliance on the case of Kenya Council of Employment and Migration Agencies & another v Samuel Mwongera Arachi & 2 others [2015] eKLR, where the Court stated;
- “ 16. Whereas from the foregoing provisions of the law, the Court has jurisdiction to adjudicate constitutional questions, these questions must arise within the broad relationship parameters set out under section 12 of the Act, and further, they can only be agitated by persons identified under section 12[2] of the Act acting in person or through authorized representative as stated earlier. The Act makes no provision for representation by civil society, which the applicant is.”
14. It follows, therefore, that the recruitment of the TSC CEO does not fall within the broad relationship parameters set out under Section 12 of the Employment and Labour Relations Act. Accordingly, the Employment and Labour Relations Court is not possessed of the requisite jurisdiction to deal with the subject matter herein.
15. Further reliance has been placed on the Court of Appeal decision in *Moi Teaching and Referral Hospital & 3 others v Gikenyi B & 152 others* [2025] KECA 937[KLR].
16. In support of the 3rd and 4th Respondent's preliminary objection, their Counsel urges the Court to take cognizance that the present suit, is not before the right forum as it seeks to canvass issues on the preliminary stage of recruitment process, which recruitment does not fall within the bounds of an employment contract, but rather constitute an offer and invitation to members of the general public with requisite qualifications for consideration of the Advertised position.
17. It is further submitted that the jurisdiction of the Employment and Labour Relations court flows from Article 162 [2][a] of the Constitution of Kenya, 2010. In furtherance of this provision, the Constitution donated powers to Parliament under Article 162[3] to establish the Employment and Labour Relations Act, Laws of Kenya, which then determines the jurisdiction and functions of the court as contemplated in clause [2].
18. According to Counsel, a careful reading of section 12 [1][a]-[f] shows that the Employment and Labour Relations Court lacks jurisdiction over matters related to Advertisement, interviews, and the entire initial stage of recruitment. Therefore, this Court cannot claim jurisdiction where it does not exist. To support this argument, Counsel relies on the decisions in *Kenya Tea Growers Association & 2 others v The National Social Security Fund Board of Trustees & 13 others* [2024] KESC 3[KLR],



and Moi Teaching and Referral Hospital, 2025 & 3 Others v Gikenyi B & 152 Others [2025] KESCA 967 [KLR].

19. Submitting on the 2nd ground, Counsel submits that the matter of determining the constitutional validity of a statute or its provisions is a preserve of the High Court as enshrined under Article 165 [3] [d] [i] and as such the instant petition and application dated 25th May, 2025 cannot be said to be a procedural technicality.

Analysis and Determination of the Preliminary Objections

20. I have carefully considered the Notices of Preliminary objection filed by the parties herein and the submissions for and against the grounds raised therein, and distilled the following principal grounds for determination;
 - a. Whether this Court has the requisite jurisdiction to hear and determine the Petitioner's petition and application dated 25th May 2025.
 - b. Whether the Petition and application are an abuse of the Court process.
21. It is a longstanding principle of law that the issue of jurisdiction is fundamental, constituting the very core and foundation of a case, and must be addressed as a priority. Jurisdiction grants a court authority to hear and determine a suit and, conversely, denies it. Whenever jurisdiction is contested at any stage of the trial, the Court is obligated to determine whether the subject matter falls within its adjudicatory competence. Once a Court concludes that it lacks jurisdiction to adjudicate a case, it must refrain from proceeding, as a case conducted without jurisdiction is ultimately rendered null and void. See Owners of Motor Vessel "Lilian S" V. Caltex Oil [Kenya] Limited [1989] KLR 1.
22. Suffice it to state that the well-known position of the law is that to determine whether or not a Court can exercise jurisdiction over a matter, it is the facts outlined in the pleadings and the reliefs endorsed therein alone that the Court is required to examine and no more. In the present case, the Court must therefore restrict itself to the Petition, the verifying affidavit, and the reliefs sought in determining the issue of jurisdiction.
23. The creation of the Employment and Labour Relations Court, as outlined in Article 162[2] of Kenya's 2010 Constitution, was motivated by the Kenyan people's desire for a specialised court. The court's exclusive jurisdiction is justified by its judges' extensive knowledge, experience, and specialisation in employment and labour law. This clearly counters the misconception that the court's jurisdiction over statutory or constitutional issues is too limited.
24. The Second Respondent's assertion that it is solely the prerogative of the High Court to interpret the Constitution and to enforce the Fundamental Freedoms and Bill of Rights is predominantly a manifestation of adherence to antiquated positions and a failure to acknowledge judicial precedents that have cleared the unwarranted or perceived jurisdictional conflicts between the High Court and the Employment and Labour Relations Court. A comprehensive interpretation of the provisions of the Constitution of Kenya, 2010, particularly Article 165(3), clearly indicates that the Constitution establishes distinct operational lanes for each Court regarding the interpretation or enforcement of the Constitution.
25. Applying the approach, I have outlined above [para. 22], I conclude that the Petitioner's petition aims to challenge, firstly, the constitutionality of Section 16 of the Teachers Service Commission Act, its effect on the recruitment process of the Secretary/CEO of the 1st Respondent, and the constitutional propriety of the ongoing recruitment process. In my view, and as will be elaborated hereunder, this Court has the requisite jurisdiction to entertain the current petition and application.



26. This Court notes the elaborate and eloquent submissions by Counsel for the 1st Respondent, and the cited decisions, on whether or not this Court has the jurisdiction to interpret and make a pronouncement on the constitutionality of the subject section, and urges this Court to return in the negative. I am not persuaded to agree with him. In *Kenya Tea Growers Association & 2 others v The National Social Security Fund Board of Trustees & 13 others* [2024] KESC 3] [KLR], cited by the Respondents, the Supreme Court states:

“In our view, there is nothing in the *Constitution*, the ELRC Act, or indeed in the *Karisa Chengo Case* to suggest that in exercising its jurisdiction over disputes emanating from employment and labour Relations, the ELRC court is precluded from determining the constitutional validity of a statute. This is especially so if the statute in question lies at the centre of the dispute. What it cannot do, is to sit as if it were the High Court under Article 165 of the *Constitution*, and declare a statute unconstitutional in circumstances where the dispute in question has nothing or little to do with employment relations within the context of the ELRC Act.

.....For the avoidance of doubt, and so as to stop the pendulum of jurisdictional re-jigging that has characterized this case from the beginning, we hereby restate that the ELRC has jurisdiction to determine the constitutional validity of a statute in matters employment and labour. Suffice it to say that the statute in question must be in focus and at the centre of the dispute in question.”

27. In my view, the Supreme Court did not hold or suggest that the Employment and Labour Relations Court has the power to determine the constitutional validity of a statute or a provision thereof, only if there is an employer-employee relationship. The Court made a broad reference to “Employment and Labour Relations disputes”, which, in my view, would, in certain circumstances, or as can flow from other statutes, not involve an employer and employee directly, or the persons mentioned in section 12 of the *Employment and Labour Relations Court Act*.

28. It is noteworthy that several matters governed by different statutes do not have explicit provisions designating them for adjudication by the Employment and Labour Relations Court. Prima facie, these issues do not seem to fall within the court’s exclusive jurisdiction. Such an interpretation would evidently conflict with the overarching goal of facilitating efficient resolution of employment and labour disputes, as well as the fundamental purpose of establishing the Employment and Labour Relations Court as a superior court with exclusive jurisdiction.

29. Consequently, based on the aforementioned premises, I must conclude that the Respondents’ assertion that the jurisdiction of the Employment and Labour Relations Court is explicitly limited to disputes concerning the persons specified under Section 12 of the *Employment and Labour Relations Court Act* is unfounded. It is my considered opinion that the Court possesses jurisdiction over all employment and labour relations matters unless explicitly excluded by statute or the *Constitution*.

30. I now address the position taken by the 1st Respondent and the submissions made thereon by its Counsel that this Court has no jurisdiction to hear pre-recruitment disputes.

31. By dint of Article 2[6] of the *Constitution*, treaties and Conventions ratified by Kenya are now part of the law of Kenya, and this was expressly so held by the Court of Appeal in the case of *Kenya Airways Limited vs Aviation and Allied Workers Union Kenya and 3 Others* [2014] eKLR, cited by the same



Court with approval in *The German School Society & Another vs- Ohany & Another* [2023] KECA 894 [KLR], when it stated;

“By dint of article 2[6] of the *Constitution*, the treaties and conventions ratified by Kenya are now part of the law of Kenya. The Kenya Constitution, 2010, was promulgated on 27th August, 2010. Before then, Kenya was a dualist state, which, like other dualist states, domesticated the treaties or conventions it ratified by legislation. By virtue of the provisions of this Article, however, the treaties or conventions which Kenya had ratified before the date, whether domesticated or not, automatically became part of the law of Kenya. The process of ratification of the treaties Kenya has entered into after the enactment and entry into force of the Ratification and Treaties Act, 2012, is now through legislation.

32. In my view, ILO conventions generally treat employees to include prospective employees in matters relating to recruitment, access to employment, equality and non-discrimination, job placement services, and protection against discriminatory practices and hiring practices. For instance, the Discrimination [Employment and Occupation] Convention, 1958 [No.111], Article 1[3], provides;

“For the purpose of this Convention, the terms employment and occupation include access to vocational training, access to employment and to particular occupations, and terms and conditions. [Emphasis mine].
33. A careful reading of the ILO Convention No.122 [Employment Policy, 1964] shows that the protection it provides extends even before employment begins. ILO Convention No. 159 [Vocational Rehabilitation and Employment of Persons with Disabilities] addresses employment opportunities. ILO recruitment standards, as set out in the General Principles and Operating Guidelines for Fair Recruitment, promote non-discriminatory and regulated recruitment processes.
34. It is for this reason, in my view, that Section 5 of the *Employment Act* deems prospective employees, employees for purposes of the section.
35. The Court of Appeal decision in *Moi Teaching Referral Hospital & 3 Others v Gikenyi B & Others* [2025] KECA [KLR] was not made with consideration of Article 2[6] of the *Constitution* of Kenya, the International Labour Organization Conventions, or international labour standards and guidelines regarding the scope of the terms, employment, and employee. They provide broader definitions of the terms. Moreover, the Supreme Court decision in *Kenya Tea Growers Association & 2 others v The National Social Security Fund Board of Trustees & 13 others* [2024] KESC 3 [KLR] has interpreted this Court’s jurisdiction as broader than implied by the Court of Appeal decision.
36. The Respondents’ assertion that this Court lacks jurisdiction to adjudicate pre-appointment employment matters, due to the absence of an employment relationship at that stage, is challenging to comprehend. If such reasoning were to be deemed appropriate, then, by analogy, this Court would also lack jurisdiction to hear cases where an employment contract has already been terminated in some manner.
37. It is essential to emphasise that the issue in question relates to employment and labour relations. The Teachers Service Commission Act, particularly section 16, is central to the dispute.
38. In the upshot, I come to the inescapable conclusion that this Court has the requisite jurisdiction to entertain the instant petition and application.



The Petitioner's Application

39. The Petitioner argues that the 1st Respondent, an independent constitutional commission tasked under Article 249 (1) of the Constitution with safeguarding the sovereignty of the people, ensuring all State organs uphold democratic values and principles, and promoting constitutionalism, has, in blatant violation of the Constitution, mischievously engaged in a partisan and discriminatory recruitment process for its Chief Executive Officer.
40. On 6th May 2025, without declaring a vacancy, the 1st Respondent issued an advertisement calling for applications for the position of Secretary/Chief Executive Officer at Teachers Service Commission (TSC).
41. Interested and qualified candidates were required to submit their applications online via the provided application portal or hand deliver them in Nairobi no later than Tuesday, 27th May 2025, at 5.00 pm.
42. He further stated that the advertisement set a window of only twenty-one (21) days during which the applications were to be received.
43. The advertisement was stated to be premised upon section 16(2) of the Teachers Service Commission Act, and in that line, defined the minimum qualification and experience required for the position, thus:
- (2) A person shall not qualify for appointment under subsection (1) unless such a person —
- a. is a citizen of Kenya;
 - b. holds a degree in education from a university recognized in Kenya;
 - c. has had at least ten years' experience in education, administration and management, public administration, human resource or financial management; and
 - d. meets the requirements of Chapter Six of the Constitution.
44. He is aggrieved, and states that Section 16(2) of the Teachers Service Commission Act is unconstitutional. As a consequence, the recruitment process of the Secretary/ Chief Executive Officer of the 1st Respondent is null and void on the basis that:
- a. Causing an advertisement without the occurrence of a vacancy or the declaration of a vacancy was unconstitutional since it amounted to recruitment for a non-existent position.
 - b. Restricting the qualification to a degree in education from a university recognised in Kenya is discriminatory contrary to Articles 10(2)(b), 27, 73(1)(a)(i) & (2)(a), 232 (1)(g), (h) & (i), and 249(1) of the Constitution
 - c. Setting the academic qualification and experience requirements is illogical and deliberately designed to favour a specific class of Kenyans (teachers and insiders in the Commission). It is impractical to restrict academic qualifications solely to a degree in education and to link that to experience in human resource or financial management, given that these are highly regulated professions with distinct qualifications under the Human Resource Management Professionals Act and the Accountants Act, respectively. It is only at the 1st Respondent that a teacher may, albeit illegally, perform human resource functions.
 - d. The twenty-one (21) day application period is grossly inadequate given the diverse geography of Kenya.



- e. Restricting the application to an online system prone to abuse or to be hand-delivered in Nairobi, despite the Commission having several regional offices, or by disregarding other known means of communication such as registered mail, was and remains contrary to the freedom of choice and the principle of providing equal opportunities for appointment as required under Article 232 (1) (i) of the *Constitution*.
45. There is no inherent requirement, based on the functions of the Secretary/Chief Executive Officer of the 1st Respondent, for the position to be linked to a person holding a degree in education.
46. He contends that unless the Application is granted, the Petition shall be rendered nugatory as:
- a. The recruitment process, the subject matter of the Petition, will be concluded;
 - b. The fundamental principles of equality, non-discrimination, equal opportunity and constitutionalism shall be rendered ornamental and superfluous;
 - c. The vices of partisanship, discrimination, and favouritism are likely to endure at the 1st Respondent, as the Secretary/Chief Executive Officer of the 1st Respondent has been influenced by these same vices; and
 - d. The remedies issued at the Judgment stage will be insufficient to address the actions taken against the *Constitution* and Kenyans.
47. The public interest requires that the *Constitution* be upheld, the Bill of Rights protected, and the values and principles realised. Therefore, it is in the public interest that the Application be granted.

The Response by the 1st Respondent.

48. It is established under Article 237(1) of the *Constitution* of Kenya, with its primary functions under Article 237(2) thereunder being: -
- a. To register trained teachers;
 - b. To recruit and employ trained teachers;
 - c. To assign teachers in its service to teach in various public schools;
 - d. To promote and transfer teachers;
 - e. To exercise disciplinary control over teachers;
 - f. To terminate the employment of teachers.
49. Furthermore, Article 237 (3) of the *Constitution* authorises them to: —
- a. Review the standards of education and training of persons entering the teaching service;
 - b. Review the demand and supply of teachers;
 - c. Advise the national government on matters relating to the teaching profession.
50. It is one of the Constitutional Commissions to which Chapter Fifteen of the *Constitution* of Kenya (the *Constitution*) applies.
51. As a Chapter Fifteen Commission and in accordance with Article 249(1) of the *Constitution*, the 1st Respondent aims to safeguard the sovereignty of the people, ensure that all State organs uphold democratic values and principles, and promote constitutionalism.



52. It is further stated that it is vested with the powers to recruit its own Secretariat Staff by virtue of Article 252(1) (c) of the Constitution.
53. It has the power to appoint its Secretary, who shall serve as its Chief Executive Officer, in accordance with Article 250(12) of the Constitution. The qualifications, tenure and term of office of the CEO/ Secretary of the 1st Respondent are regulated by Section 16 of the Act.
54. The provisions of Article 250(12) of the Constitution have been operationalized by section 16 of the Teachers Service Commission Act, 2012 (the Act), providing for the minimum qualifications and the manner of recruitment of its Secretary/Chief Executive Officer.
55. That when a vacancy arose for the position of the Secretary/Chief Executive Officer on 1st July 2015, it strictly adhered to the provisions of section 16(1) of the Act and advertised the role in accordance with the law.
56. After completing the recruitment process for the position of Secretary/Chief Executive Officer in 2015, Dr Nancy Njeri Macharia was identified as the best candidate through a fair, transparent, and highly competitive selection.
57. Subsequently, Dr Nancy Njeri Macharia was duly appointed to the position of the Commission Secretary/Chief Executive pursuant to the provisions of section 16 of the Teachers Service Commission Act for a term of five (5) years, effective from 1st July 2015 to 30th June 2020.
58. As provided under section 16 (4) of the TSC Act, Dr. Macharia's contract was renewed for the second and final term, effective from 1st July 2020 to 30th June 2025.
59. It is further stated that the term of the 1st Respondent's CEO is a fixed-term contract recognised by both the employer and the general public. Dr Macharia has proceeded on terminal leave pending her retirement, which took effect on 30th June 2025.
60. In exercising its powers under Article 250(12), and considering that the current Secretary/CEO's term was set to expire by efflux of time on 30th June 2025, it, in compliance with Articles 10 and 232 of the Constitution, commenced the recruitment process for the next Secretary/CEO on 6th May 2025 by publishing an advert in two daily newspapers of national circulation and also on its website and social media handles.
61. Additionally, it disseminated the advertisement through radio and television bulletins, including vernacular radio stations and television channels.
62. It is not contemplated under any written law that the vacancy in the office of the CEO/Secretary ought to be declared in any specific manner or through a gazette notice or otherwise. As opposed to section 8 of the TSC Act that requires vacancies in the office of Chairperson or members of the Commission to be declared formally in the Kenya Gazette, there is no such mandatory legal requirement in section 16 of the Act with respect to the office of the CEO.
63. The advertisement published on 6th May, 2025, itself constituted a declaration of a vacancy in the Office of the Secretary/CEO as well as the 1st Respondent's resolution to fill the same competitively as ordained in law.
64. The advertisement was published 55 days prior to ensure continuity, effective succession, and a smooth transition in the critical CEO role. This approach aligns with best practices in Human Resource Management.



65. Considering the CEO's term was approaching its end, and as a responsible employer, the Commission decided to start the recruitment process early to ensure a smooth leadership transition and prevent a vacancy, in accordance with Section 16(4) of the TSC Act. The claim that it should have officially declared a vacancy is unsupported by law or fact.
66. The Petitioner has failed to demonstrate how the publication of a vacancy constitutes a violation of the *Constitution*. He has not shown when, how, or how the vacancy should have been declared. Consequently, the Petitioner's allegations lack constitutional or statutory foundation, are devoid of merit or factual basis, and are solely intended to impede the recruitment process of the Chief Executive Officer.
67. Article 94, inter alia, empowers the National Assembly to enact statutes to give full meaning to and to operationalise the spirit of the *Constitution*. Accordingly, section 16 of the TSC Act is intended to operationalise Article 250(12) of the *Constitution*.
68. The significance of the contested Section 16 of the Act lies in effectuating the authority granted to the First Respondent pursuant to Article 250(12) to designate the Chief Executive Officer (CEO) or Secretary. The contested provision offers comprehensive guidance and delineates procedural procedures for the appointment of the CEO or Secretary, ensuring alignment with the constitutional values and principles articulated in Articles 10 and 232 of the *Constitution*.
69. It is asserted that section 16 of the *Teachers Service Commission Act* enjoys the principle of the presumption of constitutionality of statutes. Enacted in 2012, the statute has been in effect for 13 years. The Petitioner has not satisfied the burden of rebutting this presumption, which is fundamentally embedded in our jurisprudence.
70. The Petitioner's claim that the impugned section is unconstitutional because it discriminates by limiting the qualification of the 1st Respondent's Secretary/CEO to a degree from a Kenyan-recognised university is unfounded and lacking both factual and legal support.
71. Differentiation on the grounds of academic or professional qualifications for purposes of employment is not a ground for discrimination pursuant to Article 27(4) of the *Constitution*. Differentiation is permissible if it does not constitute unfair discrimination, which is the case here. An employer has the prerogative to determine the specific skill sets for particular roles.
72. There are valid reasons why the National Assembly limited the qualifications of the 1st Respondent's Secretary/CEO to, among other criteria, holding a degree in Education. First, the Teachers Service Commission is the regulatory body for the teaching profession in Kenya. Like all other professions, such as law, medicine, and engineering, which are regulated internally, the parliament, in its wisdom, enacted section 16 (2) to enable a member of the teaching profession to lead the profession. The same cannot be considered discriminatory for the teaching sector as alleged by the Petitioner.
73. Secondly, the functions of the TSC articulated under Article 237 are intrinsically and fundamentally intertwined and related to the teaching profession. To this end, there are rational, objective, justifiable and cogent reasons why the TSC's chief administrator must have qualifications in education to facilitate effective implementation of educational policies and professional practices
74. The requirement for a degree qualification in education is not discriminatory, but rather is logically related to the purpose of the role, which is based on the administration and leadership of an institution managing teachers, such as the 1st Respondent.



75. Pursuant to the roles of the CEO/Secretary of the 1st Respondent, s/he is expected to internalise the core mandate of the 1st Respondent provided under Article 237 (2) and (3) of the [Constitution](#), which includes education policy implementation, regulating the country's teaching service and teacher oversight. It is only proper and effective that a person with a background or knowledge in education undertake such duties.
76. The academic and professional qualification requirements under Section 16 of the Act align with the best national and global practices that emphasise domain expertise for sector-specific leadership roles. For example, the legal society is led by a legal practitioner, the medical field by a medical practitioner, and accountants by an accountant.
77. That the qualifications outlined in Section 16(2) are intended to ensure that the 1st Respondent is managed by a person with specific expertise, administrative experience, and ethical integrity, as envisaged in Chapter Six of the [Constitution](#).
78. The requirement for an education degree does not violate Article 27 of the [Constitution](#). It applies equally to all Kenyan citizens meeting the qualifications, regardless of background. It does not constitute indirect discrimination, as it is a legitimate and documented criterion premised on the core mandate of the 1st Respondent.
79. The Petitioner's interpretation of Section 16(2) of the Act is inaccurate and appears designed to mislead the court. At no point does the contested section of the Act suggest or aim to make it mandatory for an applicant for the position of CEO/Secretary to possess qualifications in human resources and financial management.
80. The allegation that applications should have been submitted in the 1st Respondent's regional offices or sent via registered mail undermines the constitutional principles of transparency, accountability, and verifiability in a sensitive constitutional process, and therefore cannot serve as a reason to halt the recruitment exercise.
81. Furthermore, there is no statutory provision specifying the timeframe within which applications for the position of Secretary/CEO of the first respondent must be submitted. It is well established that, in the absence of a prescribed period, a party is expected to act within a reasonable timeframe. The Commission maintains that a period of twenty-one days is reasonable and consistent with best practices in human resources management.
82. The 21-day period stated in the advertisement was practical and adequate for applicants to submit their respective applications. The Petitioner's claim that the 21 days were insufficient is speculative, made in bad faith and lacking any evidence or justification.
83. The recourse to the online platform is in line with trends in the management of public/teaching service as it enhances transparency and accessibility in the recruitment process. Provisions for manual delivery at the TSC headquarters are a reasonable complementary alternative for applicants who may not have full access to digital platforms.
84. Public interest strongly supports continuity, professionalism, and efficiency in managing such a vital constitutional body, and the court should therefore disapprove of any acts that may micromanage the Commission.
85. It is argued that unless the Conservatory Orders issued on 26th May, 2025, are set aside and/or the Application dismissed, the 1st Respondent will suffer irreparable prejudice, loss and damage in that:



- a. There will be a leadership vacuum in the sensitive office of the Commission Secretary/CEO, who is the Accounting Officer of the Commission and the chief administrator responsible for managing the public teaching sector on a day-to-day basis.
- b. Since Dr Macharia's term expired on June 30th, 2025, any further delay in appointing a permanent officeholder could lead to reduced efficiency, as well as less effective, transparent, and accountable governance within the Commission and the broader public teaching service. This situation ultimately prejudiced teachers in public service and, by extension, students in public schools.
- c. There will be severe institutional disruption, and uncertainty will disturb leadership continuity, affect decision-making processes, and hinder the implementation of key strategic programmes within the Commission, including the full rollout of ongoing curriculum reforms that rely on the presence of a substantive Chief Executive Officer with full authority to carry out essential constitutional, statutory, and administrative functions.
- d. The continued absence of a substantive CEO who is also the Accounting Officer under the *Public Finance Management Act* will disrupt the financial operations of the 1st Respondent and bring the entire operations of the Commission to a halt.

Analysis and Determination.

86. After meticulous examination of the Application, including its foundational grounds, the supporting affidavit, the replying affidavit submitted by the First Respondent, and the respective submissions of the counsel for all parties, a single overarching issue arises for determination: whether the Petitioner's application is merited.
87. I have carefully analysed the facts outlined in the grounds supporting the application, both in the face of the application and the supporting affidavit, as well as the replying affidavit submitted by the first Respondent. I conclude that this Court must exercise caution in how it formulates its decision on this application to avoid the appearance of having a predetermined judgment. Prudence requires a concise determination, and that the parties accept the brevity of the determination.
88. I want to acknowledge that I have thoroughly reviewed all submissions supporting and opposing the Petitioner's application, and I sincerely appreciate the detailed arguments. I have also given appropriate weight to the authorities cited. I should be permitted to state that I shall make specific reference only to the submissions of the respective learned Counsel that I consider as very salient to the determination of the various issues raised, as I deem necessary.
89. The principles that the Court must consider when approached to determine whether a party is entitled to an interim conservatory order are now well-established. In the case of the Board of Management of Uhuru Secondary School v City County Director of Education & 2 others cited by Counsel for the 1st Respondent, the Court aptly set out the principles, thus;
 - a. Foremost, the Applicant ought to demonstrate a prima facie case with a likelihood of success and that, in the absence of the conservatory orders, he is likely to suffer prejudice. It is, in my view, not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order; rather, there must also be evidence of a likelihood of success. The prima facie case ought to be beyond a speculative basis.
 - b. Once the applicant has established to the Court's satisfaction a prima facie with a likelihood of success, the Court is then to decide whether a grant or denial of the conservatory relief will



enhance the Constitutional values and objects of the specific right or freedom in the Bill of Rights: See Patrick Musimba v The National Land Commission & 4 Others HCCP 613 of 2014 [No. 1] [2015]eKLR and also Santrose Ayuma & 11 Others v Registered Trustees of Kenya Railways Staff Retirements Benefits Scheme [2011]eKLR.

- c. Thirdly, flowing from the first two principles, is whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory. It is indeed the business of the Court to ensure and secure, so far as possible, that any transitional motions before the Court do not render nugatory the ultimate end of justice;
 - d. The fourth principle, which emerges from the various cases and is well captured by the Supreme Court of Kenya in the case of Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others [2014] eKLR, is that the Court must consider conservatory orders also in the face of public interest dogma;
 - e. Finally, the Court is to exercise its discretion in deciding whether to grant or deny a conservatory order. The Court must consequently consider all relevant material facts and avoid immaterial matters. The Court will consider the Applicant's credentials, the prima facie correctness of the information availed, and whether the grievances are genuine, legitimate and deserving and finally, whether the grievances and allegations are grave and serious or merely vague and reckless: See Centre for Human Rights and Democracy & 2 Others v Judges and Magistrates Vetting Board & 2 Others CP NO. 11 of 2012 as well as Suleiman v Amboseli Resort Ltd [2004] 2 KLR 589.
90. The Petitioner contends that he has established a prima facie case, with a high chance of success, whereas the Respondents hold otherwise. A Prima facie case was defined, and I see it as such, in the case of Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR, as

“So, what is a prima facie case? I would say in civil cases, it is a case in which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party, as to call for an explanation or rebuttal from the latter.”

91. In Jan Bonde Nielsen Nguruman Limited & 2 Others [2016] eKLR, the

“We adopt that definition, save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected, which is directly threatened by an act sought to be restrained; the invasion of the right has to be material and substantive, and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini-trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The Applicant need not establish title, it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance of probabilities, or, otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view on the face of it, the applicant's case is more than not to ultimately succeed.”



92. As previously mentioned, one of the grounds for the Petitioner’s application is the supposed deficiencies in the recruitment process. It is argued that the notice period given to applicants was too short and that the advertisement was published without a clear statement of the vacancy for the Secretary/CEO position. I have carefully reviewed the material submitted to this Court by the Petitioner, intended to support this ground, and all I see is vagueness. Important questions remain unanswered for now: how relevant and connected are the findings of the Presidential Working Party on Education Reform, found in the supposed report dated “June 2023”; how was the vacancy for the Secretary/CEO of the 1st Respondent to be declared, if not as explained by the 1st Respondent? and what was the legal or reasonable notice period supposed to be? In my view, the material does not establish a prima facie case on this ground.

93. This Court acknowledges that under Article provides;

“(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

94. The Petitioner derived locus standi from this provision to initiate the current petition and application. As such, even as I consider whether he meets the conditions set hereinabove, I recognise that he may not have a personal and direct interest in the matter but rather a public interest.

95. I have carefully considered the material that the Petitioner has presented, coupled with the unchallenged fact that the impugned section has been in operation for approximately thirteen years, and I hold that the Respondents’ argument persuades me that the Petitioner hasn’t demonstrated that he or the public will suffer prejudice if the conservatory order sought is not granted.

96. Granting an interim conservatory order that suspends the operation of a section of a statute that has remained in effect for approximately thirteen years is a grave action, considering the presumption of the constitutional validity of the impugned section. It requires the Court to exercise prudence and to only issue such an order in the clearest and most well-substantiated prima facie cases.

97. This principle has been established through a series of authorities, including those cited by Counsel for the 1st Respondent. In the case of Susan Wambui Kaguru & 4 others v Attorney General & another [2012] KEHC 551, the Court held;

Under the *Constitution*, the National Assembly and the president exercise delegated sovereign authority of the people delegated to them in enacting laws [see Article 1[3] of the *Constitution*]. It is for this reason that every statute that flows from the legislative process is presumed to be constitutional and valid, and unless there are very clear reasons to stay the enforcement of the statute, the court will not ordinarily grant conservatory orders.

I have given thought to the arguments made, and once again, I reiterate that every statute passed by the legislature enjoys a presumption of legality, and it is the duty of every Kenyan to obey the very laws that are passed by our representatives in accordance with our delegated sovereign authority.

The question for the court is to consider whether these laws are within the four corners of the *Constitution*. No doubt, serious and weighty arguments have been advanced, and I think any answer to them must await full argument and consideration by the Court. I cannot, at this stage, make an interim declaration which would effectively undo the legislative will unless there are strong and cogent reasons to do so. It is on the aforesaid grounds that I reject the prayers for ex parte relief.”



98. In *Adrian Kamotho Njenga v Selection Panel for Appointment of Commissioners of the Independent Electoral and Boundaries Commission [2021] & 2 others; Independent Electoral and Boundaries Commission [2021] KEHC 6451[KLR]*, cited by Counsel for the 1st Respondent, the Court held;

“From the foregoing, it is clear that to suspend the operation of the law at an interlocutory stage of a matter would overlook the presumption of constitutionality, which all legislation benefits from. The Court runs the risk of infringing upon the legislative supremacy and independence of parliament were it to suspend legislation at the interlocutory stage without having had the full benefit of the substantive arguments of the parties.....”

99. In my perspective, within constitutional democracies such as ours, where constitutional supremacy prevails over parliamentary sovereignty, a conservatory order may be issued at any stage, contingent upon the specific circumstances of each case.

100. It is important to recognise that the arguments put forward by both the Petitioner and the Respondent regarding the constitutional validity or invalidity of the contested section of the law are substantial and not superficial. They can only be thoroughly examined at the hearing of the main petition. However, having found as I have hereinabove, that there hasn't been a demonstration of a prima facie case in respect of the specific matters mentioned and that the Petitioner has not demonstrated the prejudice that he or the public would suffer if the conservatory order is not granted, I come to the inescapable conclusion that the instant application is for rejection. It is hereby rejected. The 1st Respondent is at liberty to proceed with the recruitment process, which was temporarily halted by order of this Court.

101. Having previously held the position I have described above, a prudent use of this Court's valuable time necessitates that I do not proceed to interrogate and rule on the 1st Respondent's application dated 5th June 2025, which technically succeeds.

102. Orders accordingly.

READ, SIGNED AND DELIVERED THIS 29TH DAY OF JANUARY 2026

OCHARO KEBIRA

JUDGE

In the presence of:

Petitioner:

Respondent:

