



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT KISII

PETITION NO. E012 OF 2025

GABRIEL MARAGA SEME.....

PETITIONER

VERSUS

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

RESPONDENT

HON. ATTORNEY GENERAL.....**2ND**

RESPONDENT

RULING

1. The 1st Respondent filed a Notice of Preliminary Objection dated 30th October 2025 challenging the Application and

Petition dated 1st October 2025. The objection urges the Court to invoke the doctrine of constitutional avoidance on the ground that the Petition does not raise any constitutional questions. It is further contended that the reliefs sought do not disclose any exceptional circumstances to warrant exemption from the doctrine of exhaustion. According to the 1st Respondent, the dispute is essentially an employment matter capable of being adequately resolved under the Employment Act.

2. In opposition to the Preliminary Objection the Petitioner swore a replying affidavit on 6th November 2025. He deposed that the Preliminary Objection was an attempt at avoiding responsibility for substantive constitutional violations. He drew the Court's attention to the Respondents' failure to comply with the Court's directions issued on 15th October 2025 requiring a response to the Petition within fourteen days. He maintained that the petition raised issues of both fact and law contrary to the principle in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**, which confines preliminary objections to

pure points of law. He pointed to the fact that it would require examination of facts to decipher the factual background of his complaint, the adequacy and availability of the alternative dispute resolution mechanisms, existence of exceptional circumstances and whether his constitutional rights were violated.

3. The Petitioner maintained that, in view of the alleged grave violations of his rights, the doctrine of exhaustion was inapplicable, as the mechanisms under the Teachers Service Commission were neither impartial nor effective. He relied on Article 162(2)(a) of the Constitution and section 12 of the Employment and Labour Relations Court Act to argue that this Court is empowered to determine constitutional violations arising from employment relationships. In any event, he maintained that he had invoked the 1st Respondent's internal mechanisms through written complaints, which were ignored.

1st Respondent's Submissions

4. In its submissions, the 1st Respondent reiterated that the Petition offends both the doctrines of constitutional

avoidance and exhaustion. It asserted that the issues raised in the Preliminary Objection constitute pure points of law, as contemplated in **Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696**. On whether the Petition raises constitutional questions, the 1st Respondent submitted that the Petitioner seeks to enforce rights arising from an ordinary contract of service, which are fully justiciable under the Employment Act. It asserted that where legislation has been enacted to give effect to constitutional rights, litigants should not anchor their claims directly on the Constitution. Reliance was placed on **Sumayya Athmani Hassan v Paul Masinde Simidi & another [2019] eKLR**, which underscored that rights under Article 41 of the Constitution are enacted in the Employment Act and Labour Relations Act. The 1st Respondent further noted that the Petition challenges sick leave entitlements governed by section 31(1) of the Employment Act and the TSC Code of Regulations.

5. The 1st Respondent further submitted that the Petition does not meet the threshold of a constitutional pleading set out in

Anarita Karimi Njeru v Republic [1979] eKLR, as it fails to demonstrate with reasonable precision how the Petitioner's rights under Article 47 of the Constitution, read together with sections 42, 43, 44 and 45 of the Employment Act, were violated. In support of this position, reliance was placed on **Maggie Mwauki Mtalaki v Housing Finance Company of Kenya [2015] eKLR**, where Emukule J rendered himself as follows:

“Where there is a parallel remedy, Constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature, which at least arguably indicates that the means of least redress otherwise available would not be adequate. To seek constitutional relief in the absence of such feature would be a misuse, an abuse of the Court's process.”

6. On the basis of the foregoing, the 1st Respondent urged the Court to find that the Petition is incurably defective and to strike it out with costs.

Petitioner's Submissions

7. In his submissions the Petitioner identified the issues for determination as whether the Preliminary Objection raises any pure point of law, whether the Petition discloses constitutional issues for determination, whether the exhaustion doctrine applies to the facts of this case and whether this court has jurisdiction. On the legal test for Preliminary Objections the Petitioner reiterated the arguments in the Replying Affidavit, maintaining that the objection is premised on disputed facts and is therefore improperly before the Court. With regard to whether the Petition raises constitutional issues, the Petitioner submitted that the alleged unlawful deduction of his salary, demotion, discrimination on account of disability, and denial of reasonable accommodation due to disability raise questions of constitutional interpretation and enforcement under Articles 27, 41, 47 and 54 of the Constitution. He invoked this court's jurisdiction Under Article 162(2)(a) of the Constitution and sections 12(1) and 12(3) of the Employment and Labour Relations Court Act to remedy constitutional transgressions.

8. On the doctrine of exhaustion, the Petitioner asserted that it would be illusory and futile to require him to seek redress from the very entity alleged to have violated his rights. He reiterated that the internal mechanisms were ineffective, as evidenced by the 1st Respondent's failure to respond to his complaint letters. He relied on **Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR**, which recognised that courts may intervene where internal mechanisms are ineffective or where constitutional issues arise. On jurisdiction, the Petitioner reaffirmed this Court's mandate under Articles 22, 23, 162(2) (a) and 165(3)(d) of the Constitution, as well as section 12 of the Employment and Labour Relations Court Act, to enforce the Bill of Rights, interpret the Constitution, and determine employment and labour relations disputes.

9. Finally, the Petitioner submitted that the Respondents' disobedience of court orders disentitles them from the Court's audience. He further contended that the Respondents had not demonstrated any prejudice to be suffered should the Petition proceed to hearing on the merits. In conclusion the Petitioner urged the Court to be

guided by Article 159(2)(d) of the Constitution on not placing undue regard to technicalities. Consequently, he prayed for the dismissal of the Preliminary Objection with costs and for the Petition to be set down for hearing on its merits.

Disposition

10. The Court distils the issues for determination to be
 - a. whether the Court has jurisdiction to entertain the petition,
 - b. whether the doctrine of constitutional avoidance applies
 - c. whether the doctrine of exhaustion applies.

11. The Employment and Labour Relations Court as presently constituted has the power and authority to determine constitutional issues that arise in the sphere of employment and labour relations. As such, the Court has jurisdiction to entertain a petition asserting there has been breach of the Constitution.

12. On the question as to whether the constitutional threshold has been met to move the case beyond the

application of the doctrine of exhaustion, the Court is of the firm view that in line with precedent, where the constitutional path can be safely avoided when articulating and having determination of a dispute. That path should be pursued. Per Emukule J. in the case of **Maggie Mwauki Mtalaki v Housing Finance Company of Kenya** (*supra*):

“Where there is a parallel remedy, Constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature, which at least arguably indicates that the means of least redress otherwise available would not be adequate. To seek constitutional relief in the absence of such feature would be a misuse, an abuse of the Court’s process.”

13. In this case, the Petitioner seeks to have a determination of the salary deductions as being unlawful. The Petitioner additionally seeks the declaration of part of the Code of Regulation for Teachers as unconstitutional. The Court is reminded of the decision of Mativo J. (as he then was) in the case of **CNM v WMG [2018] eKLR** where the Learned Judge stated that courts abhor the practice of parties converting

every issue in dispute to a constitutional question and filing suits disguised as constitutional Petitions when in fact they do not fall anywhere close to violation of constitutional rights. In the matter before the court, there is an alternative remedy available within the purview of this Court that could result in efficacious remedies being granted without vaulting the matters to the constitutional platform. I therefore find the filing of the Petition to offend the doctrine of constitutional avoidance.

14. The final aspect to consider is the doctrine of exhaustion. The Petitioner only seems to have authored one letter seeking explanation for the deduction in salary. Without more, one cannot tell whether the refusal to engage and offer solutions meets the threshold for the determination the doctrine of exhaustion is at play. The Court thus finds the doctrine to apply as the resolution of the dispute has not gone through the processes in place at the 1st Respondent.

15. Having found the Petition offends the doctrine of constitutional avoidance and the doctrine of exhaustion, whereas this Court is imbued with authority to hear and

determine petitions raising constitutional issues, this Petition is misplaced and as such is for striking out. Granted that from all accounts it involves parties in an employment dispute and a suit will perhaps follow, the Court orders the Petition struck out albeit with no order as to costs.

It is so ordered.

Dated and delivered at Kisumu this 29th day of January

2026

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