

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO E027 OF 2026

IN THE MATTER OF THE CONTRAVENTION OF ARTICLES 2, 10, 19, 20, 22, 24, 27, 41, 47,
232, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010 AND

IN THE MATTER OF ALLEGED VIOLATION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER THE CONSTITUTION AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT AND

IN THE MATTER OF: THE TEACHERS SERVICE COMMISSION ACT, 2012 AND

IN THE MATTER OF: THE DISCRIMINATORY RE-ADVERTISEMENT OF TEACHING
POSITIONS IN NORTH EASTERN REGION

BETWEEN

TITUS KYALO KILONZO 1ST
PETITIONER

JOHNSON NGUMBAU MUNYOKI..... 2ND
PETITIONER

LAWRENCE KIRIMI GEORGE.....3RD PETITIONER
(Suing on his own behalf and on behalf of the persons listed in Schedule A)

-VERSUS-

TEACHERS SERVICE COMMISSION
RESPONDENT

CORAM

Before Lady Justice J.W. Keli

C/A Otieno

RULING

1. The petitioners together with others under schedule A in the petition filed a notice of motion application dated 23rd January 2026 brought Under Articles 19, 20, 22, 23, 27, 41, 47 and 159 (2) (d) of the Constitution of Kenya; and Rules 19, 23 & 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, and Rule 22 of the Employment and Labour Relations Court (Procedure) 2016.” seeking for the following orders-
 - a. spent
 - b. THAT pending the hearing and determination of this Application, this Honorable Court be pleased to issue a CONSERVATORY ORDER staying the recruitment process advertised by the Respondent vide the advertisement titled "Recruitment of Teachers to Fill 2,082 Attrition Vacancies in Senior Schools - November 2025", specifically restraining the Respondent, its agents, or officers from shortlisting, interviewing, recruiting, or deploying any new teachers to the positions currently held by the Petitioners in Garissa, Wajir, Mandera, and Lamu Counties.
 - c. THAT pending the hearing and determination of the Petition herein, a CONSERVATORY ORDER be issued preserving the status quo of the Petitioners' employment contracts, prohibiting the Respondent from declaring the said positions vacant, issuing termination notices, or removing the Petitioners from the payroll.
 - d. THAT costs of this Application be provided for.

Grounds of the application

2. The Respondent has advertised vacancies for positions that are currently occupied by the Petitioners. A comparative analysis of the Contractual Teachers List against the Vacancy

Advertisement confirms that the Respondent is recruiting for the exact subject combinations and schools where the Petitioners are currently deployed.

3. The advertisement serves as a de facto termination notice. If the recruitment proceeds to the interview stage, third parties will be engaged to replace the Petitioners, rendering the Petition nugatory and the Petitioners' loss of livelihood irreversible.
4. It is within public knowledge that the Respondent has simultaneously been confirming Junior Secondary School (JSS) interns to permanent terms to ensure continuity, while subjecting the Petitioners, who serve in hardship zones, to fresh recruitment for their own jobs. This differential treatment violates Article 27 (Freedom from Discrimination).
5. It is a violation of Article 201 for the Respondent to expend public funds advertising, vetting, and interviewing new candidates for positions already filled by competent, serving teachers who are willing to be confirmed.
6. The Petitioners, serving in volatile security zones, have legitimate expectations of confirmation. If they are displaced by new recruits during the pendency of this Petition, they will suffer irreparable psychological and economic harm that damages cannot adequately compensate.
7. The balance of convenience tilts in favor of the Petitioners, who are already at the workstations discharging their duties. Halting the recruitment for these specific posts will cause no prejudice to the Respondent or the learners, whereas allowing it to proceed will cause destitution to the Petitioners. It is therefore in the interests of justice, public policy, and Constitutional protection of human dignity, equality, and the right to fair labor practices, that the conservatory orders be granted urgently to preserve the status quo and prevent grave injustice.

8. The application was further based on the affidavit of Titus Kyalo Kilonzo (1st applicant/petitioner) sworn on the 23rd January 2026 where he annexed his letter of appointment dated 2nd June 2023 on a contract of 3 years effective date he was to start teaching, a list of contractual teachers in North Eastern region, and a copy of the impugned advertisement for various teachers and as relates to their case 2,082 posts for secondary schools.
9. The application was opposed by the respondent who filed a replying affidavit dated 6th February 2026 sworn by Antonina Lentoijoni, the Director in charge of staffing directorate of the respondent.
10. The court issued interim conservatory order on the 28th January 2026 as follows- ‘‘THAT pending the hearing of this Application, this Honorable Court is pleased to issue an interim CONSERVATORY ORDER staying the recruitment process advertised by the Respondent vide the advertisement titled "Recruitment of Teachers to Fill 2,082 Attrition Vacancies in Senior Schools - November 2025", specifically restraining the Respondent, its agents, or officers from shortlisting, interviewing, recruiting, or deploying any new teachers to the positions currently held by the Petitioners in Garissa, Wajir, Mandera, and Lamu Counties. 3. THAT the application be served with this order for response in 7 days. Right of reply on response. 4. Hearing interpartes on the 9th February 2026. ’
11. The respondent aggrieved by the above court order of 28th January 2026 filed an application by way of Notice of motion dated 30th January 2026 seeking for the following orders-
 - a. THAT pending the hearing and determination of this application, the Honourable Court be pleased to clarify and/or interpret its orders issued on 28th January, 2026 to elucidate whether the said orders suspend the recruitment of teachers in the entire North Eastern

region (Mandera, Garissa, Wajir) and Lamu County or the same applies strictly to recruitment in schools where the three Petitioners are stationed.

b. THAT this Honourable Court be pleased to set aside, discharge, vary and/or vacate its orders issued on 28th January, 2026 restraining the Respondent, its agents, or officers from shortlisting, interviewing, or deploying any new teachers to the positions currently held by the Petitioners in Garissa, Wajir, Mandera and Lamu Counties.

c. THAT cost of the Application be in the cause.

12. The grounds of the application by the respondent were as follows-

a. THAT the said orders were granted without affording the Respondent/Applicant an opportunity to be heard, contrary to the rules of natural justice and the right to fair hearing under Article 47, 48 and 50 of the Constitution.

b. THAT the interim conservatory orders have serious adverse effect and threatens the constitutional rights of children living in the hardship and marginalized areas to basic education as enshrined under Articles 43 and 53 of the Constitution.

c. THAT the orders issued impede the exercise of constitutional and statutory powers of the Respondent on employment and recruitment of teacher, contrary to the principles of institutional independence under Article 249(2) of the Constitution.

d. THAT the Conservatory Orders issued contravene the constitutional values under Article 10 and 232 of the Constitution, specifically the principles of good governance, fair competition and merit as the basis of appointment in public service.

e. THAT the orders issued were obtained through misrepresentation and concealment of material facts in order to mislead the court and steal a match. That the particulars of misrepresentations include: The Petitioners have presented before court an inaccurate list of teachers with duplicated 27 teachers in the list attached as Schedule A to arrive at a figure of

158 instead of 131, simply to create an impression of a big number of affected teachers. The Petitioners list attached as Schedule A contains teachers who are deceased, more specifically one Job Wangwe TSC No. 923358 who passed away on the 13th January 2026.iii) The Petitioners list attached as schedule A comprises of teachers who have since rescinded their employment on contract terms and have been engaged by the Commission on Internship terms. The Petitioner's list attached as schedule A comprises of 115 teachers who have as a matter of fact applied for the positions advertised for vide the advertisement for the recruitment of 2,082 teachers of November 2015. The Petitioners list attached as Schedule A comprises of 7 teachers not eligible to apply for advertised post for post - primary teachers but applied for the Primary teachers' recruitment vide advertisement for recruitment of 7,065 teachers of November 2025. The Petitioners' list contains 9 teachers who did not lodge their applications for consideration of the positions advertised in the November 2025 advert, despite being able to do so.

- f) THAT the orders lack clarity, are ambiguous, and incapable of enforcement, thereby prejudicing the Respondent's constitutional and statutory mandate and frustrating legitimate constitutional process anchored on both the constitution and statute law.
- g) THAT the conservatory orders issued ex parte are prejudicial to the public policy and interest as the same has frozen the entire recruitment exercise in the entire North Eastern region and Lamu County.
- h) THAT the Petitioner's application dated 23rd January 2026 is misconceived, fatally defective and bad in law, as they seek to restrain the Commission from lawfully exercising its constitutional and statutory mandate guaranteed under Article 237 of the Constitution and the Teachers Service Commission Act.

- i) THAT the advertisement of November 2025 for the recruitment of 2,082 teachers to fill attrition vacancies did not constitute, either in law or in fact, termination notices of the Petitioners' contracts, whether express or implied.
- j) THAT the recruitment of teachers to fill attrition vacancies is a routine, lawful, and continuous constitutional, statutory and administrative function of the Commission necessitated by retirements, resignations, deaths, and other lawful exits, and cannot be equated to replacement of serving teachers on contract.
- k) THAT the Petitioners' contracts of service remain valid and enforceable strictly in accordance with their terms, and the Commission has neither issued notices of termination nor taken any administrative action capable of being construed as termination of the said contracts.
- l) THAT the net effect of the orders issued by the court will micro- manage the internal managerial functions of the Commission, contrary to the doctrine of separation of powers and established judicial precedent.
- m) The Court is irregularly and unlawfully being invited to re-write the contracts between the Respondent and the Petitioners contrary to the tenets of employment law and practice.
- n) THAT the orders are against public Policy and Interest and ought to be discharged.
- o) THAT this Honourable Court has discretion and jurisdiction to vary, vacate, set aside and/or discharge ex-parte interim conservatory orders where they were obtained without full disclosure or without meeting the required threshold.
- p) THAT it is in the interest of justice that the constitutional and statutory functions of the Commission should not be arrested based on speculative allegations.

- q) THAT further, no prejudice shall be visited upon the Petitioners at this stage as they have the opportunity to compete fairly with other Kenyans for the advertised posts which 115 of them have duly applied for.
 - r) THAT to seek orders for employment from this Court in the manner sought by the Petitioners is not only unconstitutional but also amounts to stealing a match.
 - s) THAT no prejudice shall be visited upon the Petitioners at this stage as they will continue serving under their respective contracts of employment and in any event will have an opportunity to prosecute the Petition against the Respondent/Applicant on merit.
 - t) THAT the balance of convenience tilts in favour of granting the prayers herein and discharging the interim conservatory orders issued by the court on the 28th of January 2026.
13. The application was supported by the affidavit of Antonina Lentoijoni, sworn on the 30th January 2026. There was no filed response but the facts were same as in the petitioner's application.
14. The court directed the applications be heard together. On the 10th February 2026, the parties represented by counsel, Mwalimu for the petitioners and Anyuor for the respondent, argued their applications orally. The court took note of the parties' oral submissions, which were consistent with the filed pleadings; thus, there is no need to reproduce them herein.

Decision

15. The Petitioners hold fixed-term contracts expiring on various dates between 2026 and 2028. In their application under certificate of urgency, they informed the court that the impugned recruitment was meant to replace them, thus arbitrarily terminating their contracts. They further contended that subjecting them to competitive recruitment for their jobs while their counterparts serving as interns in Junior Secondary Schools (JSS) are simultaneously being confirmed to permanent terms without re-application constituted a violation of Article 27 of the Constitution, to wit- ‘27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms. (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4). ‘

16. The court issued interim conservatory order on the 28th January 2026 as follows- ‘THAT pending the hearing of this Application, this Honorable Court is pleased to issue an interim CONSERVATORY ORDER staying the recruitment process advertised by the Respondent vide the advertisement titled "Recruitment of Teachers to Fill 2,082 Attrition Vacancies in Senior Schools - November 2025", specifically restraining the Respondent, its agents, or officers from shortlisting, interviewing, recruiting, or deploying any new teachers to the positions currently held by the Petitioners in Garissa, Wajir, Mandera, and Lamu Counties. 3.

THAT the application be served with this order for response in 7 days. Right of reply on response. 4. Hearing interpartes on the 9th february 2026. ‘

17. The basis of grant of interim conservatory orders was based on the grounds of the application. The respondent contended that the application contained a material misrepresentation that misled the court into issuing the conservatory orders. The court perused the schedule A attached by the applicant and found that the duplicated names of 27 teachers were part of the list of 158 teachers. The respondent stated that this was meant to create the impression of a large number of affected teachers. Further, it was indicated that one of the teachers in the list had passed on 13th January 2026. The court found that it was a recent death and gave the benefit of the doubt to the petitioners. The respondent further stated that 115 of the teachers in Schedule A had applied for the impugned 2082 vacancies (AL-3). The court found that this was a material fact that the petitioners concealed from the court. It was a ground of the application that if the recruitment proceeded, third parties would be engaged to replace the petitioners, rendering the petition nugatory. The petitioners did not disclose that they had applied for the positions advertised. The impression was that their jobs were being terminated constructively. The respondent stated categorically that the petitioners held fixed contracts expiring on various dates between 2026 and 2028, and this was not disputed. Indeed, the respondent stated it had no intention of interfering with the said contracts. Non-disclosure of material facts is a basis for setting aside exparte orders. Material facts are facts that could influence the court's decision to grant or refuse the order. Non-disclosure of such facts undermines the integrity of the process as held in *Tiwi Beach Hotel Ltd vs. Stamp [1991] KLR 658* where the Court had this to say about the effect of non-disclosure:- *“It matters not upon a point of this nature being taken whether the applicant was entitled to or that the Court would*

have granted relief sought in any event, that is to say, leaving aside the non-disclosure for it is the affront to the dignity and credulity of the Court that is in point.”(Decision upheld by Court of Appeal in *Francis Kihoro Kibothu v Catherine Kagendo Mbuna [2018] KECA 746 (KLR)*)
The court finds there was non-disclosure of material facts by the applicant and thus basis of setting aside the *ex parte* orders.

18. The petitioners/applicants took issue with clause vi of the advert, to wit- ‘ *preference will be given to applicants who have not previously been employed by the Teachers Service Commission*’, which they said meant they were ousted from applying for the vacancies. Mr. Anyuor , inhouse counsel for the respondent, told the court that previously employed teachers meant those who had been dismissed on account of misconduct and removed from the register of teachers. The explanation was plausible and may be the petitioners knew that was the position, hence their application for the positions. The court found no basis for the allegation of discrimination based on that advert clause vi.

19. On the allegation of a policy by the Respondent of automatic confirmation or contract renewal for interns serving in Junior Secondary Schools on a permanent basis without competitive recruitment, the court returns that the alleged policy was not placed before the court to make any conclusion related to the applicant’s case on a prima facie basis. The Court agreed with the respondent that it has a constitutional mandate to recruit and supply teachers to public schools under Article 237 of the Constitution of Kenya, to wit-‘(1) There is established the Teachers Service Commission.
(2) The functions of the Commission are—
(a) to register trained teachers;

- (b) to recruit and employ registered teachers;
- (c) to assign teachers employed by the Commission for service in any public school or institution;
- (d) to promote and transfer teachers;
- (e) to exercise disciplinary control over teachers; and
- (f) to terminate the employment of teachers.

(3) The Commission shall—

- (a) review the standards of education and training of persons entering the teaching service;
- (b) review the demand for and the supply of teachers; and
- (c) advise the national government on matters relating to the teaching

profession.’’ The court finds that the impugned recruitment of teachers nationwide is in accordance with the respondent's constitutional mandate. The applicants have applied for the positions and have found that clause vi of the advert does not refer to teachers under fixed contracts terms , there is no basis of interference with the exercise.

20. Further competitive recruitment is a constitutional national value and principle of public service as stated in article 232(1)(G) of the Constitution – ‘(g) *subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;*’ The applicants hold fixed term contracts which are a lawful arrangement for employment and complete on their own without any obligation on the employer beyond their expiry date as held by the Court of Appeal in Transparency International - Kenya v Omondi [2023] KECA 174 (KLR) . The applicants have equal opportunity with all other applicants to be interviewed for a change of their employment arrangement from fixed term contracts to permanent. There is thus no legal basis to sustain the interim orders staying the recruitment process.

21. The court, for the foregoing reasons, finds that the continued existence of the conservatory interim orders would not be in the interest of justice and is likely to violate the child's right to quality education by limiting the availability of qualified and sufficient numbers of teachers in public schools. The court finds no prejudice to the petitioners, who were assured that their existing contracts were being respected by the employer/respondent and that they had an equal opportunity to be recruited for the impugned vacancies and had applied for the same. The court upheld the respondent's mandate to recruit and employ teachers, and it could interfere with the exercise of that mandate only where it was being exercised unconstitutionally. Having found no discrimination in the process or breach of contract by the petitioners, I find merit in the application dated 30th January 2026 and no merit in the application dated 23rd January 2026. The conservatory interim order issued on 28th January 2026 is vacated.
22. This being an employer-employee existing relationship, I make no order as to costs in both applications.
23. The petition is to be mentioned before the court on 9th March 2026 for hearing directions.
24. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 11TH DAY OF FEBRUARY, 2026.

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Petitioner/ applicant:- Mwalimu

Respondent/applicant:- Anyuor