Mweresa & 2 others v Social Health Authority & another (Petition E046 of 2026) [2026] KEELRC 870 (KLR) (25 March 2026) (Ruling)

Neutral citation: [2026] KEELRC 870 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION E046 OF 2026

JW KELI, J

MARCH 25, 2026

BETWEEN

DRC LARENCE EBOSO MWERESA ..... 1ST PETITIONER

DR AZHAR ABDUL GAFUR ..... 2ND PETITIONER

DR CLARE OTWOKO ..... 3RD PETITIONER

AND

SOCIAL HEALTH AUTHORITY ..... RESPONDENT

AND

FEDERATION OF KENYA EMPLOYERS ..... INTERESTED PARTY

RULING

1. The Petitioners/Applicants vide Notice of Motion application dated 9th February 2026 brought under the provisions of Article 23 of *the Constitution*, and *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, sought the following orders:-

    a. Spent

    b. Spent

    c. That pending the hearing and determination of this petition, this court grant a temporary injunction against the respondents restraining them from interrupting healthcare services on the 9th day of the month for employees in current employment, whose deductions the employer has effected as per law but is yet to remit.

    d. The costs of this Application be provided for.

2. The Application was supported by two affidavits sworn by the 1st and 2nd Petitioners respectively, on 9th February 2016.

3. **Grounds of the application**

a. Section 27(2a) of the Social Health Insurance (SHI) Act and Regulation 23 of the Regulations thereunder create a mandatory obligation on the employer to deduct an employee's contribution to the Social Health Insurance scheme and to remit the same to the authority by the 9th day of every month.

b. On their part, the *Employment Act* and the Regulations thereunder provide that salary payments for all employees be paid by the 5th day of every month.

c. By the time the remittances are to be made to the authority, employee payrolls will usually have been processed and employees' salaries already paid less the SHIF deductions as per law.

d. Regulation 23 of the SHI Regulations requires that an employer notify the Social Health Authority whenever any employee ceases to be in the employment of the employer within thirty days of the termination of the employment relationship.

e. As regards the deduction and remittance of contributions to the Authority, the employee does not have any obligation or control, as the employer acts as an agent of the Authority, deducting the employee's contribution even without needing the employee's consent. In other words, the deduction under the SHI Act is a statutory deduction that an employee cannot opt out of.

f. Unfortunately, pursuant to Regulation 64 of the SHI Regulations, the Authority maintains a digital system that automatically locks out any employee from services on the 9th of every month when the employer has failed to remit employee deductions to SHA even if the same have been deducted from the employee. The automatic lock out leads to a monthly interruption of services which are usually eventually restored, but which cause untold suffering to employees and their families, especially those with chronic illness that require continuous treatment.

g. The Petitioners/Applicants argue that the interruption of services is irregular and unlawful as the said employees are continuing employees, and have usually already been deducted their monthly contribution at the time of the interruption.

h. It is the Petitioners/Applicants' case that the denial of services amounts to unjust enrichment by the Authority, for the reason that the deducted contribution is usually already in the lawful process of remittance between the employer and SHA, and the Authority will usually eventually receive the money despite having already denied the services to the employee and their family.

i. Interruption of services for an employee is only justifiable under the rules when the Authority has notification from the employer that the said employee is no longer an employee, and not on the 9th of every month when the employee's contributions have already been alienated from the employee's salary.

j. Patients with chronic illnesses, especially those who require specific treatment that is specifically timed have been suffering on a monthly basis for a week or more when they have to spend money out of pocket to get the very treatment for which deductions are made to their salary.

k. The affected patients include the following categories: i)Those with kidney failure who require biweekly dialysis sessions, with a dialysis session costing upwards of Ksh 8,000/- to 20,000/- when paid out of pocket; ii) Cancer patients undergoing cycles of chemotherapy and radiotherapy, with each cycle costing upwards of Ksh 100,000/-; iii) Employees with children under five or school going children who are exposed to frequent respiratory infections that must be treated urgently to prevent complications; and iv)Health workers who are constantly exposed to environments laden with pathogens that can infect them at any time needing treatment.

l. Formally employed persons in Kenya are the main contributors to SHA and it is unfair to deny them the very services for which they pay for.

m. The average doctor household contributes Kshs. 15,000/- monthly to the Social Health Authority, to only then be made to spend a similar amount if they fall ill during the period of service interruptions.

n. There is no legal mechanism in place for any employee who pays out of pocket during a period of interruption to claim the money spent from the Authority or from their employer. On the other hand, the Social Health *Insurance Act* provides for a penalty regime for any employer who fails to remit deducted contributions or any persons who fail to contribute.

o. An employee whose contribution is deducted suffers double penalty by being denied services yet SHA has the capacity to prosecute for any fraudulent claims, to penalize for any noncontribution and to pursue the employer for the remittances. In fact the remittances are usually eventually received by the Authority, as stated hereinabove.

p. The Petitioners/Applicants have met the conditions/requirements for grant of an injunction for the reason that they a prima facie case with a likelihood of success upon consideration of the facts and the law; and the nature of the remedy sought is such that if not allowed, the suffering of the employee is not reversible or remediable through any legally established mechanism.

q. The court, by dint of Article 23 of *the Constitution* has the authority to enforce the Petitioners/Applicants fundamental rights.

r. The specific and limited questions of law raised in the application and petition have not been deliberated nor settled in any law in Kenya.

Response to the application

4. The application was opposed by the Respondent through their Replying Affidavit, sworn by Dr. Mercy Mwangangi on 6th March 2026, where they argued that:-

a. Social insurance is a solidarity-based statutory scheme, not a commercial or capitalist insurance contract hence the averment that contributors must receive benefits which are strictly equivalent to their individual premium contributions, or at open-market value, is legally and conceptually inconsistent with the purpose of a public health fund. In actual fact, the fund relies on mandatory participation and cross-subsidization between higher and lower income earners to cushion all Kenyan from catastrophic medical expenditures.

b. Indeed, Section 27 of the Social Health *Insurance Act* and Regulation 23 of the SHI Regulations impose a mandatory statutory obligation on employers to deduct employee contributions from their payroll and remit the same to the Authority by the 9th day of the following month.

c. The Respondent denies the Petitioners/Applicant's position that employers act as "agents" of the Authority for being legally flawed, and instead state that employers fulfil their role under strict statutory compulsion, not under contractual agency principles. The statutory duty to submit remittances to the Authority rests solely with the employer. Where an employer deducts but fails to remit contributions by the statutory deadline, such failure constitutes a direct breach of the employer's statutory duty, not a breach by the Authority.

d. On the digital verification system, the Respondent admits that the Authority operates a digital verification system to ensure strict compliance with statutory remittance timelines. The 9th-day submission deadline is a firm statutory requirement, not an arbitrary internal policy. The system's automated restriction of services on the 10th of the month for unremitted accounts is a necessary compliance mechanism.

e. In strict adherence to corporate governance principles and its fiduciary duty to the public, the Authority cannot lawfully disburse funds from a public insurance pool without prior verification of remittances. Verifying contribution status is an absolute necessity to preserve the financial sustainability of the Fund, maintain actuarial integrity, and prevent fraud and abuse.

f. The Authority does not control employer payroll systems and cannot access deducted funds until the remittance is actually effected by the employer.

g. On the issue of unjust enrichment, the Authority states that it empathizes with contributors, such as the 2nd Petitioner, who experience hardship or interruptions in essential treatments due to employer non-remittance, but the proximate statutory breach lies entirely with the employer. Non-remittance by an employer cannot automatically be attributed to the Authority as a constitutional violation of the right to health. According to the Respondent, the proper legal remedy for the Petitioners/Applicants lies in enforcement actions against their defaulting employers, who have unlawfully withheld deducted wages.

h. The Petitioners/Applicants have not proved the allegation of unjust enrichment against the Respondent by demonstrating that the Respondent retained a benefit unlawfully. By law, the Authority is strictly permitted to retain a maximum of only 5% of the collected funds for administrative expenses. The entirety of the remaining funds is ring-fenced and mandated by law to be paid out to contracted health care facilities for services rendered to Kenyans.

i. To demonstrate the Authority's absolute commitment to its statutory mandate and to definitively rebut any claims of hoarding public funds, the Authority has, as of February 2026, successfully disbursed over KES 102 Billion to healthcare providers across the country.

j. For the issuance of the Orders sought, the Petitioners must establish a prima facie case with a likelihood of success, prove that they will suffer irreparable harm, prove that the balance of convenience favours them, and that the orders are in the public interest. Granting the temporary injunction to suspend the 9th-day digital lockout would effectively suspend statutory enforcement mechanisms and alter the fiscal structure of the Fund.

k. Such relief would expose the Fund to actuarial instability, encourage widespread non-compliance by employers across the country, and prejudice millions of compliant contributors.

l. Further, granting the temporary injunction and the orders sought would severely hamper the Authority's service delivery mandate by paralyzing the Fund's revenue stream and disrupting its financial structure. The Authority would be unable to make timely payments to contracted

health facilities, which would trigger a systemic collapse of healthcare service provision, ultimately denying millions of patients access to critical, life-saving care.

5. In addition to the said Replying Affidavit, the Respondent filed a Notice of Preliminary Objection dated March 11, 2026, which challenges the court's jurisdiction to hear and determine the application and petition here, on the grounds that the dispute, being a constitutional challenge to legislation, regulations, and national policy concerning the implementation of the Social Health *Insurance Act*, falls within the exclusive jurisdiction of the High Court under Article 165(3)(b) and (d) of *the Constitution*.

6. It is argued that the Petition does not disclose a dispute arising out of an employer-employee relationship between the Petitioners and the 1st Respondent, as contemplated under Article 162(2)(a) of *the Constitution* and Section 12 of the *Employment and Labour Relations Court Act*. Notably, the Respondent is not the employer of the Petitioners, and neither does it stand in any contractual employment relationship with them.

7. The Respondent states that the petition and application instead raise issues relating to the constitutionality and implementation of a statutory national health insurance framework. Specifically, the suit concerns the constitutionality of statutory deductions from income; the validity of regulations issued by the Cabinet Secretary; and the legality of policy decisions implemented by the 1st Respondent. According to the Respondent, these are matters reserved for determination by the High Court exercising its constitutional jurisdiction.

8. Further, the Petition seeks declarations that: the implementation of the Social Health Insurance framework amounts to unlawful deprivation of property under Article 40 of *the Constitution*; and the regulations issued under the Social Health *Insurance Act* amount to unlawful taxation. Such reliefs require interpretation of *the Constitution* and determination of the validity of legislation and subsidiary legislation, matters which fall within the jurisdiction of the High Court under Article 165(3)(d).

Decision

9. The application was canvassed by way of oral submissions. All parties were represented. The issues for determination are as follows:

    a. Whether the Court has jurisdiction to hear and determine this matter.

    b. If issue (a) is determined in the affirmative, whether the Court should grant the orders sought.

Whether the Court has jurisdiction to hear and determine this matter.

10. Article 21(1)(1) of *the Constitution* – ‘ It is a fundamental duty of the State and every State organ to observe, respect, protect, promote, and fulfil the rights and fundamental freedoms in the Bill of Rights.

11. Article 22 provides for the enforcement of fundamental rights as follows-‘1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

    (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

        (a) a person acting on behalf of another person who cannot act in their own name;

        (b) a person acting as a member of, or in the interest of, a group or class of persons;

        (c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members."

12. Article 23 provides for authority of courts to uphold and enforce the Bill of Rights

> "(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.'

13. Article 24 provides for limitation of fundamental rights and freedoms as follows- '(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."

14. The applicant has sought for conservatory orders. The court has power to issue the order under Article 23 (3) to wit-' 3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.'

15. The court's judicial authority is under Article 162 of *the Constitution* to wit –' (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; ''Article 165 (5) provides- ' The High Court shall not have jurisdiction in respect of matters—

(b) falling within the jurisdiction of the courts contemplated in Article 162(2)."

16. The jurisdiction of the court to hear and determine the petition has been challenged. Does the instant cause of action fall under the jurisdiction of the court? Parliament legislated the jurisdiction of the court under section 12 of the Employment and Relations court as follows- '(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with

Article 162(2) of *the Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including —

(a) disputes relating to or arising out of employment between an employer and an employee;

(b) disputes between an employer and a trade union;

(c) disputes between an employers' organisation and a trade unions organisation;

(d) disputes between trade unions;

(e) disputes between employer organizations;

(f) disputes between an employers' organisation and a trade union;

(g) disputes between a trade union and a member thereof;

(h) disputes between an employer's organisation or a federation and a member thereof;

(i) disputes concerning the registration and election of trade union officials; and

(j) disputes relating to the registration and enforcement of collective agreements.

(2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.

(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders

(i) interim preservation orders including injunctions in cases of urgency;

(ii) a prohibitory order;

(iii) an order for specific performance;

(iv) a declaratory order;

(v) an award of compensation in any circumstances contemplated under this Act or any written law;

(vi) an award of damages in any circumstances contemplated under this Act or any written law;

(vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or

(viii) any other appropriate relief as the Court may deem fit to grant.

(4) In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just.

(5) The Court shall have jurisdiction to hear and determine appeals arising from -

(a) decisions of the Registrar of Trade Unions; and

(b) decisions of any other local tribunal or commission as may be prescribed under any written law."

17. The jurisdiction of the court to hear and determine constitutional petitions where the constitutionality of sections of the law is in issue was considered in the case of Kenya Tea Growers Association & 2 others v The National Social Security Fund Board of Trustees & 13 others (Petition E004 & E002 of 2023 (Consolidated)) [2024] KESC 3 (KLR) (21 February 2024) (Judgment) (Supreme Court) by the Honourable Supreme Court that: 'There was nothing in *the Constitution*, the ELRC Act, or indeed the decision in the Karisa Chengo case to suggest that in exercising its jurisdiction over disputes emanating from employment and labour relations, the ELRC was precluded from determining the constitutional validity of a statute. That was especially so if the statute in question lay at the center of the dispute. What it could not do, was 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 had nothing or little to do with employment and labour relations within the context of the ELRC Act." The respondent relied on the decision at the Court of Appeal stage and submitted the issues were similar and the decision was relevant to this case. The Supreme Court overturned the Court of Appeal decision.

18. It had already been held in Judicial Service Commission vs Gladys Shollei & Another [2014] eKLR that the Employment and Labour Relations Court has jurisdiction to hear constitutional petitions claiming breach of fundamental rights ancillary and incidental to employment and labour relations matters.

19. The present dispute concerns the legality of the automatic lock-out on 10th of the next month post salary payment imposed by the SHA digital system on an employee per Regulation 64 of the Regulations, when their deductions are not remitted by their employer to SHA by the 9th day of the month. The court finds that the dispute relates to a statutory deduction made from an employee's salary by their employer, and the remittance of the same to the Authority for access, by employees, to health facilities under SHIF.

20. Section 19 (1) (a) of the *Employment Act* 2007 authorizes an employer to make deductions from an employee's salary, of "any amount due from the employee as a contribution to any provident fund or superannuation scheme or any other scheme approved by the Commissioner for Labour to which the employee has agreed to contribute." Section 19 (4) of the same Act provides that "An employer who deducts an amount from an employee's remuneration in accordance with subsection (1)(a), (f), (g) and (h) shall pay the amount so deducted in accordance with the time period and other requirements specified in the law, agreement court order or arbitration as the case may be." Section 19 (6) provides that: "Where proceedings are brought under subsection (5) in respect of failure by the employer to remit deductions from an employee's remuneration, the court may, in addition to fining the employer order the employer to refund to the employee the amount deducted from the employee's wages and pay the intended beneficiary on behalf of the employee with the employer's own funds." Section 20 imposes an obligation on employers to provide their employees with itemized statements detailing the statutory deductions made from their salaries.

21. The dispute involving statutory deductions from wages, therefore, fall within the jurisdiction of the Court as they arise from employment. According to the decision of the Honourable Supreme Court in the Kenya Tea Growers case(supra), the Court indeed has the jurisdiction to determine the constitutional issues of statutory provisions, regulations, or policy decisions related to such statutory deductions. As such, the Respondent's preliminary objection is hereby dismissed.

If issue (a) is determined in the affirmative, whether the Court should grant the orders sought.

21. The conservatory order sought is as follows- 'That pending the hearing and determination of this petition, this court grant a temporary injunction against the respondents restraining them from

interrupting healthcare services on the 9th day of the month for employees in current employment, whose deductions the employer has effected as per law but is yet to remit.'' The fact of interruption of services as pleaded are admitted by the respondent who stated through the replying affidavit of Dr Mercy Mwangangi dated 6th March 2026 - , 'Section 27 of the Social Health *Insurance Act* and Regulation 23 of the SHI Regulations impose a mandatory statutory obligation on employers to deduct employee contributions from their payroll and remit the same to the Authority by the 9th day of the following month. The Respondent denies the Petitioners/Applicant's position that employers act as "agents" of the Authority for being legally flawed, and instead state that employers fulfil their role under strict statutory compulsion, not under contractual agency principles. The statutory duty to submit remittances to the Authority rests solely with the employer. Where an employer deducts but fails to remit contributions by the statutory deadline, such failure constitutes a direct breach of the employer's statutory duty, not a breach by the Authority. On the digital verification system, the Respondent admits that the Authority operates a digital verification system to ensure strict compliance with statutory remittance timelines. The 9th-day submission deadline is a firm statutory requirement, not an arbitrary internal policy. On the digital verification system, the Respondent admits that the Authority operates a digital verification system to ensure strict compliance with statutory remittance timelines. The 9th-day submission deadline is a firm statutory requirement, not an arbitrary internal policy. The system's automated restriction of services on the 10th of the month for unremitted accounts is a necessary compliance mechanism. In strict adherence to corporate governance principles and its fiduciary duty to the public, the Authority cannot lawfully disburse funds from a public insurance pool without prior verification of remittances. Verifying contribution status is an absolute necessity to preserve the financial sustainability of the Fund, maintain actuarial integrity, and prevent fraud and abuse. The Authority does not control employer payroll systems and cannot access deducted funds until the remittance is actually effected by the employer. On the issue of unjust enrichment, the Authority states that it empathizes with contributors, such as the 2nd Petitioner, who experience hardship or interruptions in essential treatments due to employer non-remittance, but the proximate statutory breach lies entirely with the employer. Non-remittance by an employer cannot automatically be attributed to the Authority as a constitutional violation of the right to health. According to the Respondent, the proper legal remedy for the Petitioners/Applicants lies in enforcement actions against their defaulting employers, who have unlawfully withheld deducted wages.'

22. Conversely, the applicant submitted that Regulation 23 of the SHIF Regulations requires that an employer notify the Social Health Authority whenever any employee ceases to be in the employment of the employer within thirty days of the termination of the employment relationship. Interruption of services for an employee is only justifiable under the rules when the Authority has notification from the employer that the said employee is no longer an employee, and not on the 9th of every month when the employee's contributions have already been deducted from the employee's salary. There is no legal mechanism in place for any employee who pays out of pocket during a period of interruption to claim the money spent from the Authority or from their employer. On the other hand, the Social Health *Insurance Act* provides for a penalty regime for any employer who fails to remit deducted contributions or any person who fails to contribute. The temporary interruption of services caused by remittance delays denies the right to health services during that period. It is not far-fetched to conclude that the monthly stoppage of health services may lead to premature deaths and violate employees' right to dignity. The respondent has a remedy to recover the money from the employer with penalties.

23. The court finds that the petitioners have proved on prima facie basis that the respondent's internal policy unjustifiably limits employees' right to health and dignity under the mandatory SHIF. Article 43 provides as follows: '43(1) Every person has the right—'

(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;

(2) A person shall not be denied emergency medical treatment".

Consequently, the court finds that the petition discloses a prima facie case of violation or threat to the petitioners' and all employees' fundamental rights to health and dignity, especially concerning their mandatory SHIF contributions. The respondent's internal policy, which temporarily disrupts access to health services on failure of the employers to remit deductions to the respondent by the 9th day of the following month, is unfair. The policy violates the right to access health services by the employees who have been deducted SHIF and the policy is neither reasonable nor justifiable in an open and democratic society grounded in human dignity, equality, and freedom, considering all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose (Article 22 of *the Constitution*). The enforcement measure against employers is considered extreme and disproportionate to the impact on employees who have no choice but to be in the scheme and must pay in cash to access health services, of which they legitimately expected, post-deduction of the SHIF. The respondent has an alternative remedy of recovery from the employer, with a penalty, without unfairly punishing the employees and consequently violating their right to access health services and to dignity.

24. In the upshot, the court held it has jurisdiction to hear and determined the petition. The court found that the petition disclosed a prima facie case of violation and/or threat of violation of the petitioners' and all employees' rights to health and dignity due to the respondent's policy of monthly temporary service interruptions because of delays in remittance of deducted funds by employers, specifically cutting off services on the 10th day of the following month.

25. The court issues the following conservatory order- That pending the hearing and determination of this petition, this court grant a temporary injunction against the respondents restraining them from interrupting healthcare services on the 10th day of the month for employees in current employment, whose deductions the employer has effected as per law but is yet to remit. Costs in the cause.

26. The court is of the opinion that the petition raises a novel and substantial question of law. Consequently, the court refers the matter to the Chief Justice for the appointment of a 3-judge bench to hear and determine the petition pursuant to article 165 of *the Constitution*, to wit—'(4) Any matter certified by the court as raising a substantial question of law under clause (3)(b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice."

27. It is so Ordered

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 25TH DAY OF MARCH, 2026.

J.W. KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

1st Applicant –In person

2nd and 3rd petitioners- Mutinda h/b Ms Mutua

Respondent- Konyango and Njue.

Interested party - Ouma