

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

ELRC PETITION NO. E086 OF 2025

(Before Hon. Lady Justice Hellen Wasilwa)

KENYA TEACHERS IN HARDSHIP AND ARID

AREAS WELFARE ASSOCIATION (KETHAWA)
.....PETITIONER

VS

TEACHERS SERVICE COMMISSION.....1ST
RESPONDENT

PUBLIC SERVICE COMMISSION.....2ND
RESPONDENT

SALARIES AND REMUNERATION COMMISSION...3RD
RESPONDENT

THE PRIME CABINET SECRETARY.....4TH
RESPONDENT

THE ATTORNEY GENERAL.....5TH
RESPONDENT

JUDGMENT

1 By a Petition dated 21st August 2025, the Petitioner sought for the following prayers:

- a. *A Declaration that the tabling, adoption and intended implementation of the 2019 Inter-Agency Technical Committee on Hardship Areas Report is irregular, for*

lack of public participation and is unconstitutional, therefore null and void.

- b. A Declaration that the de-gazettement of hardship areas and withdrawal of allowances from affected regions violates Articles 27, 41, 43, and 47 of the Constitution and Kenya's international obligations and is therefore a nullity.*
- c. A Conservatory Order restraining the Respondents from implementing or acting on the report until proper public participation and legislative frameworks are adopted.*
- d. An Order of Mandamus compelling the Respondents to publish the full report, criteria used for reclassification, and conduct county-level hearings on its impact.*
- e. An Injunction preventing any variation in hardship allowance payments pending full judicial review and stakeholder validation.*
- f. Any other relief that this Honourable Court may deem just.*
- g. Costs of this Petition.*

Petitioner's Case

- 2 The Petitioner avers that on or about March 2025, the 4th Respondent publicly presented a report titled the *2019 Inter-Agency Technical Committee Report on Hardship Area Reclassification*, which purports to reclassify various

hardship areas across Kenya by creating categories such as “Extreme Hardship,” “Moderate Hardship,” and areas completely excluded from hardship consideration.

- 3 The Petitioner avers that the report has not been subjected to public participation, stakeholder engagement, or any transparent validation process contrary to the national values outlined under Article 10 of the Constitution.
- 4 Additionally, the reclassification adversely affects numerous counties including 44 regions spreading across over 35 counties and over 129 sub-counties which continue to suffer from inaccessibility, poor healthcare, insecurity, and under-resourced schools amongst other challenges.
- 5 The Petitioner avers that the degazettement of some hardship areas will result in the termination or reduction of hardship allowances historically paid to teachers and other civil servants such as healthcare workers, police officers, and administrative officers. This will demotivate and displace public servants from affected regions, causing major disruptions to education, healthcare delivery, and national cohesion.
- 6 It is the Petitioner’s case that the Respondents failed to undertake any meaningful and inclusive public participation

prior to making the impugned decision, thereby violating a mandatory constitutional requirement. It is asserted that no consultations were conducted with affected stakeholders, including teachers, public sector workers, local communities, county governments, and civil society, despite the decision having far-reaching socio-economic implications.

- 7 The Petitioner avers that the Respondents' actions violate the right to fair labour practices, including the right to fair and reasonable remuneration and just working conditions, by withdrawing and/or degazetting hardship allowances without transparency, and in a manner that undermines the legitimate expectation of public officers who had committed to serve in designated hardship areas.
- 8 The Petitioner asserts that the impugned actions amount to discrimination and violate the right to equality, as the selective reclassification of hardship areas was undertaken without an objective, rational, and transparent framework, thereby resulting in unequal treatment of similarly situated regions and employees.
- 9 The Petitioner also contends that the Respondents' actions infringe socio-economic rights by removing hardship status from areas that continue to lack essential infrastructure, healthcare, education, and security, which will likely lead to

withdrawal of public servants from such regions and exacerbate marginalization and inequality.

- 10 It is the Petitioner's case that the impugned decision is unconstitutional, unlawful, and procedurally unfair for failure to comply with constitutional requirements on public participation, equality, fair labour practices, and protection of socio-economic rights.
- 11 The Petitioner contends that the Respondents' abrupt actions, undertaken without prior notice, transparency, or affording affected persons an opportunity to be heard, violate the right to fair administrative action as guaranteed under Article 47 of the Constitution, for want of procedural fairness, justification, and accountability.
- 12 The Petitioner avers that the Respondents' actions are in breach of Kenya's obligations under Articles 2 and 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which impose a duty on the State to progressively realise socio-economic rights and prohibit retrogressive measures that undermine access to adequate living and working conditions, particularly in disadvantaged communities, absent a participatory impact assessment.

- 13 The Petitioner asserts that the impugned decision also violates Articles 15 and 16 of the African Charter on Human and Peoples' Rights (ACHPR), which guarantee the right to work under equitable conditions and the right to health, respectively, and that the arbitrary withdrawal of hardship benefits from underserved regions undermines these protections.
- 14 The Petitioner further contends that the Respondents' actions contravene international labour standards, particularly ILO Convention No. 131 on Minimum Wage Fixing, which requires transparency, consultation, and fairness in wage-related decisions, and that the unilateral withdrawal of hardship allowances is inconsistent with principles of decent work and social justice.
- 15 In totality, the Petitioner maintains that the Respondents' actions are unconstitutional, unlawful, and in violation of both domestic and international legal obligations binding upon the State.

1st Respondent's Case

- 16 In opposition to the Application, the 1st Respondent filed Grounds of Opposition dated 28th November 2025 on grounds THAT:

1. *The Petition discloses no cause of action or constitutional violation*
2. *attributable to the 1st Respondent, and no specific unlawful act or omission*
3. *has been demonstrated on the part of the Teachers Service Commission.*
4. *2. The Petition is premature, speculative and based on irrational apprehension*
5. *rather than cogent factual or legal foundation as there is no threat to*
6. *withdraw or withdrawal of Hardship Allowance from teachers employed by*
7. *the 1st Respondent.*
8. *3. The Petition violates the doctrine of constitutional avoidance and the*
9. *separation of powers.*
10. *The Petition is without merit, based on unsubstantiated claims of withdrawal*
11. *of Hardship Allowance, lacks evidentiary proof, and seeks orders based on mere apprehension.*

2nd Respondent's Case

17 In opposition to the Application, the 2nd Respondent filed Grounds of Opposition dated 26th June 2025 on grounds THAT:

1. *The Petition discloses no cause of action or constitutional violation attributable to the 1st*

Respondent, and no specific unlawful act or omission has been demonstrated on the part of the Teachers Service Commission.

- 2. The Petition is premature, speculative and based on irrational apprehension rather than cogent factual or legal foundation as there is no threat to withdraw or withdrawal of Hardship Allowance from teachers employed by the 1st Respondent.*
- 3. The Petition violates the doctrine of constitutional avoidance and the separation of powers.*
- 4. The Petition is without merit, based on unsubstantiated claims of withdrawal of Hardship Allowance, lacks evidentiary proof, and seeks orders based on mere apprehension.*
- 5. The Petitioners have failed to provide cogent and compelling reasons to support the prayers sought. No evidence has been placed before Court to prove any of the allegations in the body of the Petition to warrant intervention by Court.*
- 6. The Court lacks jurisdiction to supervise internal management and administrative mandate, policy considerations and management prerogatives within the lawful mandate of the Commission under Article 237 of the Constitution and relevant policy instruments.*
- 7. The Petition is vexatious, an abuse of court process, and does not disclose any legitimate constitutional*

grievance capable of redress under Article 22 of the Constitution.

2nd Respondent's Case

- 18 In opposition to the petition, the 2nd Respondent filed a replying affidavit dated 18th September 2025, sworn by Paul Famba, its Secretary/CEO.

- 19 The 2nd Respondent avers that various public entities and sectors have often determined designated hardship areas using separate methodologies, including negotiations as part of the Collective Bargaining Agreements (CBAs), feedback from National Government Administrators, and on the basis of complaints and petitions made to the government by affected officers, often through their representatives

- 20 The 2nd Respondent states that the payment of hardship allowance within the civil service is governed by Section C.10 of the Human Resource Policies and Procedures Manual for the Public Service, 2016. Additionally, the current applicable hardship allowance rates are currently guided by the Salaries and Remuneration Commission Circular Ref. No. SRC/ADM/CIR/1/13 Vol. III (126) dated 10th December 2014.

- 21 The 2nd Respondent avers that in order to harmonize the determination and designation of hardship areas across the country, the Commission mandated the Ministry responsible

for Public Service to establish an inter-agency technical team to review existing policies, circulars, and guidelines and make appropriate recommendations aimed at eliminating disparities.

- 22 The 2nd Respondent states that the inter-agency technical committee comprised representatives from multiple government institutions, including the State Departments for Public Service, Interior and National Administration, and Basic Education, the National Treasury, the Public Service Commission, the Teachers Service Commission, the Commission on Revenue Allocation, the Salaries and Remuneration Commission, the Kenya National Bureau of Statistics, the Council of Governors, the Judiciary, and the State Department for Planning.
- 23 The 2nd Respondent avers that the committee undertook data collection and prepared a report, and a cabinet memorandum was to be tabled before the cabinet.
- 24 It is the 2nd Respondent's case that the review of hardship areas was necessitated by the need to address disparities in previously gazetted areas and to ensure parity of treatment among public servants working in similar conditions, noting that the review exercise was long overdue.

- 25 The 2nd Respondent avers that some hardship area designations were based on former district boundaries that existed prior to the promulgation of the Constitution, and that the review was intended to align such designations with the current county structure and constitutional framework.
- 26 The 2nd Respondent notes that inconsistencies existed whereby some public servants working within the same regions were receiving hardship allowances while others were not, despite being subjected to similar working conditions.
- 27 The 2nd Respondent avers that since the committee's report and the Cabinet's decision on the matter are still pending, the current designated hardship areas remain in force until further guidance is issued.
- 28 It is the 2nd Respondent's case that the intended outcome of the review process is to achieve uniformity in the designation of hardship areas across the country and ensure equitable treatment of all public servants.
- 29 The 2nd Respondent asserts that until Cabinet approval is granted and an implementation framework established, the existing policy and framework governing hardship allowance payments shall continue to apply.

- 30 The 2nd Respondent maintains that any new policy direction can only take effect upon approval by the relevant authority and subsequent determination of an implementation framework.
- 31 The 2nd Respondent asserts that no decision has yet been made regarding the implementation of a revised hardship allowance framework.
- 32 Consequently, the 2nd Respondent contends that the Petition is unmeritorious, vexatious, and bad in law, and prays that the same be dismissed with costs.

3rd Respondent's Case

- 33 In opposition to the petition, the 3rd Respondent filed Grounds of Opposition dated 18th June 2025 on grounds THAT:

1. *The 3rd Respondent is a Constitutional Commission established under Article 230 of the Constitution, operationalized by the Salaries and Remuneration Commission Act and whose mandate is to, inter alia:*
 - i. *set and regularly review the remuneration and benefits of all State officers; and*

- ii. *advise the national and county governments on the remuneration and benefits of all other public officers.*
2. *The Petitioner has omitted to frame its case against the 3rd Respondent with precision as required under the High Court's pronouncement in the case of **Anarita Karimi Njeru v Republic [1979] KECA 12 (KLR)**. The petition fails the requirement as it does not state the alleged constitutional provisions violated by the 3rd Respondent and the acts or omissions complained of with reasonable precision.*
3. *It is trite law that he who avers must prove. The Petitioner has not discharged the evidentiary burden of proving that the 3rd Respondent has acted in breach of the Constitution or any law.*
4. *The Petition discloses no reasonable cause of action against the 3rd Respondent.*
5. *The Petition is scandalous, frivolous, and vexatious and abuse of the Court's process.*
6. *The petition has no merit and should therefore be dismissed with costs to the 3rd Respondent.*

The 4th and 5th Respondents' Case

34 In opposition, the 4th and 5th Respondents filed Grounds of Opposition dated 15th July 2025 on grounds THAT:

1. *The Application and Petition are premature, speculative and lack evidentiary backing, as the Petitioner has not provided any evidence to the effect that hardship allowances for public officers in designated hardship areas have been withdrawn or are intended to be withdrawn.*
2. *Further, the hardship allowance is a policy -based administrative benefit, subject to periodic review by relevant organs of government and there has been no withdrawal of the same to date save for a recommendation for review, which cannot be unilaterally implemented by the 4th and 5th Respondents.*
3. *The Petition and Application challenges the implementation of a Report forming part of the exclusive mandate of the Executive and technical policy implementation organs, including inter-agency committees which is established under statutory or executive authority, and the Petitioner has not demonstrated that the 4th and 5th Respondent are liable for the alleged violations.*
4. *There is no evidence of violation of Article 10 of the Constitution of Kenya, 2010 by the 4th and 5th Respondents as the 2019 Inter-Agency Technical Committee Report involved structured consultations, and public participation thus without evidence on the contrary, the Petitioner has failed to disclose any reasonable cause of action against the 4th and 5th Respondents.*

5. *The Application fails to meet the requisite threshold establishment in **Gatirau Peter Munya -versus- Dickson Mwenda Kithinji & 2 Others (2014) eKLR** to justify the grant of conservatory orders.*
6. *The Petition offends the doctrine of exhaustion as the Petitioner has not pursued available administrative, statutory or internal dispute resolution mechanisms, if any, prior to filing the Petition.*
7. *The Petitioner in essence, seeks to invite the Honourable Court to interfere with functions constitutionally and statutorily vested in the Executive, contrary to the doctrine of separation of powers.*
8. *The Petition is fatally defective for failure to comply with the Constitutional Petition Rules and for want of specificity principle, as pronounced in the case of **Anarita Karimi Njeru -versus- the Republic (1976-1980) KLR 1272**, reinforced in the case of **Mumo Matemu -versus- Trusted Society of Human Rights Alliance & 5 Others (2013) (eKLR)**.*
9. *Further, specifically the Petition offends the doctrine of constitutional avoidance as the Petitioner has failed to explore other alternative forums, if any, prior to the filing of the Petition as established in the Anarita Karimi's case above.*
10. *The implementation of the Report advances the public interest and national development objectives in line with*

Articles 10 and 232 of the Constitution of Kenya, 2010 and should not be impeded by the filing of the Petition and the Application, which are based on apprehension rather than facts.

11. The Application and subsequent Petition are therefore scandalous, frivolous, vexatious and devoid of merit.

12. Further, the Petition and Application discloses no legitimate constitutional grievance capable of redress under Article 22 of the Constitution of Kenya.

13. The Petition and Application are otherwise incompetent, misconceived, misplaced and is an abuse of the process of this Honourable Court as the Petitioner's constitutional rights have not been breached in any manner as alleged or at all and the same ought to be dismissed with costs.

Petitioner's Submissions

35 The Petitioner submitted on four issues: whether the Petition is premature, speculative, or brought in bad faith; whether the Petition meets the constitutional pleading threshold under *Anarita Karimi Njeru* and subsequent jurisprudence; whether the development and proposed implementation of the Report violate constitutional rights and principles, including public participation, equality, fair labour practices, socio-economic rights, and fair administrative action; and whether the Petitioner is entitled to the reliefs sought,

including declarations, conservatory orders, injunctions, and mandamus.

36 On the first issue, the Petitioner submitted that the contention by the Respondents that the Petition is premature and speculative is misconceived both in fact and in law. The threat to constitutional rights is real, imminent, and not hypothetical, as the impugned Report was tabled before Parliament in March 2025 with express recommendations for reclassification and de-gazettement of hardship areas. Further, the 3rd Respondent, being constitutionally mandated under Article 230(4) to give effect to such recommendations through gazettement, has signaled imminent implementation. It cited ***Kenya Human Rights Commission v Attorney General & another [2018] eKLR***, and submitted that the Court held that a petition is ripe where there is a "real and substantial threat" to rights, even absent final implementation.

37 The Petitioner submitted that the Petition is brought in good faith pursuant to Articles 22 and 258 of the Constitution, in the public interest. The Petitioner, as an association, has *locus standi* under Article 22(2)(b) to institute proceedings on behalf of its members. The Petition seeks to protect not only teachers but also learners in marginalized areas whose right to education under Article 53(1)(b) is threatened.

- 38 It is the Petitioner's submission that the Respondents' reliance on ***Kenya Union Of Commercial Food And Allied Workers v Meru North Farmers Sacco Limited [2014] eKLR*** is misplaced, as that case involved no administrative action. Here, tabling the Report is an overt act toward implementation, triggering jurisdiction under Article 165(3) (d).
- 39 On the second issue, the Petitioner submitted that the Petition satisfies the constitutional pleading threshold as enunciated in ***Anarita Karimi Njeru v Republic [1979] KLR 154*** and as subsequently refined in ***Mumo Matemu v Trusted Society of Human Rights Alliance [2013] eKLR***, where the Court of Appeal held that constitutional petitions must disclose violations with reasonable precision, but not with mathematical exactitude.
- 40 It was submitted that the Petition clearly identifies the constitutional provisions violated, including Articles 10(2)(a), 27, 41, 43, and 47 of the Constitution, and sets out, with specificity, the manner in which the violations have occurred.
- 41 The Petitioner submitted that the Respondents developed the impugned Report without consultation with affected stakeholders; recommended arbitrary reclassification of

hardship areas without transparent or rational criteria; proposed the regressive withdrawal and reduction of hardship allowances; and failed to accord affected teachers an opportunity to be heard before decisions affecting their livelihood were contemplated. Additionally, the proposed measures would expose teachers working in hardship areas to significant financial loss, create economic strain, and trigger a likely exodus of teachers from marginalized regions, thereby worsening existing inequalities in access to education.

42 The Petitioner further submitted that the anticipated withdrawal of hardship allowances ranging approximately between KSh 6,600 and KSh 38,100 depending on grade demonstrates the concrete nature of the threatened harm and the breach of legitimate expectations. Additionally, it demonstrated the nature of the prejudice by quantifying the anticipated financial loss, thereby evidencing a concrete and proximate harm.

43 It is the Petitioner's submission that the Respondents' actions, including the development, tabling, and intended gazettelement of the Report, directly precipitate the threatened violations and are the proximate cause of the prejudice complained of.

- 44 The Petitioner submitted that the present petition goes even further by providing evidentiary support through sworn affidavits and by referencing the content and intended implementation of the impugned Report, notwithstanding the Respondents' continued failure to disclose the full document. Consequently, the allegation that the Petition is speculative or inadequately pleaded is without merit. Reliance was placed in ***British American Tobacco Kenya, PLC v Cabinet Secretary for the Ministry of Health & Others [2019] eKLR***.
- 45 On the third issue, the Petitioner submitted that the Respondents failed to undertake any meaningful public participation when developing the impugned report. There is no evidence of stakeholder consultations, public forums, or dissemination of relevant information. It cited ***Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR*** where the court held that public participation must be meaningful, inclusive, and effective, and must include access to adequate information to enable informed participation.
- 46 It is the Petitioner's submission that the absence of such participation renders the Report constitutionally infirm.

- 47 The Petitioner submitted that arbitrary reclassification and proposed de-gazettement of hardship areas introduces differential treatment of similarly situated regions without a rational or objective basis; thus, offending the principle of equality and non-discrimination guaranteed under Article 27 of the Constitution.
- 48 It is the Petitioner's submission that the proposed withdrawal or reduction of hardship allowances directly undermines the constitutional guarantee of fair labour practices under Article 41. It argues that hardship allowances have historically been provided as compensation for the adverse working conditions faced by teachers serving in marginalized regions. Their abrupt removal without due process violates the legitimate expectations of affected teachers.
- 49 The Petitioner submitted that the proposed de-gazettement will discourage teachers from serving in marginalized areas, thereby undermining access to education and other essential services, threatening the realization of socio-economic rights guaranteed under Article 43 of the Constitution. Additionally, the principle of non-retrogression under Article 2(1) of the International Covenant on Economic, Social and Cultural Rights, requires states to refrain from taking regressive measures that undermine the progressive realization of socio-economic rights unless fully justified. Therefore,

absence of any socio-economic impact assessment or justification for the proposed changes further demonstrates the unconstitutionality of the measure.

50 It was further submitted that the Respondents' actions contravene the right to fair administrative action under Article 47. The affected teachers and stakeholders were not given notice of the proposed changes, the criteria used in the reclassification exercise were not disclosed, and no opportunity was provided for affected persons to present their views.

51 It is the Petitioner's submission that the impugned measures contravene Kenya's obligations under international law, which forms part of Kenyan law under Article 2(6) of the Constitution, including: The International Covenant on Economic, Social and Cultural Rights (Articles 2 and 11); The African Charter on Human and Peoples' Rights (Articles 15 and 16); ILO Convention No. 131 on Minimum Wage Fixing, which requires consultation with social partners. The unilateral nature of the process is therefore inconsistent with both constitutional and international standards.

52 On the final issue, the Petitioner submitted that it is entitled to conservatory and injunctive orders to preserve the substratum of the Petition. It cited **Board of Management**

of Uhuru Secondary School v City County Director of Education & 2 others [2015] eKLR, the Court emphasized that conservatory orders serve to maintain the status quo and safeguard the subject matter of the dispute. The interim orders already granted by this Court further justify the issuance of permanent reliefs pending full compliance and review.

53 It is the Petitioner's submission that it also entitled to an order of mandamus compelling the Respondents to perform their constitutional and statutory duties, including the disclosure of information and facilitation of due process. Such obligations arise under Articles 35 and 10 of the Constitution, which impose duties of transparency, accountability, and public participation upon public bodies.

1st Respondent's Submissions

54 The 1st Respondent submitted on three issues: whether the Petition discloses any constitutional violation or cause of action against the 1st Respondent; whether the Petition is premature, speculative and brought in bad faith; and whether the Petitioner is entitled to the prayers sought.

55 On the first issue, the 1st Respondent submitted that Petition falls short of the test for constitutional pleadings enunciated in ***Anarita Karimi Njeru v. Republic (supra)***. The application lacks specificity and particularity as it fails to

provide a clear, precise and reasonable nexus between the Articles quoted in the application and the manner in which the 1st Respondent has violated the provisions of the Constitution

- 56 It was further submitted that the Petition is vague, general, ambiguous, and lacks particularity. The Supporting Affidavit of Mr. Daniel Ndung'u Wangenye contains broad, unspecific allegations against "the Government" and "the Respondents," without isolating any conduct attributable to the 1st Respondent. This lack of precision prejudices the 1st Respondent's right to a fair hearing.
- 57 The 1st Respondent further submitted that the Petition fails to attach or produce the impugned Inter-Agency Technical Committee Report, which is central to the allegations. By failing to do so, the Court cannot interrogate the report and verify whether any rights have been infringed. It argues that, in the absence of a demonstrable act or omission, the Petition falls short of the constitutional pleading threshold and should be dismissed.
- 58 On the second issue, the 1st Respondent submitted that the Petitioner has not demonstrated that there is any actual, threatened, imminent or ongoing implementation of the alleged Inter- Agency Technical Committee "Report" by the 1

Respondent capable of necessitating the intervention of this Court. It cited ***Mati & another v Gicheru [2025] KEHC 2062 (KLR)*** “It is trite law that he who alleges must proof. The legal burden of proof is provided under Section 107 of the [Evidence Act](#) Cap 80 Laws of Kenya provides that: Whoever desires any court to give Judgment as to any legal right or liability dependent on the existent of facts which he asserts must proof that those facts exists.”²)when a person is bound to prove the existence of any fact it is said the burden of proof lies on that person.”

- 59 It is the 1st Respondent’ submission that the instant Petition is premature, speculative and based on unreasonable apprehension rather than cogent factual or legal foundation. The Petitioner bears the burden of demonstrating that there is real danger or likelihood of infringement and not a perceived or remote possibility.
- 60 It was further submitted that there is no decision, indication, plan or threat made by the 1st Respondent concerning the impugned “Report” on Hardship Area Reclassification inviting the Petitioner to claim illegality, irrationality and procedural impropriety. Actually, no allegation has been cited against the 1st Respondent in relation to the terms and conditions of service for its employees. Accordingly, hence the Court cannot issue orders in vacuum. In the Ugandan Case of

Pastoli Vs Kabale District Local Government Council and Others 2008 2EA 300, the court held that: *“the applicant has to show that the decision complained of or act complained of is tainted with illegality, irrationality and procedural impropriety”*

- 61 On the third issue, the 1st Respondent submitted that the Petitioner has neither proved any infringement of their constitutional rights nor adduced the alleged Inter-Agency Technical Committee Report on hardship Area Reclassification to warrant granting the prayers sought by the Petitioner. The Petition does not seek a copy of the alleged Report under the Access to Information Act, yet seeks final reliefs based on speculative content.
- 62 On conservatory orders, the Respondent relies on ***Dock Workers Union & another v Portside Freight Terminals Limited & 10 others [2024] KESC 66 (KLR)*** the apex Court observed that, *“Conservatory orders therefore serve to offer short-term relief so as not to expose the Constitution or the appellant to preventable perils pending the determination of the dispute.”* By implication, Conservatory orders can only be issued on a preliminary stage and not as the final orders of the Court hence the prayer is unmerited.”

63 It is the 1st Respondent's submission that in the absence of a concrete dispute, the Petition is not entitled to such orders. Consequently, all reliefs sought should be dismissed with costs.

3rd Respondent's Submissions

64 The 3rd Respondent submitted on three issues: whether the Petition meets the threshold of precision in constitutional pleadings; whether the Petitioner has discharged the evidentiary burden of proof; and whether the Petitioner is entitled to the reliefs sought as against the 3rd Respondent.

65 On the first issue, it was submitted that although the Petition cites numerous constitutional provisions, Articles 1, 2, 10, 19, 20, 21, 22, 23, 24, 27, 35, 41, 43, 47, 73, and 232, it fails to demonstrate with specificity how the 3rd Respondent has violated any of those provisions. The allegations are framed in broad and generalized terms, referring collectively to "the Government" and "the Respondents," without isolating any act or omission attributable to the 3rd Respondent.

66 The 3rd Respondent submitted that jurisprudence on constitutional pleadings is settled in ***Anarita Karimi Njeru v Republic [1979] KLR 154*** and reaffirmed in ***Mumo Matemu v Trusted Society of Human Rights Alliance***

[2013] eKLR, where the Court of Appeal emphasized that vague and generalized allegations cannot sustain a constitutional claim. The Court stressed that precision is not about technical exactitude but about ensuring that the Court and the Respondent can clearly discern the alleged violation and respond to it.

67 It is the 3rd Respondent's submission that the Petition claims that the Report violates Articles 27, 41, 43, and 47, yet it does not demonstrate how the 3rd Respondent, whose mandate is limited to advising and reviewing remuneration under Article 230, has acted in breach of those provisions. The Petition conflates the actions of multiple state organs and attributes them collectively to "the Respondents," without distinguishing the specific role or conduct of the 3rd Respondent. Such ambiguity prejudices its right to a fair hearing under Article 50, as it is unable to ascertain the precise case it is required to answer.

68 It is further submitted that while the Petition acknowledges that the impugned Report was tabled by the Prime Cabinet Secretary, it inconsistently attributes its implementation to the 3rd Respondent without evidence of any gazette notice or advisory issued by it.

69 On the second issue, the 3rd Respondent submitted that Section 107 of the Evidence Act, which provides that

whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

70 It is the 3rd Respondent submission that the Petition is premised on speculation rather than evidence. While the Petitioner alleges that hardship allowances will be withdrawn pursuant to the 2019 Inter-Agency Technical Committee Report, no evidence has been produced to demonstrate that the 3rd Respondent has taken any steps toward such implementation. Further, the Petitioner's Supporting Affidavit itself acknowledges that the Report is merely "proposed for implementation" and "under consideration," thereby confirming that no actionable decision has been made.

71 The 3rd Respondent relied on ***Josphat Koli Nanok & another v Ethics and Anti-Corruption Commission [2018] eKLR***, where the Court held: *"Moreover, I think that it trivializes the Constitution, its values and principles when empty allegations of infringement are made. A petitioner who cites a violation of the Constitution must by cogent evidence relate alleged breaches with real, concrete and direct loss, damage or injury arising out of the violation. It does not help to allege violation, drop conceptual abstracts and interpolations to fit some artificial textbook arguments of the nature and extent of constitutional principles. The*

violation must be real, with real implications on real lives of the people.”

72 It was submitted that the Petitioner has the Petitioner has not discharged even the initial burden. The Petition is founded on apprehension and speculation rather than demonstrable facts. The Petitioner has not annexed any gazette notice, circular, or communication from the 3rd Respondent withdrawing hardship allowances nor has the Petitioner shown that the 3rd Respondent has taken any steps to implement the Report. Thus, the Court is being invited to determine the matter in a vacuum, contrary to established principles that judicial intervention must be grounded on proven facts. Accordingly, the Petition fails on the ground of burden of proof.

73 On the third issue, it was argued that no constitutional violation has been demonstrated against the 3rd Respondent. The impugned Report was tabled by the Prime Cabinet Secretary, and no evidence has been adduced to show that the 3rd Respondent has issued any gazette notice, directive, or advisory withdrawing hardship allowances or reclassifying hardship areas.

74 The 3rd Respondent submitted its constitutional mandate under Article 230(4), which is limited to: setting and

reviewing remuneration and benefits of State officers; and advising national and county governments on remuneration and benefits of public officers. While this mandate encompasses allowances, the 3rd Respondent exercises it within the framework of lawful designation of hardship areas by the relevant bodies.

- 75 It is the 3rd Respondent's submission that the reliefs sought are speculative, premature, and incapable of being granted in the absence of any proven act or omission.

4th and 5th Respondent's Submissions

- 76 The 4th and 5th Respondents submitted on three issues: whether the Petition is premature, speculative, and brought in bad faith; whether the Petition meets the constitutional pleading threshold; and whether the petitioner is entitled to reliefs sought.
- 77 On the first issue, the Respondents' submitted that the jurisdiction of this Court is only invoked where there is a concrete administrative or employment action affecting terms and conditions of service. In the absence of such action, the Court ought not to intervene. It cited ***Kenya Union Of Commercial Food And Allied Workers v Meru North Farmers Sacco Limited [2014] eKLR.***

- 78 The Respondents submitted that in the present case: the impugned Report remains advisory in nature; no gazette notice has been issued; no employer has altered teachers' remuneration or allowances. It is therefore argued that granting the reliefs sought would amount to pre-emptive judicial interference with executive and inter-agency policy processes, contrary to the doctrine of separation of powers under Article 1 of the Constitution.
- 79 It is the Respondents' submission that the Petition is premature, speculative, and lacks justiciable basis, falling squarely outside the scope of this Court's intervention.
- 80 On the second issue, it was submitted that while the Petition invokes Articles 10, 27, 41, 43, 47, 73, and 232 of the Constitution, it does not: identify any specific affected teacher; demonstrate any quantifiable loss or injury; point to any binding administrative decision; establish a nexus between State action and the alleged harm. The Petition relies on the speculative premise that hardship allowances may be withdrawn thus it is constitutionally unsustainable. They relied on ***Anarita Karimi Njeru v Republic [1979] eKLR***, and ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR***.

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- 82 The Respondents submit that the Petition is founded on the speculative assertion that hardship allowances “may” be withdrawn, which does not meet the required threshold.
- 83 On the final issue, it was submitted that the 2019 Report is a **policy review exercise** under the **SRC mandate**, and cannot be treated as a violation of labour rights absent implementation. They relied upon ***Kenya Union of Domestic, Hotels, Educational Institutions & Hospital Workers v Salaries and Remuneration Commission & Another [2014] eKLR***.
- 84 The Respondents submitted that Article 47 of the Constitution is only triggered where an administrative action has been taken that affects rights. In the present case, no binding decision has been made. It is argued that judicial intervention at this stage would amount to improper supervision of policy formulation processes.
- 85 The Respondents further submitted that reliance on international instruments such as the ICESCR, the African Charter, and ILO Convention No. 131 is misplaced, as these do not create enforceable rights in the absence of actual deprivation. It is contended that: no teacher has suffered loss of income or benefits and no socio-economic right has

been infringed. Thus, the Petition is based on hypothetical harm.

- 86 It is the Respondents' submission that declaratory relief is available only when an actual or imminent violation exists. Conservatory and injunctive orders cannot preserve a non-existent dispute. Mandamus requires the existence of a statutory duty that has been neglected, which is absent in the instant petition.
- 87 The Respondents submitted that grant of conservatory orders require an existing or imminent dispute and cannot be used to restrain policy discussions or advisory reports; as held in ***Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others [2015] eKLR.***
- 88 It was submitted that in the present case, teachers' hardship allowances remain intact, no administrative action has been communicated, and no employment term has been varied. There is no dispute to preserve, and therefore the Petition is premature, speculative, and cannot satisfy the threshold for conservatory or injunctive relief.

89 I have examined all the averments and submissions of the parties herein. The issue for this courts determination are as follows:

- (1) Whether this petition has been filed prematurely.
- (2) Whether the petition is framed with precision as against the respondents.
- (3) Whether the impugned 2019 inter agency technical committee on Hardship areas report is unconstitutional null and void.
- (4) What remedies to grant in the circumstances.

ISSUE NO 1

90 On this issue the petitioners have submitted that the petition is not premature as there is incorrect implementation of the impugned report with the same being tabled in Parliament in March 2025 with recommendation for re classification and de gazettelement of hardship areas. They therefore aver that there is a real and substantial threat to rights as submitted herein.

91 The petitioners further submitted that there was anticipated withdrawal of hardship allowances of between kshs 6,600 and 38,100 depending on grade thus showing threatened harm and breach.

- 92 In their submissions the respondents submitted that there is no actual, threatened imminent or on going implementation of the impugned report. The respondent aver that the petitioners have not demonstrated this assertion.
- 93 I have looked at the petition as framed and in particular the affidavit in support therein. Despite the petitioner averring that this report was tabled in Parliament in March 2025, there is no any supporting evidence to this effect. The petitioner also averred that there is anticipated reduction of hardship allowance of between kshs 6,600 and 38,100 without any evidence being placed before it.
- 94 There is no evidence that there is any implementation of such hardship allowance from a gazette notice or from circulars or pay slips demonstrating the implementation of the report. The allegation by the petitioner remains therefore as mere allegations and there is no demonstration of any imminent or threatened implementation of the impugned report.

ISSUE NO 2

- 95 On the issue of the way this petition is framed, the respondents have submitted that the petition is vague and does not disclose any cause of action against the respondents. The 1st respondent submitted that the petition

is vague, general and ambiguous and lacks particularity. The petition has not indeed attached the impugned report. The petition does not state the act or omissions committed by each of the said respondents in relation to the impugned report.

- 96 The petitioner has not set out what the TSC, PSC, SRC the 1st and 3rd respondents have done. The facts relating to the impugned report have also not been set out as to explain what role each of the respondents played and what breach each of them is set to commit. In view of this fact, the requirements for threshold on constitutional petitions set out in **Anarita Karimi Njeru vs Republic** has not been established.

ISSUE NO 3

- 97 Following my analysis above, it is also true that the petition has not set out with precision which article of the Constitution has been breached. The petition in a general manner simply indicated that the respondents had breached various articles of the Constitution. The petitioner however failed to demonstrate with evidence or facts what had been done to warrant the alleged breach. In the circumstances of this petition, there is no evidence of any breach of any constitutional imperatives demonstrated.

ISSUE NO 4

98 Having found as above, this court finds that the petition as set out is premature and does not warrant issuance of the prayers sought. This petition as a whole cannot lie and is therefore dismissed accordingly. There shall be no order of cost.

Dated, Signed and Delivered Virtually at Nairobi this 9th Day of April, 2026.

S

**HELLEN WASILWA
JUDGE**