



Kenya Union of Clinical Officers v County Government of Marsabit & another (Constitutional Petition E006 of 2025) [2026] KEELRC 972 (KLR) (17 April 2026) (Judgment)

Neutral citation: [2026] KEELRC 972 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CONSTITUTIONAL PETITION E006 OF 2025**

SC RUTTO, J

APRIL 17, 2026

BETWEEN

KENYA UNION OF CLINICAL OFFICERS PETITIONER

AND

COUNTY GOVERNMENT OF MARSABIT 1ST RESPONDENT

MARSABIT COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

JUDGMENT

1. The Petitioner has described itself as a duly registered trade union and the sole body mandated, under the *Labour Relations Act*, to represent the interests of clinical officers in matters relating to employment and labour relations.
2. The 1st Respondent is a County Government established pursuant to Articles 6 and 176(1), and the First Schedule of *the Constitution* of Kenya, 2010. The 2nd Respondent is a County Public Service Board established under Section 57 of the *County Governments Act*, 2012, in accordance with Article 235 of *the Constitution*.
3. The Petition, supported by an Affidavit sworn on 26th March 2025 by George Gibore, who describes himself as the Petitioner's General Secretary, seeks the following orders on behalf of the Petitioner's members: -
 - a. A declaration that the extension of the probationary period of employment without the consent of the grievants is unlawful and in violation of Section 42(2) of the *Employment Act*.
 - b. An order of mandamus Compelling the 2nd Respondent to immediately revoke the extension of the employee's probationary period issued via its letter dated 3rd February 2025 and forthwith confirm the Petitioner's members herein under permanent and pensionable basis.



- c. An order of mandamus compelling the Respondents to forthwith pay the Petitioner's members their salaries and allowances as prayed in the petition herein, for the months of July, August, September, October, November December 2024.
- d. This Honourable Court be pleased to issue any other orders that it may deem fit and just to ensure that the rule of law is upheld.
- e. Costs of this petition

Petitioner's Case

4. The Petitioner's case is that, pursuant to letters of appointment dated 8th May 2024, the Respondents offered employment to 13 of its members listed in the Petition. The terms provided that their employment would commence on 1st July 2024 and would be on permanent and pensionable terms, subject to successful completion of a six-month probationary period.
5. It is averred that the said probationary period lapsed on or about 1st January 2025, yet the Respondents have failed to confirm the Petitioner's members to permanent and pensionable terms, contrary to the Human Resource Policies and Procedures Manual for the Public Service, 2016.
6. The Petitioner further avers that its members did not receive salaries for the period between 1st July 2024 and September 2024, and were only paid for the months of October and November 2024, which payments excluded Health Risk Allowances and Emergency Call Allowances.
7. It is further stated that, by a letter dated 9th January 2025, the Petitioner's members raised their grievances with the Respondents, seeking payment of the outstanding salary arrears and the allowances which they noted had been paid to their colleagues.
8. The Petitioner contends that its members are entitled to Health Risk Allowances and Emergency Call Allowances, which were neither included in their terms of employment nor reflected in their pay slips. It is the Petitioner's assertion that, in line with the principle of equity in the workplace, employees performing similar duties under comparable conditions are entitled to equal benefits, including allowances.
9. The Petitioner further avers that the Respondents, through a letter dated 3rd February 2025, responded by extending the probationary period of its members by a further six months, allegedly on the basis that individual performance evaluation reports had not been received to facilitate confirmation. The Respondents also characterized the grievances raised by the Petitioner's members regarding unpaid salaries and allowances as acts of insubordination and gross misconduct.
10. The Petitioner states that, on behalf of its members, it responded by a letter dated 10th February 2025, maintaining that the grievances raised were legitimate and that the unilateral extension of the probationary period, without notice or consent, was in violation of Section 42(2) of the [Employment Act](#). It is contended that such an extension could not lawfully be effected without the express agreement of the affected employees.
11. The Petitioner further avers that pay slips issued to its members for December 2024 and January/February 2025 indicate that they were being remunerated on permanent and pensionable terms, notwithstanding the Respondents' decision to extend the probationary period. The Petitioners argue that its members therefore had a legitimate expectation that, upon completion of the six-month probation period, their employment would be confirmed and secured.



12. It is also the Petitioner's assertion that, without justification, the 1st Respondent subjected its members to disciplinary action as communicated in a letter dated 17th March 2025, wherein it was indicated that the probationary period had been extended on account of the members' participation in a nationwide industrial strike called by the Petitioner.
13. The Petitioner contends that the Respondents' actions are calculated to frustrate its members by infringing upon their rights to salary and allowances, as well as their constitutional rights under Article 41(2)(d), including the right to fair labour practices, fair remuneration, and to participate in trade union activities, including the right to strike. It is asserted that subjecting members to disciplinary action for participating in a lawful strike while on probation is unlawful.
14. The Petitioner further contends that the Respondents' conduct has adversely affected the morale of its members, who reasonably believed that the Respondents would act in their best interests, but are now being penalized for asserting their entitlement to unpaid salaries and due allowances.

Respondents' Case

15. The Respondents opposed the Petition through a joint Replying Affidavit sworn on 3rd September 2025 by Dr. Arero Halkano, who describes himself as the Acting County Secretary of the 1st Respondent.
16. Dr. Halkano contends that the Petitioner's assertion that the 13 clinical officers are entitled to automatic confirmation on permanent and pensionable terms is misleading, unfounded, and contrary to established public service procedures. He maintains that their engagement is conditional upon satisfactory performance evaluation, availability of budgetary resources, and compliance with applicable county public service human resource policies and procedures.
17. He further deposes that the [County Governments Act, 2012](#), vests the authority to appoint, confirm, and discipline county public officers in the 2nd Respondent, and that this statutory mandate cannot be usurped by a court order or by agreement of the parties.
18. Dr. Halkano avers that, following a meeting of the County Public Service Board held on 29th January 2025, a decision was made to extend the probationary period of the 13 clinical officers by a further six months due to concerns of insubordination and gross misconduct, particularly their failure to adhere to established internal grievance redress mechanisms before escalating their complaints. This decision was communicated vide a letter dated 3rd February 2025 from the Chief Executive Officer of the County Public Service Board to the Chief Officer, Medical Services, Marsabit County.
19. He further deposes that, at the time the Petitioner's members sought confirmation, they had not undergone the requisite individual performance evaluations, rendering any such confirmation premature and contrary to policy.
20. It is Dr. Halkano's position that the Petitioner's members are bound by the terms of their letters of appointment, which expressly provide that confirmation is subject to satisfactory performance and fulfillment of prescribed conditions. Having voluntarily accepted those terms, they are estopped from seeking to vary them through judicial intervention.
21. He states that he has been advised by the County Attorney, whose advice he believes to be correct, that contracts freely entered into must be respected, and that terms of employment should not be interfered with unless they are unlawful or unconstitutional, which is not the case herein.



22. Dr. Halkano contends that the Petitioner's request that this Honourable Court compel the 2nd Respondent to unconditionally confirm its members to permanent and pensionable terms is illegal, misconceived, and amounts to an attempt to override statutory mandates.
23. He reiterates that the appointment, confirmation, and discipline of county public officers fall within the exclusive mandate of the County Public Service Board pursuant to Article 235 of *the Constitution* and Section 59 of the *County Governments Act*, and urges that the Court should be slow to interfere with such constitutional and statutory functions.
24. Without prejudice, Dr. Halkano states that the Respondents are not opposed to settling any legitimate arrears of salaries and allowances due to the Petitioner's members for the period July to December 2024, subject to verification and audit.
25. He further avers that the Respondents have at all times engaged the Petitioner in good faith with a view to amicably resolving the dispute, but that the impasse arises from the Petitioner's insistence on overriding the lawful discretion of the County Public Service Board in matters of staff confirmation.
26. In light of the foregoing, Dr. Halkano has urged the Court to dismiss the Petition in so far as it seeks to compel the automatic confirmation of the Petitioner's members.
27. The Petition was canvassed by way of written submissions.

Submissions

28. The Petitioner submitted that there was no evidence demonstrating that its members consented to the extension of the probation period. It was the Petitioner's position that upon the lapse of the initial six-month probation, the Respondents were under an obligation to confirm the said members to permanent and pensionable terms of employment.
29. Relying on the case of *Lucy Wangui v NAM Consult (2016) eKLR* and Industrial Court Cause No. 784 of 2010, *Catherine E. Nyawira Nyaga v Wilderness Lodges Limited [UR]*, the Petitioner further contended that the Respondents unilaterally extended the probation period by an additional six months without obtaining the employees' consent, in contravention of Section 42(2) of the *Employment Act*.
30. The Petitioner maintained that the lack of any documented agreement or consultation with the employees rendered the extension procedurally defective and legally untenable. It argued that consent is not a mere formality but a statutory requirement intended to shield employees from arbitrary variation of fundamental employment terms.
31. Citing the decision in *Ogila v Dawa Life Sciences Limited (Cause E598 of 2022) [2025] KEELRC 1144 (KLR)*, the Petitioner further argued that the withholding of salaries for three consecutive months, followed by partial payments excluding statutory and sectoral allowances, resulted in its members receiving less favourable remuneration than other employees performing similar duties. In the same vein, the Petitioner submitted that the Respondents failed to provide any lawful or objective justification for such differential treatment.
32. The Petitioner further submitted that the cumulative effect of the non-payment of salaries, exclusion of applicable health sector allowances, and deviation from PSC-prescribed terms amounted to discriminatory treatment contrary to Sections 5(3) and (5) of the *Employment Act*. The Petitioner further posited that these actions infringed on its members' constitutional rights to fair labour practices under Article 41 and to equality and freedom from discrimination under Article 27.



33. The Petitioner additionally contended that the Respondents' conduct amounted to victimization of unionised employees for participating in protected labour activities, thereby violating Articles 41(1) and (2) of *the Constitution*, Section 5 of the *Employment Act*, and the right to freedom of association under Article 36.
34. On the Respondents' part, it was submitted that probation serves the purpose of assessing an employee's suitability for employment. In the same breath, they argued that where such an assessment is incomplete or reveals concerns, the employer retains discretion to either terminate the employment or extend the probation period to ensure suitability.
35. The Respondents further submitted that the officers' conduct, particularly their failure to adhere to internal human resource policies by bypassing established grievance mechanisms, constituted a breach of their terms of employment and justified the extension of probation to further assess their discipline and suitability.
36. It was the Respondents' further submission that the extension of probation was neither punitive nor arbitrary, but a necessary and justified administrative measure undertaken by the 2nd Respondent in the discharge of its mandate to uphold discipline and proper human resource management. This, they argued, was consistent with the principles outlined in *Wilson Simiyu v Chairman, B.O.G. Friends School Bokoli* [2016] eKLR, Article 47 of *the Constitution* on fair administrative action, and Section 42 of the *Employment Act*.
37. Relying on the case of *Republic v. Public Procurement Administrative Review Board & Another Ex Parte Tropical Technology Limited* [2020] KEHC 9235 (KLR), the Respondents argued that matters relating to public employment in Marsabit County fall primarily within the purview of the 2nd Respondent. On this score, the Respondents maintained that the Court's role is limited to reviewing the legality and procedural propriety of the decision, rather than substituting it with its own determination.
38. The Respondents further contended that the Petitioner had failed to demonstrate that the impugned decision was arbitrary, ultra vires, or made in bad faith.
39. It was the Respondents' further contention that any salary arrears, if established upon audit, would be settled, thereby addressing the Petitioner's claims regarding remuneration and mitigating any alleged violation of Articles 27, 41, and 43 of *the Constitution*.
40. Additionally, the Respondents contended that the officers' failure to utilise internal grievance mechanisms before escalating their concerns amounted to insubordination. In the Respondents' view, the extension of probation was a justified disciplinary measure aimed at restoring order and adherence to established human resource procedures, and did not constitute victimization for exercising the right to strike, but rather a response to procedural non-compliance.

Analysis and Determination.

41. Flowing from the record, the Court has identified the following issues for determination: -
 - i. Whether the extension of the Petitioner's members' probationary period was unlawful;
 - ii. Whether the Petitioner's members were confirmed in employment by operation of law; and
 - iii. Whether the Respondents violated the constitutional rights of the Petitioner's members.



Extension of the probationary period

42. It is not in dispute that the Petitioner's 13 members were appointed as clinical officers with effect from 1st July 2024 and were initially placed on a six-month probationary period.
43. The Petitioner asserts that the probationary period lapsed in January 2025, but the Respondents did not confirm the officers to permanent and pensionable terms of employment.
44. It is further common ground that the Respondents extended the officers' probation for an additional six months with effect from 3rd February 2024.
45. The Petitioner challenges this extension, contending that it was unlawful and in contravention of Section 42(2) of the *Employment Act*.
46. Section 42(2) of the *Employment Act*, which is central to the resolution of this issue, is couched as follows:

[42 (2)] A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee. Emphasis added
47. As can be discerned from the provisions of Section 42(2) aforementioned, any extension of a probationary period must be founded on mutual agreement between the employer and the employee.
48. In the instant case, there is no evidence demonstrating that there was any such mutual agreement to extend the probationary period of the Petitioner's members. Indeed, there is nothing to show that the Respondents proposed the extension and that the affected officers accepted the same.
49. On the contrary, it is apparent that the letter dated 3rd February 2025, conveying the 2nd Respondent's decision to extend the probation of the 13 officers, was the product of a unilateral determination.
50. On this issue, the Court concurs with the holding in *James O. Oloo v Tana and Athi River Development Authority* [2016] eKLR, wherein it was stated as follows:

“This Section is couched in mandatory terms in respect to the probationary period. In case of the claimant then this probation period be extended, then it would have been done in agreement with the Claimant. There is no indication that immediately after 30th April, the Claimant was informed of any extension of this probationary period and even if this was done, he was to be consulted.”
51. The Respondents have contended that the officers had not undergone individual performance evaluations at the time they sought confirmation, thereby rendering such confirmation premature and inconsistent with established policy.
52. According to the letter dated 3rd February 2025 issued by the 2nd Respondent, confirmation was contingent upon each officer's demonstrated performance and good conduct during the probationary period. It was also indicated in the said letter that the Board had not received the requisite individual performance evaluation reports from the authorised officer and, on that basis, characterised the officers' grievances as insubordination and gross misconduct for failure to follow due process.
53. There is no evidence on record to suggest that the officers in question had any control over the preparation or submission of their individual performance evaluation reports.
54. In the circumstances, the Court finds it unjust for the Respondents to rely on their own inaction, namely, the failure to conduct and furnish performance evaluations within the lawfully prescribed



period, to the detriment of the officers. The responsibility for undertaking such evaluations lay squarely with the Respondents, and they cannot invoke their own inaction to prejudice the officers.

55. In applying Section 42(2) of the *Employment Act* to the case herein, the Court finds that the Respondents acted unlawfully in unilaterally extending the probationary period of the 13 officers.

Confirmation of the employment of the Petitioner's members

56. In the present case, the probationary period for the Petitioner's officers lapsed on 31st December 2024. However, the Respondents neither confirmed the officers nor sought to extend their probation with their concurrence, as required under Section 42(2) of the *Employment Act*.
57. Indeed, it is not in dispute that the Petitioner's members continued to render their services beyond January 2025, well after the expiry of the initial six-month probationary period.
58. On this issue, the Court adopts the reasoning in the case of *Narry Philemons Onaya-Odeck v Technical University of Kenya (formerly Kenya Polytechnic University College)* [2017] eKLR, in which it was held as follows:

“In this case, the contemplated 6 months of probation for the claimant came and went. The claimant was not reviewed and was not issued with a letter of confirmation. Such process did not take place as agreed. The respondent sought to review the claimant's employment for purposes of confirmation 8 months into his employment. The inaction of the respondent as the employer cannot be visited upon the claimant. The benefit of this lapse can only apply to protect the claimant's rights in the employment relationship... By operation of the law and in accordance with section 42 of the *Employment Act*, the claimant successfully completed his probation period and thus his employment confirmed.”

59. In the instant case, it is apparent that the Respondents were only jolted into action after the officers raised grievances concerning the terms of their employment. It was only thereafter that the 2nd Respondent unilaterally moved to extend the probationary period of the 13 officers.
60. Needless to state, this action was taken too late in the day, as by that time the officers' employment had already been confirmed by operation of law. The extension of the probationary period was an exercise in futility. In any event, the Court has found that the purported extension was unlawful and in contravention of Section 42(2) of the *Employment Act*.
61. In sum, the Court finds that upon the expiry of the probationary period, the 13 officers were deemed confirmed in employment by operation of law.

Violation of the Petitioners' members' constitutional rights

62. The Petitioner has asserted that the Respondents infringed upon the constitutional rights of its members.
63. Under this head, one of the issues raised by the Petitioner concerns the alleged non-payment of the officers' salaries for the period between 1st July 2024 and September 2024. The Respondents have not controverted this claim. On the contrary, Dr. Halkano deponed in his Replying Affidavit that the Respondents are amenable to settling any salary arrears, subject to verification and audit.
64. However, it remains unclear from Dr. Halkano's deposition what has impeded the verification and audit process he alludes to from 2024 to date.



65. It is a cardinal rule in any employment relationship that an employer is obligated to remunerate an employee for services rendered. This duty is expressly provided for under Section 17(1) of the *Employment Act*, which stipulates as follows:
- [17](1) Subject to this Act, an employer shall pay the entire amount of the wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service....
66. To underscore the significance of subsection (1) of Section 17, subsection (10) (a) thereof further provides for a penalty where an employer fails to pay or tender wages earned or lawfully due to an employee.
67. Flowing from the foregoing, it is evident that by withholding the salaries of the 13 officers for a period of three months, the Respondents infringed the officers' right to fair labour practices and thereby violated Article 41(1) of *the Constitution*. What's more, this conduct amounted to a breach of both the officers' respective employment contracts and the Respondents' statutory obligation.
68. The Petitioner has further averred that although its members received salaries for October and November 2024, the payments were made without the inclusion of health risk allowances and emergency call allowances, which were allegedly paid to their counterparts performing similar duties.
69. It is noteworthy that the Petitioner only produced payslips for one officer for December 2024, January 2025, and February 2025, during which the said allowances were reflected.
70. In that regard, the Petitioner did not produce payslips for October and November 2024 to substantiate the claim that the allowances were not paid. Further, no comparative payslips of the alleged counterparts were provided to demonstrate that those employees received such allowances while the Petitioner's members did not, thereby establishing differential treatment.
71. Undeniably, pursuant to Section 5(7) of the *Employment Act*, the burden of disproving discrimination lies with the employer once an allegation of discrimination is properly established.
72. However, the initial burden rests on the employee to demonstrate a prima facie case of discrimination by presenting facts from which such discrimination may reasonably be inferred, after which the evidential burden shifts to the employer to disprove the allegation of discrimination.
73. Accordingly, beyond merely asserting non-payment of health risk and emergency call allowances, the Petitioner was required to demonstrate that other employees in comparable positions received the allowances while its members did not.
74. Put simply, the material on record does not prove that the Petitioner's members were treated less favourably or that they were denied health risk and emergency call allowances, unlike their colleagues who were similarly situated.

Disposition

75. Ultimately, the Court finds in favour of the Petitioner and accordingly allows the Petition dated 26th March 2025, and issues the following orders:
- a. A declaration is hereby issued that the extension of the probationary period of the Petitioner's 13 members was unlawful and in contravention of Section 42(2) of the *Employment Act*.
 - b. A declaration is hereby issued that the Petitioner's 13 members were deemed confirmed in employment by operation of law upon the lapse of the probationary period.



- c. An order of mandamus is issued compelling the Respondents to pay the Petitioner's 13 members their withheld salaries for the period from 1st July 2024 to 30th September 2024.
- d. In view of the subsisting employment relationship, there shall be no order as to costs.

DATED, SIGNED AND DELIVERED AT NYERI, THIS 17TH DAY OF APRIL 2026.

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STELLA RUTTO

JUDGE

In the presence of:

For the Petitioner Ms. Migele instructed by Mr. Ataka

For the Respondents Mr. Omondi instructed by Ms. Gekone

Court Assistant Ndati

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court had been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

