

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**  
**AT NAIROBI**

**ELRC PETITION NO. E113 OF 2025**

***(Before Hon. Lady Justice Hellen Wasilwa, J)***

**KENYA TEACHERS IN HARDSHIP AND ARID**

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

**VS**

**TEACHERS SERVICE COMMISSION.....1<sup>ST</sup>**  
**RESPONDENT**

**THE NATIONAL ASSEMBLY.....2<sup>ND</sup>**  
**RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup>**  
**RESPONDENT**

**JUDGMENT**

1 By a Petition dated 4<sup>th</sup> June 2025, the Petitioner sought for the following orders:

a) *A Declaration that the implementation of Status Report on the Resolution of the Departmental Committee on Education Regarding Teachers' Promotions is irregular, for lack of public participation and is unconstitutional, therefore null and void.*

b) *A Declaration that the removal of One Thousand Eight Hundred and Sixty-Four (1,864) from hardship and arid areas from the promotion list by the 1st Respondent violates Articles 27, 41, 43, 47 and 56 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, stakeholders' engagement and legislative frameworks are adopted.*
- d) An Order of Mandamus compelling the 1st Respondent to issue letters of promotion to One Thousand Eight Hundred and Sixty-Four (1,864) teachers who had been removed from the promotion list.*
- e) An Injunction preventing any variation of initial list that had been published by the 1st Respondent that included One Thousand Eight Hundred and Sixty-Four (1,864) teachers pending hearing and determination of this matter.*
- f) Any other relief that this Honourable Court may deem just.*
- g) Costs of this Petition.*

### **Petitioner's Case**

- 2 The Petitioner has instituted this Petition pursuant to Articles 22(1) and 258(1) of the Constitution, acting in the public interest, challenging the decision of the 1<sup>st</sup> Respondent to remove 1,864 teachers from a promotion list that had been lawfully published on its website on 6<sup>th</sup> April 2025, together with their respective TSC numbers.

- 3 The affected teachers are drawn from nine counties, namely Samburu, Mandera, Garissa, Wajir, Lamu, Isiolo, Tana River, Turkana and Marsabit, all of which are classified as hardship and arid areas, and are members represented by the Petitioner.
  
- 4 The Petitioner avers that in or around November 2024, the 1<sup>st</sup> Respondent advertised vacancies for promotion to various grades on its website, following which thousands of teachers applied countrywide. Shortlisting and interviews were conducted across different county offices by the 1<sup>st</sup> Respondent, culminating in the publication of the list of successful candidates on 6<sup>th</sup> April 2025. According to the Petitioner, the affected teachers had met all the interview and eligibility requirements and were legitimately awaiting issuance of their promotion letters.
  
- 5 The Petitioner further avers that on diverse dates in May 2025, the Departmental Committee on Education of the 2<sup>nd</sup> Respondent summoned the 1<sup>st</sup> Respondent to explain the criteria applied in promoting the teachers whose TSC numbers had already been published.
  
- 6 Following these engagements, the 1<sup>st</sup> Respondent prepared and submitted a document titled “Status Report on the Resolution of the Departmental Committee on Education Regarding Teachers’ Promotions”, dated 22<sup>nd</sup> May 2025, addressed to the Clerk of the National Assembly, recommending the removal of 1,864 teachers from hardship and arid areas from the promotion list.

- 7 It is the Petitioner's case that the affected teachers had already been promoted and publicly listed by the 1<sup>st</sup> Respondent before the said Status Report was generated, and that the subsequent decision to remove their names was reached without their participation, consultation, or an opportunity to be heard, in violation of Article 47 of the Constitution on the right to fair administrative action.
- 8 The Petitioner contends that the Status Report, now at the implementation stage, has far-reaching consequences, including lowering teacher morale, discouraging service in marginalized regions, and exacerbating inequities in already underserved areas.
- 9 The Petitioner asserts that the process leading to the report and its proposed implementation violates constitutional principles, statutory requirements, and the rights of public servants and affected communities.
- 10 The Petitioner avers that the selective removal of teachers exclusively from the nine hardship and arid counties amounts to discrimination, contrary to Article 27 of the Constitution, as there was no disclosed objective or rational framework justifying the exclusion. It contends that the action unfairly targets teachers serving in marginalized regions.
- 11 The Petitioner asserts that the Respondents' actions violate the right to fair labour practices under Article 41, including the right to fair remuneration and just working conditions, and breach the legitimate expectation of teachers who accepted and continued service in hardship

areas on the understanding that promotions would be based on merit and due process. The abrupt reversal of published promotions is said to undermine dignity and livelihood.

- 12 It is the Petitioner's case that the impugned decision violates socio-economic rights under Article 43, as removing teachers from the promotion list in marginalized areas will likely result in migration of public servants, thereby diminishing access to education and other essential services in those regions and deepening marginalization.
- 13 On locus standi, the Petitioner relies on Article 3(1) (duty to respect, uphold and defend the Constitution), Article 22(2) (right of an association to act in the interest of its members), and Article 258(2) (right to institute proceedings in the public interest).
- 14 The Petitioner contends that the Respondents failed to undertake meaningful public participation, contrary to Articles 10 and 232 of the Constitution, before making a decision of national importance affecting socio-economic entitlements.
- 15 The Petitioner further relies on international and regional instruments applicable under Article 2(6) of the Constitution, including: Articles 2 and 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which prohibit retrogressive measures without justification and participatory impact assessment; Articles 15 and 16 of the African Charter on Human and

Peoples' Rights, guaranteeing the right to work under equitable conditions and the right to health; and ILO Conventions, which require transparency, equality, and worker consultation in employment and promotion matters.

- 16 The Petitioner asserts that the Petition satisfies the threshold under Rule 10(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules) and meets the test set out in **Anarita Karimi Njeru v Republic [1979] KEHC 30 (KLR)** and **Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] KECA 445 (KLR)**, by clearly identifying: the specific acts complained of, namely the removal of the 1,864 teachers through the Status Report dated 22<sup>nd</sup> May 2025; the constitutional provisions violated, including Articles 10, 27, 41, 43, 47 and 56; and the specific reliefs sought.
  
- 17 In response to the Respondents' reliance on Article 119 of the Constitution and Section 46 of the TSC Act, the Petitioner contends that the doctrine of exhaustion is not absolute, citing **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR**, where the Supreme Court held that courts may be approached directly where a matter raises pure constitutional issues or where alternative remedies are inadequate.

- 18 It is argued that Section 46 of the TSC Act addresses individual administrative reviews and is inapplicable to mass, discriminatory constitutional violations affecting teachers across nine counties.
- 19 The Petitioner avers that although the 1<sup>st</sup> Respondent is an independent constitutional commission; Article 249(2) of the Constitution does not shield it from judicial scrutiny where constitutional violations are alleged.
- 20 The Petitioner contends that this Court has jurisdiction under Articles 22, 23 and 165(3)(d)(ii) to interrogate the impugned administrative actions, rebut the presumption of constitutionality, and grant appropriate relief to protect the rights of the affected teachers.
- 21 The Petitioner avers that the Respondents failed to conduct meaningful public participation before preparing and proposing to implement the Status Report on the Resolution of the Departmental Committee on Education Regarding Teachers' Promotions.
- 22 It is the Petitioner's case that key stakeholders, including the affected teachers, KETHAWA and other stakeholders, were excluded, contrary to constitutional requirements on public participation, transparency and inclusivity.
- 23 The Petitioner further avers that the removal of teachers from hardship and arid areas, whose names and TSC numbers had already been published after qualifying for promotion, will occasion social and financial hardship,

lower morale, and negatively affect service delivery in already marginalized regions.

24 It is also the Petitioner's case that the Respondents' proposal risks creating new inequities by applying a one-size-fits-all approach that ignores profession-specific challenges.

25 The Petitioner avers that the process lacked transparency, with insufficient public disclosure of the reclassification criteria and potential impacts.

### **1<sup>st</sup> Respondent's Case**

26 In opposition to the Petition, the 1<sup>st</sup> Respondent filed a replying affidavit dated 18<sup>th</sup> March 2026, sworn by its Director in-charge of Staffing of Public schools, Antonina Lentoijoni.

27 The 1<sup>st</sup> Respondent avers that it is a constitutional commission established under Article 237(1) of the Constitution of Kenya, with its primary functions under Article 237(2) thereunder being to register trained teachers; recruit and employ trained teachers; assign teachers in its service to teach in various public schools; promote and transfer teachers; exercise disciplinary control over teachers and terminate the employment of teachers.

28 It is the 1<sup>st</sup> Respondent's case that pursuant to Article 237(2)(d) of the Constitution, it is mandated to promote teachers in its employment, and in discharging this

function, it is guided by the values and principles of public service under Article 232 of the Constitution.

- 29 The 1<sup>st</sup> Respondent asserts that it has endeavoured to apply the principle of fair competition and merit, integrity, transparency and accountability, equity, fairness and impartiality, inclusiveness, non-discrimination and gender equity in the selection and appointment process.
- 30 It avers that Regulation 73 of the Code of Regulations for Teachers (CORT) provides for general guidelines in promotion of teachers including: merit and ability as reflected in the teacher's work, performance and results; seniority and experience as set out in the scheme of service; existence of a vacancy; and academic and professional qualifications.
- 31 The 1<sup>st</sup> Respondent contends that during the 2024/2025 promotion exercise, the subject of this Petition, it ensured alignment of the promotion process with the applicable legal and regulatory frameworks, namely Regulation 73 of CORT, the Career Progression Guidelines (CPG), and the Policy on Selection and Appointment of Institutional Administrators. It asserts that the scoring criteria applied was consistent with Regulation 73, considering performance, seniority and experience, academic qualifications, and merit.
- 32 The 1<sup>st</sup> Respondent avers that it automated the promotion process through the Teachers Online System, which facilitated online application for advertised vacancies, shortlisting, and notification of interview outcomes. The

automation minimized human error and enabled teachers to track the status of their applications in real time, thereby enhancing transparency and fairness.

- 33 It further asserts that it developed standardized evaluation criteria applied during interviews to ensure objective assessment of candidates. The criteria encompassed performance appraisal, institutional leadership experience, age, and contribution to academic excellence, with the aim of promoting meritocracy and minimizing bias.
- 34 The 1<sup>st</sup> Respondent contends that it ensured transparency through publication of vacancies and results, noting that vacancies were advertised in the print media and on the TSC website, clearly setting out the promotional requirements and timelines. Additionally, it published the list of all successful applicants on its website, which list was also annexed by the Petitioners.
- 35 The 1<sup>st</sup> Respondent asserts that all teachers whose names were published on its website as successful candidates were duly promoted and their salaries adjusted in accordance with its internal policies.
- 36 It is the 1<sup>st</sup> Respondent's case that no evidence has been placed before the Court to demonstrate that any teacher was removed from the official promotion list published by the Commission, and urges the Court to dismiss the said allegation.
- 37 The 1<sup>st</sup> Respondent contends that the prayers sought in the Petition lack evidential support and are contrary to public

policy and public interest. It asserts that the grant of the said prayers would amount to a usurpation of its constitutional, statutory and administrative mandate, and would set a bad precedent in the public service by undermining the administrative prerogative of public employers.

## **2<sup>nd</sup> Respondent's Case**

38 In opposition to the petition, the 2<sup>nd</sup> Respondent filed grounds of opposition dated 16<sup>th</sup> June 2025 on grounds that:

1. *The 2<sup>nd</sup> Respondent enjoys a presumption of constitutionality in respect of all its actions, which presumption the Petitioner has not rebutted.*
2. *The presumption of constitutionality of all acts of the 2<sup>nd</sup> Respondent is only rebuttable upon a substantive hearing of the Petition and not at the interlocutory stage as sought in the application dated 4<sup>th</sup> June 2025.*
3. *The Petition has not been pleaded with a specific degree of precision as required under Rule 10(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules and as set out by the Court of Appeal in the case of **Anarita Karimi Njeru v Republic (1979) eKLR**.*
4. *The Petitioner has not exhausted alternative remedies under Article 119 of the Constitution before approaching this Honourable Court.*

5. *The orders sought in the application dated 4<sup>th</sup> June 2025 are similar to the orders sought in the Petition and are thus final nature and cannot be issued at the interlocutory stage.*
6. *The Petitioner has failed to meet the test for the grant of conservatory orders set out by the Supreme Court of Kenya in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR.***
7. *The Petitioner has not sought any specific orders against the 2<sup>nd</sup> Respondent.*

### **3<sup>rd</sup> Respondent's Case**

39 The 3<sup>rd</sup> Respondent filed grounds of opposition dated 3<sup>rd</sup> July 2025 on grounds that:

1. *That the Petition does not in any manner whatsoever disclose with precision and particularity any constitutional or human rights violations, as is legally mandatory, and thus gravely offends the principles laid down in various judicial decisions and principally, in the matter of **Anarita Karimi Njeru v Republic [1979] eKLR** as affirmed by the Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR.***
2. *The Petitioner has not exhausted alternative remedies under Article 119 of the Constitution and also Section 46 of Teachers Service Act which provides mechanism for review of Commission's decision before approaching this Honourable Court.*
3. *The Petitioner has not sought any specific orders against the 3<sup>rd</sup> Respondent.*

4. *That the Petition herein has been filed in this Honorable Court in clear disregard of the law, is an abuse of the due process of court, hence cannot be countenanced and/or determined by this Honorable Court.*

### **Petitioner's Submissions**

40 The Petitioner submitted on three issues: whether the Petition meets the constitutional threshold and is properly before this Honourable Court; whether the impugned decision violated constitutional and statutory rights of the affected teachers; whether the Petitioner is entitled to the reliefs sought.

41 On the first issue, the Petitioner submitted that the Respondents' argument that the petition lacks precision contrary to ***Anarita Karimi Njeru v Republic [1979] KLR 154***; is misplaced. The Petitioner avers that in ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR***, the Court of Appeal clarified that: *"The principle in Anarita Karimi is not a technical doctrine of pleading, but a substantive one: the petitioner must set out with a reasonable degree of precision the right alleged to have been infringed and the manner of the infringement."*

42 The Petitioner submitted that the Respondents invoke Article 119 of the Constitution and Section 46 of the TSC Act. Article 119 relates to petitions to Parliament and does not oust the jurisdiction of this Court. Section 46 of the TSC Act provides for individual review of administrative

decisions, not for collective redress of systemic constitutional violations affecting over 1,800 teachers.

- 43 It is the Petitioner's submission that the Supreme Court in ***Communication Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others [2014] eKLR*** held: *"Where a remedy is not effective or available, a litigant is entitled to approach the courts directly."*
- 44 On the second issue, the Petitioner submitted that the Respondents singled out teachers from nine hardship counties and removed them from a promotion list despite their merit-based selection; this is indirect discrimination based on place of work and residence. It cited ***Law Society of Kenya v Kenya Revenue Authority & Another [2017] eKLR***, wherein the Court held: *"Where a policy is manifestly discriminatory, it is open to the Court to intervene."*
- 45 The Petitioner submitted that by abruptly excluding teachers who had already qualified and been published in the promotion list, the Respondents undermined their right to fair labour practices and their economic rights under Article 43 of the Constitution.
- 46 The Petitioner submitted that the affected teachers were never notified nor given reasons for their removal contrary to Article 47 of the Constitution that provides every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. It cited ***Judicial Service Commission v Mbalu Mutava & another [2015] eKLR***, the Court of Appeal held fair

administrative action entails the right to be heard and to be given reasons before adverse action is taken.

- 47 The Petitioner submitted that by publishing the teachers' names and TSC numbers in the promotion list, the Respondents created a legitimate expectation that could not be arbitrarily withdrawn. Reliance was placed in ***Keroche Industries Limited v Kenya Revenue Authority & 5 others [2007] eKLR***, the High Court stated: *"A legitimate expectation arises where a public body, by representation or past practice, induces an expectation that is reasonable, lawful and logical."*
- 48 On the third issue, the Petitioner submitted that it has annexed documentary evidence proving discrimination, violation of due process and disregard of constitutional values, thereby rebutting any presumption of regularity. The 1<sup>st</sup> Respondent argued that this is a contractual grievance, however, in ***Okiya Omtatah Okiiti v Communication Authority of Kenya & 8 others [2015] eKLR***, the Court held: *"Where a petition raises issues of violation of constitutional rights, it cannot be dismissed as a mere employment dispute."*
- 49 It is the Petitioner's submission that the threshold for the grant of interim conservatory orders has been fully satisfied. It was guided by the principles for grant of such orders stated by the Supreme Court in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR***, where the Court held that: *"Conservatory orders bear a more decided public-law connotation: they are*

*orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to private-party issues, but to the inherent merit of a case, bearing in mind the constitutional values..... Conservatory orders are meant to preserve the subject matter and ensure that constitutional values are upheld pending determination.”*

50 The Petitioner placed reliance in **Centre for Rights Education and Awareness (CREAW) & Another v Speaker of the National Assembly & 2 others [2017] eKLR**, wherein the court: *“At this stage the court is not required to make any conclusive or definitive findings on the merits of the case but only satisfy itself that the Petition is not frivolous and that it discloses arguable constitutional issues.”*

51 On prima facie case, the Petitioner submitted that the Respondent's actions implicate Articles 27, 41, 43 and 47 of the Constitution on non-discrimination, fair labour practices, socio-economic rights and fair administrative action. The Petition therefore raises genuine and arguable constitutional questions. In **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR** the court held; *“A prima facie case is not one that must succeed at the end of the day but one that is not frivolous and raises serious questions fit for investigation by the court.”*

- 52 On irreparable damage, the Petitioner submitted that if the impugned decision is implemented, the 1,864 teachers stand to suffer; loss of anticipated salary increments and benefits, stagnation in career progression, and demoralization and disruption of service delivery in already under-resourced hardship areas. These constitute a real and imminent danger that cannot be adequately compensated by damages. The Court of Appeal in ***Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR***, affirmed: *“If damages recoverable in law is an adequate remedy and the defendant is capable of paying, no interlocutory injunction should normally be granted, however strong the applicant's claim may appear at that stage.”*
- 53 It is the Petitioner’s submission that the damages are not adequate to cure the constitutional violations and career stagnation.
- 54 On the balance of convenience, the Petitioner submitted that the balance of convenience tilts heavily in favour of preserving the status quo pending hearing. Granting the orders sought does not unduly prejudice the Respondents but instead ensures: That teachers continue serving with legitimate expectations intact; That constitutional values of equality and fair treatment are respected; and that public confidence in independent commissions and Parliament is upheld.
- 55 The Petitioner submitted that the public interest lies in retaining experienced teachers in hardship areas to avoid

disruption of education services in marginalized counties an objective recognized by Article 56 of the Constitution which mandates affirmative action for marginalized groups. It cited ***Muslim for Human Rights (MUHURI) & 2 others v Inspector General of Police & 4 others [2015] eKLR*** wherein the court emphasized: “*Where there is doubt, the court should lean towards protecting the rights and fundamental freedoms of citizens and allow the suit to be heard on merit.*”

56 It is the Petitioner’s submission that without the conservatory orders sought, the Petition risks being rendered nugatory. By the time the Court determines the matter, the promotions would have been concluded and implemented, leaving the affected teachers without effective remedy as held in ***Judicial Service Commission v Speaker of the National Assembly & Another [2013] eKLR***.

### **1<sup>st</sup> Respondent’s Submissions**

57 The 1<sup>st</sup> Respondent submitted on four issues: Whether the Petition is in blatant breach of the doctrines of exhaustion and constitutional avoidance; Whether the Petition as drawn meets the test espoused in *Anarita Karimi Njeru v Republic [1979] KECA 12 (KLR)1272*; Whether evidence has been placed before Court to prove the allegations; Whether the reliefs sought are merited.

58 On the first issue, the 1<sup>st</sup> Respondent submitted that the doctrine of constitutional avoidance discourages the direct

invocation of constitutional provisions where a litigant's remedy is grounded in statute. It submitted that the dispute herein is purely an employment matter relating to promotion of teachers and does not raise any genuine constitutional issue.

59 The 1<sup>st</sup> Respondent submitted that the petition contravenes the doctrine of constitutional avoidance as the core issue arises from a contractual employment relationship falling within private law, but has been framed as a constitutional Petition to circumvent statutory procedures under employment laws. It argued that no cause of action anchored in the Constitution has been raised, as the subject matter pertains to ordinary contractual grievances within the ambit of the Employment Act disguised as a constitutional petition.

60 It urged the Court to apply the substantive law under the Employment Act and adopt the principle of constitutional avoidance. The Respondent cited various case laws including **Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR** wherein the Court of Appeal stated:

*“..... It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves*

*the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”*

- 61 The 1<sup>st</sup> Respondent submitted that the principle of constitutional avoidance requires the Court to decline jurisdiction where the matter can be resolved through statutory processes, and urged the Court to find that entertaining unverified constitutional Petitions undermines internal dispute resolution mechanisms and burdens the Court with matters outside its jurisdiction.
- 62 On the second issue, the 1<sup>st</sup> Respondent submitted that the Petition is vague, ambiguous and lacks specificity and particulars, thereby violating the right to fair hearing.
- 63 It was submitted that a party alleging violation of constitutional rights must plead with reasonable precision the manner of such violation. It cited **Anarita Karimi Njeru v Republic [1979] eKLR**, the court stated constitutional violations must be pleaded with a reasonable degree of precision.
- 64 The 1<sup>st</sup> Respondent submitted that the alleged provisions of the Constitution, which accord rights to the Petitioner must be precisely enumerated and the claim pleaded to

demonstrate such violation with the violations being particularized in a precise manner. Further, that the manner in which the alleged violations were committed and to what extent must be shown by way of evidence based on the pleadings.

- 65 It further submitted that pleadings must be drafted with clarity and specificity so as to accord a respondent a fair opportunity to know what the complaint is all about and to possibly prefer a response thereto. Given the nature of the Petition and the gravity of the issues raised, there remains the need that the pleadings be crafted in such a manner as to demonstrate how each respondent violated which of the Petitioners' constitutional rights. Reliance was placed on ***Meru Cultural Center & 17 others v Kisima Farm Limited & 24 others [2023] KEELC 19863 (KLR)*** where the Court held:

*“ I find that the objection raised is merited to the extent that the petitioners have failed to plead with precision the constitutional violations, the particulars of their complaints against the respondents and the manner in which [the Constitution](#) has been violated in relation to their complaints, and therefore has not met the threshold established in *Anarita Karimi Njeru (supra)*. Consequently, the petition is hereby struck out with costs.....”*

- 66 It is the 1<sup>st</sup> Respondent's submission that pleadings are drafted with certain degree of clarity and specificity as to accord a respondent a fair opportunity to know what the

complaint is all about and to possibly prefer a response thereto. However, in the instant suit, the Petition is not only drafted in a manner that the 1<sup>st</sup> Respondent is not able to know what to respond to, but also a mockery of fair judgement.

- 67 On the third issue, the 1<sup>st</sup> Respondent submitted that it is trite law that he who alleges must prove as provided under Sections 107(1), (2) and 109 of the Evidence Act, Cap 80.
- 68 It is therefore the 1<sup>st</sup> Respondent's submission that the Petitioner was required to present before this Court evidence of the said violations of the Constitution. At the very least, the Petitioner ought to have presented to this Court evidence that the 1<sup>st</sup> Respondent removed any of the teachers from the Promotion List. This has not been done. No complaint letter or an Affidavit sworn by any teacher that his name was removed from the published list has been presented before you to support the allegations.
- 69 It submitted that the Petitioners have not met both the evidential burden of proof nor the applicable standard of proof as enunciated in ***Matendechele v Sunstar Hotel Nairobi [2023] KEHC 1921 (KLR)*** as follows:

*“Returning to the matter at hand, this Court hereby settles that the Petitioner bore the legal and evidential burden of proof unless the evidential burden of proof shifted to the Respondent. The Court*

*also settles that the applicable standard of proof in this matter, just like in any other Constitutional Petitions, shall be on a balance of probabilities.”*

70 On the final issue, the 1<sup>st</sup> Respondent submitted that the Petition is speculative and unsupported by evidence. It argued that no nexus has been established between the constitutional provisions cited and the alleged infringements. Thus, the Petitioner failed to place sufficient and cogent material before Court to warrant the reliefs sought.

### **2<sup>nd</sup> Respondent's Submissions**

71 The 2<sup>nd</sup> Respondent submitted on three issues: whether the 2<sup>nd</sup> Respondent has been properly joined in the Petition; whether the Petitioner exhausted remedies under Article 119 and Section 48 of the TSC Act; and whether the orders sought should be granted.

72 The 2<sup>nd</sup> Respondent submitted that it has been improperly joined to the proceedings. The Petition does not seek any express orders against the National Assembly, nor does it make specific allegations of constitutional violations attributable to it.

73 The 2<sup>nd</sup> Respondent submitted that from the pleadings and the orders sought, the Petitioner's grievance is directed at the implementation of the Status Report by the 1<sup>st</sup> Respondent, and not at any proceedings, resolution, or decision of the Departmental Committee on Education. Additionally, the Petitioner does not seek to quash the

Status Report itself, but merely challenges its implementation, which does not implicate the National Assembly.

- 74 It was submitted that Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (the Mutunga Rules), defines a respondent as a person alleged to have denied, violated, infringed, or threatened to violate a right or fundamental freedom. The 2<sup>nd</sup> Respondent submitted that no such allegation has been pleaded against the National Assembly.
- 75 It was further submitted that Rule 5(d)(i) of the Mutunga Rules, empowers the Court, at any stage of proceedings, to strike out the name of any party improperly joined, either on application or on its own motion.
- 76 It is the 2<sup>nd</sup> Respondent's submission that the Petitioners have not sought any specific orders against the National Assembly and no improper conduct has been imputed upon it. Consequently, and in line with the provisions of Rule 5(d)(i) above, it urged the court to strike out the National Assembly from the proceedings herein.
- 77 The 2<sup>nd</sup> Respondent cites ***Abdullahi v Director of Public Prosecutions & another; Director of Criminal Investigations & another (Interested Parties) [2023] KEHC 19275 (KLR)***, where the Court held that in answering the question whether a respondent has been properly joined to the proceedings, the right question to

ask is “*whether its absence would prejudice the petitioner’s case in terms of settling all the issues in dispute or in regard to reliefs sought.*”

78 It is the 2<sup>nd</sup> Respondent’s submission that there will be no prejudice occasioned to the Petitioner’s case should the National Assembly be struck off from the proceedings.

79 On second issue, the 2<sup>nd</sup> Respondent submitted that before approaching the court, the Petitioner ought to exhaust all remedies available to them under any other written law and if not, demonstrate the exceptional circumstances to warrant the court’s intervention.

80 It is the 2<sup>nd</sup> Respondent’s submission that Article 119(1) of the Constitution and Section 46 of the TSC Act are not a bar to approaching the Court, the Petitioner is under an obligation, pursuant to Section 9(2) of the FAA to explore all remedies available to them before approaching the Court and in the event that they do not, there must be shown to the court exceptional circumstances to warrant its intervention; these have not been demonstrated by the Petitioner.

81 The 2<sup>nd</sup> Respondent placed reliance in the Court of Appeal decision of ***Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] KECA 304 (KLR)*** that held:

*“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is*

*invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews.... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accord with article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution."*

82 On the final issue, the 2<sup>nd</sup> Respondent submitted that conservatory orders are not final orders but interim in nature; they are issued to preserve the status quo until the determination of a petition, as held by the Supreme Court, in the case of ***Munya v Kithinji & 2 others (Application 5 of 2014) [2014] KESC 30 (KLR) (2 April 2014) (Ruling)***.

83 The 2<sup>nd</sup> Respondent submitted that the purpose of conservatory orders is to preserve the substratum of the suit. We rely on the case of ***Makumi & 4 others v Speaker County Assembly of Kitui & another (Constitutional Petition E001 of 2024) [2024] KEHC 2812 (KLR) (19 March 2024) (Ruling)*** where the Court held that:

*"A Conservatory order is a Judicial remedy sought or issued by a court to preserve a subject matter until the Suit/Petition is heard and determined. It is in other words an order of status quo ante so that the*

*substratum of the suit/petition is preserved, or so that the same is not rendered an academic exercise.”*

84 The 2<sup>nd</sup> Respondent submitted that Rule 5 (d) (i) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provides that the Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just order that the name of any party improperly joined, be struck out. The Petitioner has not sought any specific orders against the National Assembly and no improper conduct has been imputed upon it, consequently, it should be struck out from the proceedings in line with the provisions of Rule 5(d)(i).

### **3<sup>rd</sup> Respondent's Submissions**

85 The 3<sup>rd</sup> Respondent submitted four issues: whether the Petitioner is in breach of the doctrines of exhaustion and constitutional avoidance; whether the conservatory order sought is merited; whether the injunction sought is merited; whether the Petition discloses a violation of constitutional rights.

86 On the first issue, the 3<sup>rd</sup> Respondent submitted that the petition is fatally premature, procedurally irregular, and legally unsustainable on account of the Petitioner's wilful failure to exhaust the mandatory statutory dispute resolution mechanisms set out in Section 46 of the Teachers Service Commission Act which provides that a

person who is aggrieved by a decision of the Commission under this Act may apply to the Commission for review of that decision.

87 The 3<sup>rd</sup> Respondent submitted that the Petitioner has failed to lodge an appeal before the Teachers Service Commission as provided in the statute thus the petition is premature as it violates the doctrine of exhaustion.

88 It is the 3<sup>rd</sup> Respondent's submission that the Petitioner ought to have utilized the available internal dispute resolution mechanisms instead of burdening the court with matters that fall outside its constitutional jurisdiction. In the premises, the petition is premature, procedurally defective, and offends both the doctrine of exhaustion and the principle of constitutional avoidance, thus, this court lacks jurisdiction to entertain this petition until the statutory mechanisms have been fully exhausted.

89 On the second issue, the 3<sup>rd</sup> Respondent submitted that the Petitioner has not met the legal requirements for grant of conservatory orders as set out in ***Nkunja v Magistrates and Judges Vetting Board & another [2016] KEHC 7269 (KLR)*** as follows:

*“An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution; Whether if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of*

*rights will be rendered nugatory; and the public interest must be considered before grant of a conservatory order.”*

90 The 3<sup>rd</sup> Respondent submitted that the conservatory orders to restrain the Respondents from implementing or acting on the 2nd Respondent’s report should not issue since the Petitioner has not demonstrated a prima facie case. It cited ***Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KECA 175 (KLR)*** in which the Court considered what constitutes a prima facie case and held:

*“In civil cases, a prima facie is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter; A prima facie case is more than an arguable case; It is not sufficient to raise issues but the evidence must show an infringement of a right and the probability of success of the Applicant’s case upon trial; That is clearly a standard which is higher than an arguable case.”*

91 The 3<sup>rd</sup> Respondent submitted that the Petitioner has also failed to demonstrate that there is a real danger that it will suffer prejudice if the conservatory order sought is not granted and that failure to grant the order will render the petition nugatory. It placed reliance in the meaning of real danger enunciated in ***Martin Nyaga Wambora v***

**Speaker of The County of Assembly of Embu & 3 Others [2014] eKLR** as follows: *“To those erudite words I would only highlight the importance of demonstration of “real danger”. The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court.”*

- 92 On the third issue, it is the 3<sup>rd</sup> Respondent’s submission that the injunction sought lacks merit as the Petitioner has not demonstrated that it has a *prima facie* case. Secondly, the Petitioner has not proven it will suffer irreparable harm since the matter in dispute is reviewable under the Teachers Service Commission Act and Petitioner ought to seek recourse under the said internal mechanism. The availability of the internal avenue therefore negates any claim of irreparable harm.
- 93 On the final issue, the 3<sup>rd</sup> Respondent submitted that the petition does not disclose any specific, actionable or substantiated violation of constitutional rights. The decision to remove the teachers from the promotion list does not amount to a constitutional violation but pertains to ordinary contractual grievances within the ambit of statutory law. Additionally, the Petitioner has not shown how the process of removal of teachers from the promotion list violated specific constitutional rights.
- 94 It is the 3<sup>rd</sup> Respondent’s submission that the claim challenges administrative discretion which is subject to internal TSC mechanisms and not constitutional

enforcement. The Petitioner has alleged violation of various provisions of the constitution without providing sufficient legal or factual basis to support the alleged violations.

- 95 The 3<sup>rd</sup> Respondent submitted that the Petitioner has failed to demonstrate that the teachers were discriminated against or treated unequally contrary to Article 27 of the Constitution. Further, there is no evidence tendered by the petitioner to prove that there was any discrimination of a minority or a marginalized group under Article 56.
- 96 The 3<sup>rd</sup> Respondent submitted that Article 41 of the constitution does not guarantee automatic promotion. Promotions done by the 1<sup>st</sup> Respondent are merit based and governed by internal regulations and availability of positions.
- 97 The 3<sup>rd</sup> Respondent submitted that fairness in administrative action does not equate entitlement to a particular result and the 1<sup>st</sup> Respondent followed due process in removing the teachers from the promotion list. Additionally, the Petitioner has not adduced any credible evidence to demonstrate that there was no public participation.
- 98 I have examined all the averments and submissions of the parties herein. The petitioner seeks orders to stop implementation of the status report on the resolution of the Departmental Committee On Education regarding Teachers Promotion for lack of public participation. The petitioner also sought orders to declare removal of 1,864

teachers from hardship and arid areas from the promotion list by the 1<sup>st</sup> respondent as being unconstitutional.

99 The petitioner has exhibited a report dated 22/5/2025, which in principal sets out the process of advertisement, shortlisting, interview process, and appointments of the teachers who were promoted. The report covers guidelines used in the entire process. The report also sets out the distribution of the teachers promoted by county and another sheet attached titled Successful Teacher Promotion 2024-2025.

100 The respondents denied the allegations raised in the petition. The 1<sup>st</sup> respondent explained that the process used in the advertisement, short listing, interview process and appointment of the qualified teachers. The 1<sup>st</sup> respondent denied removing any qualified teacher from the list and avers that the teachers were all appointed as per the guidelines in place. The documents before court as submitted by the petitioners did not show any list of teachers previously on the promotion list and who were subsequently removed from the list by the 1<sup>st</sup> respondent.

101 The petitioner's pleadings despite indicating that they had attached evidence of the teachers removed from the list, no such list was exhibited.

102 The petition as submitted by the respondent lack evidential support. The petition does not also disclose the constitutional violation made by the respondents. The petition therefore cannot stand and must fail at this point. There shall be no order of costs.

**Dated, Signed and Delivered Virtually at Nairobi  
this 28<sup>th</sup> Day of April, 2026.**

**HELLEN WASILWA**

**JUDGE**