



**Magwanga v Governor, Homa Bay County & another (Petition
E012 of 2026) [2026] KEELRC 1083 (KLR) (27 April 2026) (Ruling)**

Neutral citation: [2026] KEELRC 1083 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E012 OF 2026
NZIOKI WA MAKAU, J
APRIL 27, 2026**

**IN THE MATTER OF ARTICLES 2, 10, 22, 23, 27, 41, 47, 50, 73, 75, 174, 175,
179, 181, 232 & 258 AND CHAPTER SIX OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT, NO.17 OF 2012

AND

**IN THE MATTER OF: VIOLATION OF THE PRINCIPLES OF FAIR ADMINISTRATIVE
ACTION, FAIR LABOUR PRACTICES, PUBLIC PARTICIPATION AND ABUSE OF POWER**

AND

IN THE MATTER OF THE COUNTY GOVERNMENT’S ACT

BETWEEN

HON. JOSEPH OYUGI MAGWANGA PETITIONER

AND

THE GOVERNOR, HOMA BAY COUNTY 1ST RESPONDENT

THE COUNTY GOVERNMENT OF HOMABAY 2ND RESPONDENT

RULING

1. The Petitioner herein was erstwhile the Deputy Governor Homa Bay County. He instituted this suit alleging constitutional and legal violations arising from what he terms as unfair treatment by the Respondents. Particularly he contends that their actions of locking him out of his office, rendering his office inoperable by refusing to engage him and withdrawal of his official motor vehicles are in violation of Articles 179, 47, 28, 41, 73, 232, and 10 of *the Constitution*. He further avers that these actions amount to constructive dismissal.



2. In response to the Petition the Respondents raised a Preliminary Objection dated 30th January 2026 contending:
 1. That the Petition is vexatious, frivolous, and an abuse of the process of this Honourable Court, instituted without reasonable cause, motive, or legal basis, and is therefore incompetent and liable to be struck out in limine with costs.
 2. That the Petition is fatally vague and incompetent for want of precision in pleading the alleged constitutional violations, contrary to the principle in *Anarita Karimi Njeru v Republic* [1979] eKLR, and is liable to be struck out.
 3. That the Petition discloses no justiciable constitutional controversy capable of properly invoking the constitutional or statutory jurisdiction of this Honourable Court, the matters complained of being non-justiciable and not amenable to judicial determination.
 4. That this Honourable Court lacks jurisdiction to entertain or determine the Petition by virtue of the doctrines of constitutional avoidance and exhaustion, the Petitioner having failed to pursue and exhaust available constitutional, statutory, and administrative dispute resolution mechanisms prior to invoking this Court's jurisdiction.
 5. That the Petition discloses no reasonable or sustainable cause of action against the 1st Respondent, there being no specific acts, omissions, or legal breaches pleaded or particularised as against her, and her joinder to these proceedings is therefore misconceived, improper, and legally untenable, rendering the Petition incompetent as against the 1st Respondent and liable to be struck out in limine with costs.
 6. That the continued inclusion of the 1st Respondent in these proceedings is unwarranted, vexatious, and constitutes an abuse of the process of this Honourable Court, and is therefore incompetent and liable to be struck out in limine with costs.
 7. That the Petition is incompetent as it challenges the internal administration and operational discretion of the County Executive, matters constitutionally vested in the Executive under Articles 176 and 179 of *the Constitution*. Such matters are political and administrative in nature, do not create enforceable legal or employment rights, and are not justiciable.
 8. That granting the reliefs sought would improperly subject the Executive's internal functioning to judicial control, contrary to the doctrine of separation of powers.
 9. That the entire suit dated 26th January 2026 is incompetent, fatally and incurably defective, and an abuse of the process of this Honourable Court for fundamental non-compliance with mandatory procedural requirements of law, namely:
 - a. That the Petition together with the Supporting Affidavit dated 26th January 2026 offends section 31 of the County Government Act and ought to be dismissed in limine.
 - b. Failure to extract and serve proper process upon the Respondents, contrary to the mandatory provisions of Order 5 Rules 21 and 25 of the Civil Procedure Rules, thereby rendering the proceedings improperly instituted and void ab initio.
 - c. Non-conformity of the pleadings with the mandatory requirements of Order 2 of the Civil Procedure Rules, the Petition being defective, irregular, and incapable of sustaining a competent cause of action; and



- d. Failure to issue and serve the requisite statutory notice upon the Government, contrary to section 13A of the *Government Proceedings Act*, which notice is a condition precedent to the institution of proceedings against the Government.
10. That in view of the foregoing, the Respondents respectfully pray that this Honourable Court be pleased to strike out the Petition in its entirety with costs to the Respondents, for being premature, legally untenable, and constituting a manifest and gross abuse of the process of this Honourable Court.
3. On 23rd February 2026, parties agreed to canvass the Preliminary Objection by way of written submissions.

Respondents' Submissions

4. The Respondents contend that the Court should determine whether the Preliminary Objection is sustainable; whether the Petition is moot; whether the suit offends sections 30 and 31 of the County Government Act; whether there is misjoinder and incompetence; whether statutory notice under section 13A of the *Government Proceedings Act* was issued; whether failure to extract and serve summons offends Order 5 Rule 6; whether statutory dispute resolution mechanisms were exhausted; and whether the suit amounts to an abuse of process.
5. On the first limb, the Respondents submit that the Petition is a straightforward administrative grievance improperly clothed as a constitutional petition. They rely on *Anarita Karimi Njeru v Republic* (1979) KLR 54, which requires precise pleading of constitutional violations. They assert that although the Petitioner cites Articles 2, 3, 20, 21, 22, 23, 40, 47 and 48, he fails to particularize the specific violations. They further rely on *Mumo Matemo v Trusted Society of Human Rights Alliance* Civil Appeal No. 290 of 2012 [2013] eKLR, where the Court held that a petitioner must demonstrate with precision the violated rights and the manner of violation.
6. On constitutional avoidance, the Respondent submits that the suit should not have been elevated to constitutional status. They assert that courts should not determine constitutional issues where alternative remedies exist. They rely on *Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* [2014] eKLR and *S v Mhlungu*, 1995 (3) SA 867 (CC) where the court underscored that constitutional avoidance demands that a court will not determine a constitutional issue, when a matter may be properly decided on another basis. They also reference the case of *Uhuru Muigai Kenyatta v Nairobi Star Publications Ltd* [2013] eKLR, for the proposition that not every grievance warrants constitutional adjudication. Additional reliance is placed on *Peter O. Ngoge v Francis ole Kaparo & 4 others* [2007] eKLR, which in applying *Harriksson v Attorney General of Trinidad And Tobago* [1980] AC 265, underscored that not every illegality constitutes a constitutional violation.
7. On mootness of this Petition, the Respondents submit that the Petition has been overtaken by events since the Petitioner resigned on 26th February 2026 to pursue political ambitions. They assert the steps to replace the Petitioner with Hon. Danish Onyango have since been commenced pursuant to Article 179(4) of *the Constitution* and section 31(a) of the *County Governments Act*. They therefore assert that the reliefs sought, including mandamus to restore access to office and facilities, are now impractical. They rely on the case of *Natural World Mombasa Safaris Ltd v Karuri* Civil Appeal E045 of 2022 [2022] KEHC 9979 (KLR), in which a moot suit was described as one in which further legal proceedings would have no practical effect.



8. On the suit contravening sections 30 and 31 of the *County Governments Act*, the Respondents submit that the Governor has no role in the alleged administrative actions complained of. They argue that sections 30 and 31 define the Governor's functions, which do not extend to the matters complained of. They contend that including the Governor constitutes an abuse of process and that courts do not issue orders in vain.
9. Concerning incompetence of the suit the Respondents submit that the Deputy Governor is a State Officer, not an employee, and therefore no employer–employee relationship exists. As for whether a demand notice or intention to sue was issued under section 13 A of the *Government Proceedings Act*, the Respondent submits that they were not issued. They submit that the omission is fatal and the suit should be struck out. They reference the case of Republic v Town Clerk of Webuye County Council & another [2014] eKLR, Paul Njuguna v Barclays Bank of Kenya Limited [2016] eKLR and Republic v Principal Secretary, Ministry of Interior & Coordination of National Government Ex parte Salim Seif, Lamu County Government [2020] eKLR, for the principle that failure to issue a demand renders proceedings premature. They also cite Order 3 Rule 2(2) of the Civil Procedure Rules and the decision in Kenya Power & Lighting Company Ltd v Sheriff Molana Habib [2018] eKLR, where the Court of Appeal held that suits filed without a demand are premature and incompetent. The Respondents further submit that the Petitioner violated Article 50 of *the Constitution* on fair hearing when he failed to extract and serve summons to enter appearance as required under Order 5 Rules 1, 6, and 8 of the Civil Procedure Rules. They reference the decision in the case of Joseph Gachagua & another v Alice C. Kalya & 4 others [2015] eKLR, in which it was held that a party can only respond after being served with summons. In conclusion they submit that the Petitioner contravened the doctrine of exhaustion by failing to subject the issues to the County Public Service Board and the Human Resource Department pursuant to sections 57 and 77 of the County Government Act and sections 85 and 88 of the *Public Service Commission Act*. They cite the cases of Geoffrey Muthinja Kabiru & another v Samuel Muguna Henry & 1756 others [2015] eKLR and Mutanga Tea & Coffee Company Ltd v Shikara Ltd & another [2015] eKLR, for the principle that statutory procedures must be followed to the hilt before the court is approached for adjudication. Consequently, they urge the Court to allow the Preliminary Objection with costs.

Petitioner's Submissions

10. On his part the Petitioner identifies the following issues for determination:
 - a. Whether this court has jurisdiction;
 - b. Whether the Petition offends the doctrine of separation of powers;
 - c. Whether the Petition offends Order 2, Order 5 rule 21 and 25 of the Civil Procedure Rules;
 - d. Whether the Petition offends the provisions of section 31 of the County Government Act; and
 - e. Whether the Petition offends the provisions of section 13A of the *Government Proceedings Act*.
11. On this court's jurisdiction, the Petitioner maintains that this Court is clothed with the same pursuant to Article 162(2) of *the Constitution* and section 12 of the Employment and *Labour Relations Act*. He contends that the dispute concerns a labour-related matter between himself and the Respondents and raises constitutional violations, thereby falling squarely within this Court's mandate.
12. On separation of powers the Petitioner submits that invoking the Court's jurisdiction to address constitutional violations does not offend the doctrine. He relies on County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015] eKLR, where the Court



of Appeal affirmed that while the three arms of government are independent, courts retain the mandate to intervene where constitutional violations occur. The Petitioner also cites *Omweno & 3 others v Governor, County Government of Kakamega & 4 others; Wanyama & another (Interested Parties)* [2024] KEELRC 463 (KLR), where the Court affirmed that all State organs are bound by *the Constitution* and courts are free to interrogate unconstitutional actions without offending the doctrine of separation of powers.

13. Concerning allegations of the Petition offending Order 2 and Order 5 Rules 21 and 25 of the Civil Procedure Rules, he asserts that nothing could be further from the truth. He submits that the Petition complies with Order 2 of the Civil Procedure Rules, as it clearly sets out the violated provisions of law. On service, he submits that summons were properly served in accordance with Order 5. He contends that it is this service that enabled the Respondents to enter appearance and respond to the suit. He asserts that Order 5 Rules 21 and 25 are inapplicable, as they relate to service outside jurisdiction, yet the Respondents are resident within the country. He maintains that service complied with Order 5 Rule 22 B as the Respondents did not dispute the email addresses used or receipt of pleadings and summons. He adds that the 2nd Respondent was physically served through its Attorney, as evinced by the affidavit of service dated 29th January 2026.
14. Turning to whether the Petition offends section 31 of the County Government’s Act, he submits that it does not. He asserts that no internal disciplinary proceedings had been initiated against him to justify the administrative actions taken against him. He further submits that he was never subjected to any disciplinary process or removal procedure under Article 181 of *the Constitution*, and therefore the Respondents’ reliance on section 31 is misplaced. On the Petition offending section 13A of the *Government Proceedings Act*, the Petitioner submits that the section is unconstitutional to the extent that it prescribes prior notice before filing suit. He cites the case of *Kenya Bus Service Ltd & another v Minister for Transport & 2 others* [2012] eKLR, where Majanja J. held that the mandatory requirement of notice under section 13A violates Article 48 by limiting access to courts. Moreover, he submits that no prejudice or hardship has been occasioned to the Respondents by the absence of such notice. He urges the Court to apply the “oxygen principle” to facilitate substantive justice. In conclusion the Petitioner urges the Court to dismiss the Preliminary Objection with costs.

Disposition

15. The objection taken is that the Petition is incompetent and offends the law. In reply, the Petitioner asserts the Petition is properly before Court as the Court is clothed with jurisdiction. The Court has considered the matter and isolates the following as the issues for determination:
 - a. Whether the jurisdiction of the Court was properly invoked
 - b. Whether the Petition herein is moot
 - c. If the answer to (a) is in the negative and the answer to (b) in the positive, what orders lie.
 - d. Who is to bear costs.
16. The jurisdiction of this Court is donated by Article 162(2)(a) and section 12 of the *Employment Act* enunciates this. Under the provisions of the law, this Court is empowered to hear and determine disputes such as the one contained in the Petition. The question of service of a notice in terms of section 31 of the *Government Proceedings Act* is raised. In the case of *Kenya Bus Service Ltd & another v*



...The strictures imposed by these provisions must be considered in light of the right of access to justice. The right of access to justice protected by *the Constitution* involves the right of ordinary citizens being able to access remedies and relief from the courts. In *Dry Associates v Capital Markets Authority and another Nairobi Petition No. 328 of 2011 (Unreported)*, the court stated, “[110] Access to justice is a broad concept that defies easy definition. It includes the enshrinement of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to one’s rights; equal right to the protection of those rights by the law enforcement agencies; easy access to the justice system particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay.”

37. By incorporating the right of access to justice, *the Constitution* requires us to look beyond the dry letter of the law. The right of access to justice is a reaction to and a protection against legal formalism and dogmatism. (See “Law and Practical Programme for Reforms” (1992) 109 SALJ 22). Article 48 must be located within the Constitutional imperative that recognises as the Bill of Rights as the framework for social, economic and cultural policies. Without access to justice the objects of *the Constitution* which is to build a society founded upon the rule of law, dignity, social justice and democracy cannot be realised for it is within the legal processes that the rights and fundamental freedoms are realised. Article 48 therefore invites the court to consider the conditions which clog and fetter the right of persons to seek the assistance of courts of law.

[underline for emphasis]

17. Given the position in the above case, my position is that the mandatory requirement of notice under section 13A clearly violates Article 48 by limiting access to courts and as held by Majanja J., such a requirement is unconstitutional. The failure to issue a notice in this case is not fatal, in my view, and the suit could be progressed. It is on the basis of the foregoing that the Petition is not for striking out in limine on grounds of non-service of a notice.
18. The question that therefore arises is whether the jurisdiction of the Court was properly invoked. For that, the Petitioner needs to demonstrate that he exhausted the internal dispute resolution mechanisms before moving the Court. Black’s Law Dictionary Tenth Edition holds that the exhaustion doctrine requires that a party exhaust all possible administrative or preliminary remedies before seeking relief in court. Closer home, where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed before the jurisdiction of the Court is invoked. Examples are such as the situation where there exists an internal appeal mechanism or recourse to obtain relief before a quasi-judicial body such as Public Service Commission before moving the court. It is imperative that where dispute resolution mechanisms exist outside Courts, the same should be exhausted before the jurisdiction of the Courts is invoked. Premature invocation of the jurisdiction of the Court is tantamount to abuse of process. Accordingly, the special procedure provided by any law relating to the recourse the Petitioner has, must be strictly adhered to before the Court can properly entertain the suit save for instances where the exception to the exhaustion doctrine applies. The Petitioner herein had not exhausted the dispute resolution mechanisms before moving the Court. He did not deploy the challenges he could have initiated before



moving to Court. The exceptions to the exhaustion doctrine do not apply in his case. As such, the Court returns the Petition as premature and the Court's jurisdiction was not properly invoked. Though the Court has jurisdiction, it has not been properly moved.

19. The second issue is whether the Petition is moot. It is asserted the Petitioner has since moved on. It is not controverted that the Petitioner resigned on 26th February 2026 to pursue political ambitions. The Respondents have commenced the process to replace the Petitioner with Hon. Danish Onyango as Deputy Governor pursuant to the provisions of Article 179(4) of *the Constitution* as read with section 31(a) of the *County Governments Act*. In my considered view, when a matter is overtaken by events, it becomes moot. Mootness is a justiciability doctrine which prevents courts from deciding hypothetical or academic cases where the live controversy between the parties no longer exists. The reliefs sought by the Petitioner, including the order of mandamus directed at the Respondents requiring them to restore the Petitioner access to office and facilities, are now impractical and merely academic since he has since resigned his position to pursue political ambitions. The Petitioner would not be able to exercise the functions of the office of Deputy Governor even if an order were to issue herein. Why does he need access to an office he will not occupy? In my considered view, the actions of the Petitioner have rendered the Petition moot and of no effect.
20. The foregoing demonstrates the Petition is for striking out. The Petition is accordingly struck out in limine. On the matter of costs, each party is to bear their own costs.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF APRIL 2026

NZIOKI WA MAKAU, MCIARB.

JUDGE

