



**Odenyo v Judicial Service Commission & 2 others (Petition E015 of 2025) [2026] KEELRC 1080 (KLR) (27 April 2026) (Ruling)**

Neutral citation: [2026] KEELRC 1080 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
PETITION E015 OF 2025  
NZIOKI WA MAKAU, J  
APRIL 27, 2026**

**IN THE MATTER OF ARTICLES 2, 10, 19, 20, 22, 23, 27, 35, 41, 47, 50, 73, AND 232 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE JUDICIAL SERVICE ACT, CAP. 8A (LAWS OF KENYA)**

**AND**

**IN THE MATTER OF THE JUDICIAL SERVICE (PROCESSING OF PETITIONS AND COMPLAINTS PROCEDURES) REGULATIONS,**

**2025**

**AND**

**IN THE MATTER OF ALLEGED SYSTEMIC VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS GUARANTEED UNDER THE CONSTITUTION**

**BETWEEN**

**HON RICHARD OKOTH ODENYO ..... PETITIONER**

**AND**

**THE JUDICIAL SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**THE CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT OF KENYA ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents have raised a Preliminary Objection to the petition, contending that this Court lacks jurisdiction. Their argument is that, at the time of filing suit, the Petitioner had already



retired and, consequently, no employer–employee relationship subsisted. In support of this position, they rely on Articles 161(1), 162(2), and 172(1)(c) of *the Constitution*. They further argue that the reliefs sought in the petition are incapable of enforcement and would, in any event, be in vain, as any purported promotion after retirement would not restore the Petitioner to active service.

2. The Preliminary Objection was canvassed by way of written submissions.

### **1<sup>st</sup> and 3<sup>rd</sup> Respondent’s Submissions**

3. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents identify three issues for determination:
  1. Whether this Court has jurisdiction to entertain the Petition filed by a person who had ceased to be an employee of the Judiciary at the time of filing;
  2. Whether the orders sought by the Petitioner are legally capable of enforcement; and
  3. Whether the Petition constitutes an abuse of the court process.
4. On jurisdiction they submit that it is a foundational issue that must be determined at the earliest opportunity. They rely on Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1, where the Court of Appeal held that jurisdiction is everything and that a court must down its tools the moment it finds it lacks jurisdiction. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents assert that this court’s jurisdiction is limited to disputes arising from employer–employee relationships which is not the case here. They highlight the fact that the Petitioner had already retired on 17<sup>th</sup> November 2025 when he filed this suit. They rely on Article 162(2)(a) of *the Constitution* and section 12(1) of the *Employment and Labour Relations Court Act* to buttress this point. They also cite Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, where the Supreme Court held that a court can only exercise jurisdiction as conferred by *the Constitution* or statute and cannot arrogate to itself jurisdiction beyond that mandate.
5. Further supporting this point, they rely on Clerk, Nakuru County Assembly & 3 others v Odongo & 7 others [2023] KECA 427 (KLR), where the Court of Appeal held that the jurisdiction of the ELRC is limited to employment and labour relations disputes and that, in the absence of an employer–employee relationship, the Court acts without jurisdiction. They also cite Nick Githinji Ndichu v Clerk, Kiambu County Assembly & Kiambu County Assembly (Petition No. 11 of 2014) [2014] KEELRC 437 (KLR), where the Court emphasized that access to the ELRC requires demonstration of an existing employer–employee relationship or a dispute falling within section 12(1).
6. On the orders sought in the Petition the 1<sup>st</sup> and 3<sup>rd</sup> Respondents submit that the order for promotion to Chief Magistrate is unenforceable. They maintain that having attained the mandatory retirement age, the Petitioner is disqualified from holding any position in the Judicial Service under the *Judicial Service Act* and the Judiciary Human Resource Manuals (2014 and 2025). They further argue that the Petitioner has executed retirement documents, including the Election to Commute Pension Form and the *Official Secrets Act* Declaration Form, thereby unequivocally accepting the termination of his employment. They therefore assert that the employment relationship cannot be revived in law. They rely on B v Attorney General [2004] 1 KLR 431, for the proposition that courts should not issue court orders in vain.
7. With respect to the Petition constituting an abuse of the court process, the 1<sup>st</sup> and 3<sup>rd</sup> Respondents assert that filing a claim that is jurisdictionally defective and seeks unenforceable reliefs amounts to misuse of court process. They reiterate the fact that Petition was filed after the Petitioner’s retirement and after the Petitioner had accepted retirement benefits. Additionally, they submit that the Petition



is fatally defective and does not plead constitutional violations with precision. They rely on *Anarita Karimi Njeru v Republic* [1976–80] 1 KLR 1272, for this argument.

8. In conclusion the 1<sup>st</sup> and 3<sup>rd</sup> Respondents urge the Court to uphold the Preliminary Objection and strike out the Petition with costs.

### **Petitioner’s Submissions**

9. The Petitioner submits that the Preliminary Objection is incompetent and does not meet the threshold in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. He asserts that it raises contested contractual factual issues, such as whether the employment relationship had been conclusively severed, and whether his constitutional rights were violated, all of which require evidentiary examination. On jurisdiction, the Petitioner submits that this Court is properly seized of the matter. He asserts that Article 162(2)(a) and (b) of *the Constitution*, read together with section 12(1) of the *Employment and Labour Relations Court Act*, confer broad jurisdiction upon the Court to determine disputes arising out of employment, including constitutional claims relating to rights and fundamental freedoms arising in the course of employment. He maintains that his claims arise from alleged violations of constitutional rights during his service in the Judiciary and therefore fall squarely within the Court’s jurisdiction, notwithstanding his subsequent retirement. In support, he relies on *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, for the principle that jurisdiction flows from *the Constitution* and statute, and that where a court is properly vested with jurisdiction over a class of disputes, subsequent changes in the parties’ circumstances do not divest that jurisdiction over accrued claims. He further cites *Mary Chemweno Kibet v Teachers Service Commission* [2014] eKLR, where the Court held that retirement does not extinguish the ELRC’s jurisdiction over claims founded on employment where the cause of action arose during the subsistence of the employment relationship. The Petitioner also submits that the Petition raises substantial constitutional questions concerning the interpretation and application of Articles 10, 19, 20, 22, 23, 27, 35, 41, 47, 50, 73 and 232 of *the Constitution*. He references *In Re the Matter of Interim Independent Electoral Commission* [2011] eKLR, where the Supreme Court held that courts must adopt a purposive interpretation of *the Constitution* and should not decline jurisdiction where bona fide constitutional issues are raised. He argues that Article 172(1)(c), relied upon by the Respondents, does not limit the Court’s jurisdiction but merely defines the mandate of the Judicial Service Commission.
10. On the effect of retirement, the Petitioner submits that his accrued constitutional rights were not extinguished upon retirement and that the matter is not moot. He contends that constitutional violations give rise to enforceable claims that survive changes in personal status. He places reliance on *Anarita Karimi Njeru v Republic (No. 1)* [1979] eKLR, *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR, and *Okiya Omtatah Okoiti & another v Communications Authority of Kenya & 4 others* [2018] eKLR, in support of the proposition that constitutional claims remain justiciable notwithstanding supervening events. He further asserts that his retirement was not legally complete, as his pension and terminal dues had neither been processed nor paid. In that regard, he relies on *Linus Kamotho Kiema v Teachers Service Commission* [2018] eKLR, where the Court held that non-payment of terminal dues sustains the Court’s jurisdiction over employment disputes. He points to post-retirement conduct by the Respondents, including a letter dated 7<sup>th</sup> November 2025 inviting him to attend official training as a serving officer, to demonstrate that the employment relationship had not been conclusively severed. The Petitioner also invokes the doctrine of continuing constitutional violations, submitting that the impugned conduct violating his rights spanned eleven years and persists through ongoing non-disclosure of information and arbitrary promotion practices. He relies on *Mumo Matemu v Trusted Society of Human Rights Alliance &*



- 5 others [2013] eKLR, where the Court of Appeal recognized that continuing violations sustain the Court's jurisdiction notwithstanding the passage of time or changes in circumstances. He further draws attention to recent promotions by the Respondent, as evinced by JSC Circular No. 1/2026, as proof of ongoing arbitrary conduct.
11. On the enforceability of reliefs, the Petitioner submits that the Respondents had mischaracterized his claims as being limited to promotion. He asserts that his primary reliefs include declaratory orders, mandamus to compel disclosure of information, damages for constitutional violations, and structural remedies, all of which remain enforceable irrespective of his retirement. He cites Article 23(3) of *the Constitution*, which empowers the Court to grant appropriate relief, including declarations and compensation. He references David Gituma Kimura & another v Teachers Service Commission & another [2016] eKLR, where the Court granted declaratory relief and damages to a retired employee, and Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others [2014] eKLR, where the Supreme Court affirmed the intrinsic value of declaratory reliefs even where other remedies may be impractical. He therefore contends that the principle that courts do not issue orders in vain is inapplicable.
  12. On locus standi, the Petitioner submits that he has standing under Article 22 of *the Constitution* to institute proceedings for violation of his rights. He relies on Trusted Society of Human Rights Alliance v Attorney General & 2 others [2012] eKLR and Rose Wanjiru Kamau v Judicial Service Commission & another [2022] KEELRC to argue that constitutional standing is broad and is not dependent on the existence of a current employment relationship.
  13. Finally, the Petitioner submits that the Preliminary Objection itself constitutes an abuse of the court process. He asserts that the objection is intended to defeat legitimate constitutional claims including the withholding of information and conduct of opaque appeal processes. He relies on Philemon Jos Origa v Kenya Revenue Authority (Petition No. E033 of 2025) to submit that preliminary objections that do not raise genuine pure points of law amount to an abuse of process. In conclusion he urges the court to dismiss the Preliminary Objection.
  14. The Petitioner also filed further submissions dated 26<sup>th</sup> March 2026 in response to the 1<sup>st</sup> and 3<sup>rd</sup> Respondents' submissions dated 25<sup>th</sup> March 2026. In respect of jurisdiction, he contends that the Respondents selectively relied on Article 162(2)(a) while ignoring Article 162(2)(b). He asserts that while the former covers disputes arising from employment, the latter covers disputes relating to rights and fundamental freedoms as sought herein. He avers that courts must interpret constitutional provisions holistically and purposively, relying on In the Matter of the Interim Independent Electoral Commission [2011] eKLR, Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR, and Attorney General v Kituo Cha Sheria & 7 others [2017] eKLR.
  15. As regards the authorities relied upon by the Respondents, namely The Clerk, Nakuru County Assembly & 2 others v Kenneth Odongo & 2 others [2022] (Consolidated Appeals) and Nick Githinji Ndichu v Clerk, Kiambu County Assembly & another [2014] KEELRC 760 (KLR), the Petitioner submits that they are distinguishable as they concern pre-employment or recruitment disputes where no employment relationship had crystallised, unlike the present case which arises from a long-standing employment relationship.
  16. He also maintains that the Respondents' assertion of a completed retirement is factually and legally untenable. He relies on uncontested affidavit evidence demonstrating that his pension and terminal benefits remain unprocessed and unpaid, and that he was invited and attended official pre-retirement training after the purported retirement date. He argues that the Respondents cannot approbate and reprobate by treating him as a serving officer for official purposes while simultaneously asserting that the employment relationship had been extinguished, relying on Kuldip Singh Bhatt v Bhatt Brothers



[1971] EA 73. He further submits that execution of retirement forms does not amount to a waiver of constitutional rights, citing Article 19(3)(b) of *the Constitution*.

17. Moreover, the Petitioner submits that the uncontroverted evidence, including JSC Circular No. 1/2026 promoting his peers without interviews, demonstrates the ongoing and systemic nature of the violations complained of. He asserts that these constitute continuing constitutional violations, thereby sustaining the Court's jurisdiction, as affirmed in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR.

### Disposition

18. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents have raised a preliminary objection which in essence is that the Petition herein is moot and ought to be dismissed in limine as the employee-employer relationship ceased. The preliminary objection was canvassed by way of written submissions. The submissions by the parties were found to be incomplete prompting the Court to direct proper submissions with citations and copies of authorities to be filed. On behalf of the objectors, a set of submissions was filed on Sunday 26<sup>th</sup> April 2026 while none were filed for the Petitioner.
19. The objection taken is one that goes to the jurisdiction of the Court. The position on jurisdiction was well elaborated in the case of the Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (*supra*), where the Court of Appeal held that jurisdiction is everything and that a court must drop its tools the moment it finds it lacks jurisdiction. The 1<sup>st</sup> and 3<sup>rd</sup> Respondent's assert the relationship of employer and employee ceased thereby depriving this Court of jurisdiction. Having this as the background, the Court notes the issues isolated for determination by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents are:
- a. Whether this Court has jurisdiction to entertain the Petition filed by a person who had ceased to be an employee of the Judiciary at the time of filing;
  - b. Whether the orders sought by the Petitioner are legally capable of enforcement; and
  - c. Whether the Petition constitutes an abuse of the court process.
20. The Court notes the second issue offends the doctrine in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (*supra*) which held that

.....a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.

Further in the same judgment Sir Charles Newbold P. stated:-

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct.

It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.

[Emphasis supplied]

21. The preliminary objection raised cannot be determined in respect of issue no. 2 without delving into facts.



22. On the first and third issue, the jurisdiction of the Court is challenged. In setting up the Employment and Labour Relations Court, the people of this great Republic had in mind a Court at the same level as the High Court to determine disputes between employers and employee. Article 162(2)(a) states as follows:
- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to--
- (a) employment and labour relations; and
- (b) the environment and the use and occupation of, and title to, land.
23. The Court established under Article 162(2)(a) deals with disputes between employers and employees. Those disputes relate to the employment relationship. Contrary to the assumption made by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents, the disputes that come to the Court are typically between employers and FORMER employees. Occasionally, the Court handles disputes between current employees and their employer. Also within the remit of the Court are disputes between employers' federations and trade unions, prospective employees and even special interest groups. The narrow perspective taken by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents is emblematic of the narrow jurisdiction the 2 seem to have of the Court. That is plainly wrong as a plain reading of *the Constitution* reveals. The jurisdiction of the court in terms of section 89 of the *Employment Act* is up to 3 years from the date of accrual of the cause of action. Moving the Court a few months after the employment relationship was severed is well within the time limits of the law relating to employment. The Court returns it has jurisdiction over employees, employers, former employees and former employers in addition to the classes that were referred to above. Almost all the cases before the Employment Court involve people whose employment relationship has been severed. The Petitioner is before the right court.
24. The final issue is the question as to whether the Petition is an abuse of the Court process. A merit determination must be made in order for the Court to determine whether the Petition is an abuse of the court process. This is because the Petition itself has challenged aspects of the 1<sup>st</sup> Respondent's exercise of its mandate which is a question that can only be determined after the ventilation of the Petition. As such, it cannot be determined in limine whether the Petition as presented is an abuse of the Court process.
25. The foregoing is ample to demonstrate the preliminary objection is for dismissal. As there was non-compliance by the Petitioner with the directions of the Court on filing of submissions, the objection is dismissed with no order as to costs. Directions on the disposal of the Petition will follow this Ruling.
- It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 27<sup>TH</sup> DAY OF APRIL 2026**

**NZIOKI wa MAKAU, MCI Arb.**

**JUDGE**

