



**Ochieng & 293 others v Siaya County Public Service Board & 2 others
(Petition E002 of 2026) [2026] KEELRC 1151 (KLR) (27 April 2026) (Ruling)**

Neutral citation: [2026] KEELRC 1151 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E002 OF 2026
NZIOKI WA MAKAU, J
APRIL 27, 2026**

**IN THE MATTER OF: ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 27,
28, 30, 35, 41, 47, 48, 50, 159, 176, 232 OF THE CONSTITUTION
OF KENYA**

AND

**IN THE MATTER OF: VIOLATION AND THREATENED VIOLATION
OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES
27, 28, 30, 35, 41, 47 & 50 OF THE CONSTITUTION**

AND

**IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT,
PUBLIC SERVICE COMMISSION ACT, EMPLOYMENT ACT, 2007
AND COUNTY GOVERNMENTS ACT**

AND

**IN THE MATTER OF: UNLAWFUL, ARBITRARY AND ULTRA VIRES
TERMINATION OF PERMANENT AND PENSIONABLE HEALTH
WORKERS BY THE COUNTY SECRETARY, SIAYA COUNTY**

BETWEEN

BRIAN OCHIENG & 293 OTHERS & 293 OTHERS PETITIONER

AND

SIAYA COUNTY PUBLIC SERVICE BOARD 1ST RESPONDENT

COUNTY GOVERNMENT OF SIAYA 2ND RESPONDENT

COUNTY SECRETARY, SIAYA COUNT 3RD RESPONDENT



RULING

1. The Petitioners have filed an application dated 9th January 2026 seeking the following orders:
 1. Spent
 2. Spent
 3. Spent
 4. Spent
 5. That pending hearing and determination of this Petition, this Honourable Court be pleased to issue an order directing the 1st, 2nd and 3rd Respondents to provide and furnish each individual Petitioner/Applicant herein with a termination letter indicating reasons for termination in accordance with the Law.
 6. That pending hearing and determination of this Petition, this Honourable be pleased to issue an Order suspending the ongoing recruitment by the 1st and 2nd Respondents in respect to positions in the department of health as advertised by the 1st and 2nd Respondents per the advertisement attached in this Application.
 7. That pending hearing and determination of this Petition, this Honourable Court be pleased to issue an order directing the 1st and 2nd Respondents to pay to the Petitioners/Applicants salaries and benefits owed as of September 2025.
 8. That pending hearing and determination of this Petition, this Honourable Court be pleased to compel the Respondents to reinstate the Applicants to the impugned positions as of September 2025.
 9. That this Honourable Court be pleased to exempt the Petitioners/Applicants from the obligation to exhaust the dispute resolution remedy of the County Public Service Commission as provided for under section 13 of the Public Service Commission (County Appeals Proceedings) Regulations, 2022, section 77 of the County Government Act and sections 85 & 87(2) of the [Public Service Commission Act](#).
 10. That costs of this Application be in the cause.
2. The application is premised on the grounds set out on its face and is supported by the affidavit of Mr. Brian Ochieng. He depones that the Petitioners were duly employed by the Respondents within the health sector under the 2nd Respondent on permanent and pensionable terms following issuance of letters of offer and appointment in August 2023. They were subsequently deployed to various health facilities in December 2024 and reported to duty as required. According to the deponent, the terms of engagement included defined job descriptions, remuneration in line with SRC guidelines, and a probationary period of six months, all of which the Petitioners complied with, including submission of requisite personal and statutory documentation. It is further deponed that despite being in active service, the Petitioners experienced persistent delays in payment of their salaries, even after participating in an employee competency audit and a meeting convened on 1st July 2025 to address employment and remuneration concerns. The deponent states that the Petitioners' demands for payment culminated in a letter dated 14th August 2025 by the Kenya Union of Clinical Officers protesting their mistreatment through non payment of salary. Thereafter, on 11th September 2025, the



Petitioners were declared “ghost workers” and summarily dismissed by the 3rd Respondent during a public baraza. The deponent avers that no formal termination letters were issued and that subsequent requests for reasons for termination were met with silence, in violation of the Petitioners’ constitutional rights. He further contends that the 3rd Respondent lacked the legal authority to terminate their employment, such mandate being vested exclusively in the County Public Service Board. In the absence of a lawful decision by the Board, the deponent asserts that there exists no appealable decision capable of invocation before the Public Service Commission. Moreover, he maintains that their employment contracts remain valid having served beyond the probationary period, and that they are therefore entitled to salary arrears amounting to Kshs. 149,974,984/-. They aver that continued non-payment constitutes discrimination and a violation of Article 27 of the Constitution. The deponent also avers that the Petitioners’ employment had effectively been confirmed, having served beyond the probationary period, and that they continue to be employees in the absence of lawful termination.

3. The Petitioners also contend that the Respondents have since initiated a recruitment process to fill the positions previously held by them, while expressly excluding them, thereby prejudicing their rights and rendering the Petition nugatory unless interim relief is granted.
4. On the doctrine of exhaustion, the deponent avers that this matter falls within the recognized exceptions warranting direct recourse to this Court. These include the absence of a formal and appealable decision, the lack of jurisdiction of the Public Service Commission over constitutional violations, the ultra vires actions of the 3rd Respondent, the inability of the Commission to grant the reliefs sought, and the existence of ongoing constitutional violations requiring immediate judicial intervention. It is therefore deponed that unless the orders sought are granted, the Petitioners stand to suffer irreparable prejudice.
5. The application is opposed. The Respondents filed a replying affidavit sworn on 2nd February 2026 by Joseph Onyango Ogutu, the County Secretary of Siaya County. He depones that the application is incompetent, misconceived, and an abuse of the court process. It is his position that prayers 5, 7, 8 and 9 are res judicata, having been conclusively determined in *Ochieng & 348 others v Siaya County Public Service Board & 5 others (Miscellaneous Application E068 of 2025) [2025] KEELRC 3604 (KLR) (15 December 2025) (Ruling)*. Further, the Respondents contend that this Court lacks original jurisdiction by virtue of the doctrine of exhaustion. They assert that the Petitioners have already invoked the appellate jurisdiction of the Public Service Commission and that the matter is still pending determination before that body. Entertaining the present application, it is argued, would amount to usurping the statutory mandate of the Commission. With regard to the prayer seeking suspension of the ongoing recruitment process, the Respondents maintain that no sufficient basis has been laid to warrant the grant of such orders. They contend that there is no nexus between the recruitment exercise and the issues raised in the Petition and, in any event, that the issue is similarly barred by res judicata. On the whole, the Respondents assert that the Petitioners have failed to meet the threshold for the grant of conservatory orders and urge the Court to dismiss the application with costs.
6. The application was canvassed by way of written submissions

Petitioners’/Applicants’ Submissions

7. The Petitioners identify three issues for determination, namely: whether this Court has jurisdiction and whether the doctrine of exhaustion applies; whether the application is res judicata; and whether they have met the threshold for grant of the orders sought. On jurisdiction and the doctrine of exhaustion, the Petitioners submit that this Court is properly seized of the matter by virtue of Articles 22, 23 and 162(2)(a) of the Constitution and Section 12 of the Employment and Labour Relations Court Act, the Petition being anchored on violations of constitutional rights including Articles 27, 41 and



47. They submit that the Court has original jurisdiction to grant constitutional remedies, including compensation under Article 23(3). They further submit that the doctrine of exhaustion is not absolute and that courts retain residual jurisdiction to intervene in exceptional circumstances. Reliance is placed on the cases of Chief Justice & President of the Supreme Court & another v Bryan Mandila Khaemba [2021] eKLR, Republic v IEBC ex parte NASA [2017] eKLR, Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR, and Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) [2023] KESC 113 (KLR) for the proposition that where constitutional violations are alleged, or where the alternative forum lacks jurisdiction, parties may approach the Court directly. The Petitioners further rely on Fleur Investments Limited v Commissioner of Domestic Taxes & another [2018] eKLR, to submit that courts may intervene where there is arbitrariness, bad faith, or abuse of power, and on Republic v Institute of Certified Public Accountants of Kenya ex parte Joy Vipinchandra Bhatt T/A JV Bhatt & Company [2008] eKLR, to argue that unexplained administrative action is irrational and unlawful.
8. They contend that the Respondents' impugned actions including failure to issue termination letters and continued withholding of salaries, constitute a continuing violation of constitutional rights, thus bringing the matter within the exceptions to the exhaustion doctrine. In this regard, they rely on the case of Mutiso v Commissioner of Domestic Taxes [2023] KEHC 22421 (KLR), which held:
- “That the doctrine of exhaustion cannot apply where the impugned conduct constitutes an ongoing violation of constitutional rights and where the statutory forum is incapable of granting the constitutional remedies sought. The Court observed that in such circumstances a party is entitled to approach the Court directly for relief, particularly where the violation complained of is continuous and requires immediate constitutional intervention.”
9. They also cite the case of E.T. v Attorney General & Another [2012] eKLR, which stated:
- “A continuing violation is one which is not occasioned by a single act, but by a series of acts or by an omission which persists over time. In such cases, time does not begin to run until the violation ceases.”
10. They further submit that the 3rd Respondent acted ultra vires in purporting to terminate the Petitioners' employment, as such powers are vested exclusively in the County Public Service Board under section 59 of the [County Governments Act](#). Reliance is placed on the case of Joseph Kareko Gikonyo v County Government of Lamu & 2 others [2022] KEELRC 166 (KLR). The Petitioners assert that the impugned decision is null and void and incapable of appeal, and therefore not amenable to the statutory dispute resolution mechanism. In this regard, they cite the case of Secretary, County Public Service Board v Hulbhai Gedi Abdille [2017] eKLR and Republic v Kenyatta University ex parte Ochieng Orwa Dominick & 7 others, [2018] eKLR.
11. On the issue of res judicata, the Petitioners submit that the present application is not barred by the doctrine, notwithstanding the earlier decision in the case of Ochieng & 348 others v Siaya County Public Service Board & 5 others (Miscellaneous Application E068 of 2025) [2025] KEELRC 3604 (KLR) (15 December 2025) (Ruling). They assert that the said application was dismissed on a preliminary objection for want of jurisdiction and not on the merits, and therefore does not satisfy the threshold for res judicata. They rely on the case of John Florence Maritime Services Ltd v Cabinet Secretary Transport & 3 others [2015] eKLR and Bernard Mugo Ndegwa v James Nderitu Githae & 2 others [2010] eKLR, for the elements of res judicata, emphasizing that a prior decision must be final and on the merits. Further reliance is placed on the cases of Michael Bett Sibor v Jackson Koech [2019] eKLR, Caneland Ltd v Delphis Bank Ltd [2000] eKLR, and Dhamini Limited v Tanad



- Transporters Limited [2022] KEELC 522 (KLR), to submit that dismissals on technical grounds do not constitute determinations on merit. They further submit that the previous proceedings were materially different, as they were brought by way of a miscellaneous application, whereas the present matter is a constitutional petition raising substantive constitutional violations. They rely on the Supreme Court decision in *Dina Management Limited v County Government of Mombasa & 5 others* [2022] KESC 24 (KLR) to argue that all elements of *res judicata* must be satisfied conjunctively.
12. On whether the Applicants have met the threshold for grant of the orders sought, the Petitioners submit that they have satisfied the principles in *Giella v Cassman Brown & Co. Ltd* [1973] EA 358, namely the existence of a *prima facie* case, likelihood of irreparable harm, and balance of convenience. On the existence of a *prima facie* case, they rely on *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR, and submit that they were lawfully employed, reported to work, and discharged their duties, but were not paid salaries for over eight months. They further submit that their purported termination was unlawful, having been effected by the 3rd Respondent without jurisdiction and without compliance with section 41 of the *Employment Act*, thereby violating Articles 41 and 47 of the *Constitution*. They also contend that failure to pay salaries amounts to servitude and forced labour, contrary to Article 30 of the *Constitution*, relying on *Ndwiga v Principal Secretary, Ministry of Health & another* [2024] eKLR and *Jonathan Spangler v Centre for African Family Studies* [2017] eKLR. They equally reference *Judicial Service Commission v Gladys Boss Shollei & another* [2014] eKLR, on the requirement of due process in termination.
 13. On irreparable harm, the Petitioners submit that unless the orders are granted, they risk being permanently replaced through the ongoing recruitment process, thereby rendering the Petition nugatory. They also point to the financial hardship occasioned by non-payment of salaries. Reliance is placed on *Centre for Rights Education and Awareness (CREAW) v Attorney General* [2015] eKLR to underscore that conservatory orders are intended to preserve the substratum of a dispute and prevent the violation of constitutional rights pending determination of a case.
 14. On the balance of convenience, the Petitioners submit that it tilts in their favour, as granting the orders would preserve the status quo, whereas declining them would defeat the Petition. They further submit that public interest favours the grant of orders, given the adverse impact of removing over 294 healthcare workers on healthcare delivery in Siaya County. Reliance is placed on the Supreme Court decision in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR, which emphasized that conservatory orders are granted to preserve the subject matter of litigation and protect public interest pending the final determination of a dispute. In conclusion, they urge the Court to allow the application with costs.

Respondents' Submissions

15. The Respondents filed submissions dated 13th April 2026, which, however, are incomplete and address only the issue of exhaustion. On that issue, the Respondents reiterate that section 77 of the *County Governments Act* and section 85 of the *Public Service Commission Act* require the Petitioners to exhaust the statutory dispute resolution mechanisms before approaching this Court. They submit that the Public Service Commission is the proper forum for determination of the dispute in the first instance and that this Court ought to decline jurisdiction in line with the doctrine of exhaustion. They rely on *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* [2015] eKLR, where it was held:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts can be invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brew..... 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 interests within the mechanisms in place for resolution outside the courts.....This accords with Article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution."

Disposition

16. The determination herein relates to 2 issues in the matter being the doctrine of exhaustion and the principles for grant of injunctive relief. The doctrine of exhaustion has been expounded on as it arises from the provisions of Article 159(2). The Petition herein is in relation to the services of employees in the County Government of Siaya. The doctrine of exhaustion would require that an appeal be filed before the Public Service Board and thereafter a reference to the Public Service Commission. The Petitioners were before the Court in the case reported as *Ochieng & 348 others v Siaya County Public Service Board & 5 others* (Miscellaneous Application E068 of 2025) [2025] KEELRC 3604 (KLR) (15 December 2025) (Ruling) where they had attempted to obtain injunctive relief in a miscellaneous application. This effort was unsuccessful. The Petitioners did indicate that they are before the Public Service Commission and as a result have a pending dispute before a body that is competent to handle the same. It would seem the precise reason the Petition was lodged was to obtain injunctive relief. The doctrine of exhaustion is again offended as the Petitioners having lodged a dispute before the Public Service Commission, have chosen not to wait for determination by that competent authority before moving Court.
17. In the determination as to whether there is basis for grant of injunctive relief, the principles enunciated in *Giella v Cassman Brown & Co. Ltd* (supra), namely there must be an existence of a prima facie case, there should be a possibility or likelihood of irreparable harm should the order not issue, and where in doubt, the court will determine the matter on the balance of convenience. The case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (supra) was cited on the prima facie case aspect. All elements of prima facie must be satisfied conjunctively, meaning that all the requirements in the principle must be met for the doctrine to apply.
18. The Petitioners herein have demonstrated that there is a prima facie case, that is not in doubt. Having satisfied the first element, the second aspect before considering the issue of balance of convenience when in doubt, is the issue of irreparable harm. Irreparable harm is injury that cannot be compensated in damages. The main prayers in the Petition other than halting the recruitment relate to unpaid salaries and dues. These are monetary claims capable of being satisfied by way of an award of monetary relief and therefore damages would be sufficient once the Petition is disposed in favour of the Petitioners. This is disjunctive in terms of the requirements for the doctrine to apply to the Petitioners.
19. Consequently, from the foregoing, the Court returns that the second limb of *Giella v Cassman Brown* is not met and this therefore disentitles the Petitioners from receiving the determination in their favour in the application before me. In the premises I decline the motion and dismiss it albeit with no order as to costs.
20. There will be directions as to the disposal of the Petition after this Ruling.
It is so ordered.

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

NZIOKI WA MAKAU, MCIARB.

JUDGE

