



**Nderitu v Teachers Service Commission & another (Petition  
E023 of 2024) [2025] KEELRC 591 (KLR) (26 February 2025) (Ruling)**

Neutral citation: [2025] KEELRC 591 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
PETITION E023 OF 2024  
AN MWAURE, J  
FEBRUARY 26, 2025**

**BETWEEN**

**PETER NDEGWA NDERITU ..... PETITIONER**

**AND**

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

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

**RULING**

1. The Petitioner filed a Petition dated 22<sup>nd</sup> April, 2024 seeking the following orders:
  - a. A declaration that sections 146, 149 and 156 of the Teachers Service Commission Code of Regulations for Teachers, 2015 are unconstitutional to the extent that they do not provide timelines of hearing and determining cases brought under the said sections, thus offending the provisions of Article 47, 50(2)(e) of *the Constitution*;
  - b. A declaration that the Petitioner's rights were violated under Articles 47(1) and 50(2)(e) of *the Constitution*;
  - c. A declaration that the Petitioner is entitled to payment of damages and compensation for breach and violation of his constitutional rights and freedoms as stated in the Petition;
  - d. An award of general damages, exemplary damages and aggravated damages under Article 23(3) of *the Constitution* and/or in the alternative;
  - e. A declaration that the Teacher's Service Commission review committee proceedings and decision dated 29<sup>th</sup> January 2018 were unconstitutional and for the same to be set aside and for the Petitioner to be reinstated and be paid all his dues from the date of interdiction; and
  - f. Any other or further reliefs that this Court may deem fit and just to grant.



### **1<sup>st</sup> Respondent's Preliminary Objection and Grounds of Opposition**

2. In opposition to the Petition, the Respondent filed a preliminary objection and grounds of opposition, both dated 15<sup>th</sup> May 2024.
3. In the preliminary objection, the 1<sup>st</sup> Respondent avers that the suit is res-judicata. The grounds of opposition further elaborate as follows:
  - a. The Claim herein is res-judicata, and that the facts and issues raised in the claim are similar to the facts and issues in Nakuru ELRC Petition No. 11 of 2018 Peter Ndegwa Nderitu V Teachers Service Commission.
  - b. The parties in this instant claim are also similar to the ones in Nakuru ELRC Petition No. 11 of 2018 and were litigating under the same title as in the present Petition.
  - c. That this Honourable Court has already heard and determined the claim herein in Nakuru ELRC Petition No. 11 of 2018.
  - d. That being dissatisfied with the determination of this Honourable Court in the Nakuru ELRC Petition No. 11 of 2018, the Petitioner herein filed in the Court of Appeal at Nakuru Civil Appeal No. 41 of 2019, which appeal was heard and determined on its merits and dismissed with costs.
  - e. The suit herein is thus a waste of the court's time and an abuse of the due process of law as the Claimant is trying to re-litigate.
  - f. Consequently, this court does not have jurisdiction to entertain the suit.
4. The 2<sup>nd</sup> Respondent entered appearance on 12<sup>th</sup> June 2024 but did not file any response to the preliminary objection.
5. The preliminary objection was canvassed by way of written submissions.

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

6. The 1<sup>st</sup> Respondent contended that the Petition is res-judicata as the prayers in the said Petition are similar in Nakuru ELRC Petition No. 11 of 2018. The Respondent relied on section 7 of the [Civil Procedure Act](#), which provides as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
7. The 1<sup>st</sup> Respondent relied on the case of John Florence Maritime Services Limited & another V Cabinet Secretary for Transport and Infrastructure & 3 others [2021] eKLR the Supreme Court held that the doctrine of res-judicata also applies to constitutional petitions.



8. In Independent Electoral & Boundaries Commission V Maina Kiai & 5 others [2017] eKLR, the court held that:

“Thus, for the bar of res judicate to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit;
- b. That former suit was between the same parties or parties under whom they or any of them claim;
- c. Those parties were litigating under the same title;
- d. The issue was heard and finally determined in the former suit;
- e. The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

9. The 1<sup>st</sup> Respondent submitted that the Petitioner had previously filed in Nakuru ELRC Petition No. 11 of 2018, which was delivered vide a ruling on 29<sup>th</sup> April 2019 by Honourable Lady Justice Monica Mbaru, stating the matter is statutorily barred.

10. The 1<sup>st</sup> Respondent submitted that the issue for determination in both Petitions is the same, where the Petitioner’s dismissal from the teaching service was unlawful, and thereafter, such a finding, he prayed to be compensated and reinstated to service.

11. The 1<sup>st</sup> Respondent argued that the parties in the previous case in Nakuru ELRC Petition No. 11 of 2018, are the same, and the Petitioner included the 2<sup>nd</sup> Respondent in this instant Petition. The 1<sup>st</sup> Respondent also argued that the issues raised in the instant Petition were raised, canvassed, considered, heard, and determined in Nakuru ELRC Petition No. 11 of 2018 being dismissed.

12. The 1<sup>st</sup> Respondent submitted that the Petitioner appealed to the Court of Appeal and the Appeal Court dismissed his appeal. In Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others (supra). The Court of Appeal held that the doctrine of res judicata aims to bring finality to litigation by providing parties closure and preventing them from being repeatedly troubled by issues already determined by a competent court. It protects against the wastage of time and resources in endless litigation initiated by persistent pleaders seeking favourable outcomes through multiple suits. Without this doctrine, litigation would be unending, and the judicial process would become a nuisance and lose its credibility.

13. In John Florence Maritime Services Limited & another V Cabinet Secretary for Transport and Infrastructure & 3 others (supra), the court held that res judicata is a legal doctrine that prevents subsequent proceedings on the same issue once it has been conclusively decided by a competent court in a prior suit between the same parties or their representatives. It is based on public interest to end litigation and protect parties from repetitive litigation over the same matter. The doctrine ensures efficient use of court resources, timely case resolution, stability in judgments, and reduces inconsistencies. It also promotes confidence in the judicial system and predictability, which is essential for justice and the rule of law. Without res judicata, the rule of law would be at risk of unravelling.

14. The 1<sup>st</sup> Respondent submitted that the issues raised in the instant Petition and the prayers therein were in issues or ought to have been in issue in Nakuru ELRC Petition No. 11 of 2018.



15. In *Muchanga Investments Ltd V Safaris Unlimited (Africa) Ltd & 2 Others* [2009] eKLR cited the Nigerian case of *Karibu- Whytie J Sc in Sarak V Kotoye*(1992) 9 NWLR 9PT 264 at 188-189 which defined the concept of abuse of judicial process as the issue of instituting multiple legal actions on the same subject matter against the same opponent, even if there is a right to do so. Initiating different actions between the same parties simultaneously in different courts on different grounds and using similar processes for exercising the same right, such as a cross-appeal and a Respondent's notice. This approach can lead to redundant and inefficient use of judicial resources.
16. The 1<sup>st</sup> Respondent submitted that issues raised in Nakuru ELRC Petition No. 11 of 2018 and Nakuru Civil Appeal No. 41 of 2019 were already heard and determined therefore, the instant Petition is an abuse of the court process and time.
17. In conclusion, the 1<sup>st</sup> Respondent submitted that the Petition dated 22<sup>nd</sup> April 2024 is res judicata, an abuse of the court process, and should be dismissed with costs.

### **Petitioner's submissions**

18. The Petitioner submitted that the issues raised in this instant Petition are similar, but to the other one the issues for consideration are different. Also, the Petitioner moved to the court as his constitutional rights were infringed as set out under Article 258 of *the Constitution* due to lack of timelines despite the issue arising out of employment. The Petitioner also submitted that the issues raised in Nakuru ELRC Petition No. 11 of 2018 were on judicial review, and the court did not have jurisdiction to handle the same. The Petitioner relied on Article 23(3) of *the Constitution*, which outlines the remedies a judicial review court can grant, such as declarations of rights and injunction orders, among others, in addition to judicial review orders.
19. The Petitioner relied on the Supreme Court case of *John Florence Maritime Services Limited & another V Cabinet Secretary for Transport and Infrastructure & 3 others* (supra), it was held that the issues in the present suit and JR 130 of 2011 seem similar, but the appellants argued that their petition was based on grounds that the bilateral agreement should have been approved by Parliament, and the respondents' actions contravened *the Constitution*. They also claimed the FERI and COD certificates threatened their property rights. The court in a judicial review application did not have jurisdiction over these issues, so res judicata was wrongly invoked. Judicial review focuses on the decision-making process, not the merits of the decision, and cannot substitute its own decision. In contrast, a constitutional petition allows the court to examine and substitute decisions, granting broader reliefs. Therefore, a judicial review application is not a final determination of issues under a constitutional petition, as the considerations and outcomes are different. When hearing a constitutional petition, the court may reach the same conclusion as in a judicial review application. However, the initial considerations, procedures, and reliefs the court can grant differ, meaning the court plays distinctly different roles in each type of case.
20. The Petitioner submitted that the issues raised regarding the timelines in the 1<sup>st</sup> Respondent's Code of Regulations are expected to bring clarity and order to how disputes involving teachers are managed. In *John Florence Maritime Services Limited & another and Cabinet Secretary Transport & Infrastructure & 3 others* (supra), the court proposed parameters for granting an exemption to the doctrine of res judicata. The first condition is the potential for substantial injustice if a constitutional matter or issue is not heard on its merits. Before reaching this conclusion, the court must consider the entire context and weigh the factors for and against using such discretionary power.
21. The Petitioner submitted that the prayers are not the same as the issues in the previous petition and are based on reviewing the decision of the 1<sup>st</sup> Respondent review committee. The Petitioner also submitted



that the ingredients of res-judicata have not been met and thus urges this Honourable Court to dismiss the preliminary objection with costs.

### **Analysis and determination**

22. The court has considered the preliminary objection, grounds of opposition, as well as the submissions by both parties. The issue for determination is whether the preliminary objection is merited.

23. In *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 at 700:

“So far as I am aware, 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. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving raise to the suit or to refer the dispute to arbitration.”

24. The Black’s Law Dictionary 9<sup>th</sup> Edition defines res judicata as follows:

“An issue that has been definitively settled by judicial decision... the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”

25. The substantive law on res judicata has been set in Section 7 of the *Civil Procedure Act*, which states as follows: -

“No court shall hear any case where the main issue has already been directly addressed in a previous case between the same parties, or those claiming through them, in a court that could decide it.”

The cases of *John Florence Maritime Services Limited & Another V Cabinet Secretary for Transport and Infrastructure & 3 others* (supra) and *Independent Electoral & Boundaries Commission V Maina Kiai & 5 Others* (supra) have set out the ingredients of the res judicata doctrine as set in the earlier part of this ruling.

26. In *Kenya Commercial Bank Limited & Another V Muiji Coffee Estate Limited & 3 Others* [2016] KESC 6 (KLR), the Supreme Court stated as follows:

“The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.”

27. In this instant Petition, the Petitioner had previously filed a Petition in Nakuru Petition No. 11 of 2018 seeking the following prayers: -

- a. A declaration that the Respondent did not comply with the law and regulations that regulated the matter in disciplinary case No. 1203/06/2011/2012 and for the decisions, therefore, to be declared null and void for violating the Petitioner’s constitutional rights to a fair and speedy trial



- b. Judicial review orders quashing all the proceedings in respect of disciplinary case No. TSC/DISC/1203/06/2011/2012 and all consequential decisions and measures made arising therefore.
  - c. An order directed to the respondent to reinstate the petitioner to his former teaching position and payment of his salary and other allowances and benefits that he is entitled to from 11/6/12
  - d. Costs of the Petition
  - e. Any other reliefs deemed fit and just to grant by the Honourable Court.
28. A ruling was delivered in Nakuru Petition No. 11 of 2018, where Mbaru J stated the claim pertains to an employer-employee relationship, and the remedies sought can only be provided under the [Employment Act](#), 2007, and the Employment Relations Court Act, 2011. Filing a petition instead of a Memorandum of Claim does not address the issue of the time bar, leading to the dismissal of the petition.
29. The Petitioner was dissatisfied with the judgment and appealed vide Nakuru Civil Appeal No. 41 of 2019, where the Court of Appeal upheld the decision in Nakuru Petition No. 11 of 2018 and dismissed the appeal. The court has perused and compared the Petition in Nakuru ELRC Petition No. 11 of 2018, and this instant Petition and hold the two raise the same issues, both have the same parties, and finally, the matter was heard and concluded, fulfilling the requirement of *res judicata*.
30. The prayers in this Petitioner on the other hand are –
- a. A declaration that sections 146, 149 and 156 of the Teachers Service Commission Code of Regulations for Teachers, 2015 are unconstitutional to the extent that they do not provide timelines of hearing and determining cases brought under the said sections, thus offending the provisions of Article 47, 50(2)(e) of [the Constitution](#);
  - b. A declaration that the Petitioner’s rights were violated under Articles 47(1) and 50(2)(e) of [the Constitution](#);
  - c. A declaration that the Petitioner is entitled to payment of damages and compensation for breach and violation of his constitutional rights and freedoms as stated in the Petition;
  - d. An award of general damages, exemplary damages and aggravated damages under Article 23(3) of [the Constitution](#) and/or in the alternative;
  - e. declaration that the Teacher’s Service Commission review committee proceedings and decision dated 29<sup>th</sup> January 2018 were unconstitutional and for the same to be set aside and for the Petitioner to be reinstated and be paid all his dues from the date of interdiction; and
  - f. Any other or further reliefs that this Court may deem fit and just to grant.
31. The prayers in Petition 11/2018 sought in my summarised version are that a declaration be issued that the respondent failed to comply with law and regulations in handling disciplinary case No. 1203/06/2011/2012 and prayed to be reinstated to his former position of a teacher.

The ruling was delivered by Justice M. Mbaru to the effect that the case related to ordinary employer/employee relationships and the remedies sought could only issue pursuant to [Employment Act](#) and [Employment and Labour Relations Court Act](#) and since the time had elapsed to file a claim the matter could not be cured. The petitioner was dismissed from employment on 18<sup>th</sup> October 2012 and filed that first petition on 21<sup>st</sup> September 2018.



32. The petitioner filed an appeal against the Employment and Labour Relations Court ruling dated 29<sup>th</sup> April 2019 and the Court of Appeal dismissed his appeal.
33. On 22<sup>nd</sup> April 2024 the Petitioner filed this petition seeking a declaration in Sections 146, 149 and 156 of Teachers Service Commission Code of Regulations are unconstitutional as they do not provide timelines of hearing and determining cases brought under the said sections thus offending provisions of Articles 47 and 50(2)(e) of *the Constitution*. The two articles deal with fair administration of actions and fair trial.
34. He also asks the court to find that his rights were violated and he should be paid damages and compensation for violation of his constitutional right and also to be reinstated to his position and paid dues from the date of interdiction.
35. The petition basically arises from the initial cause of action that arose in 2012 October and was declared time barred both by the High Court and the Court of Appeal.
36. The court finds there is no doubt this application is a replica more or less of Petition 11 of 2018. The court is persuaded by the case of Independent Electoral & Boundaries Commission -Vs- Maina Kiai & 5 Others which to retaliate what has already been recited hereinbefore stated as hereinbefore - “the doctrine of res judicata aims to bring finality to litigation by providing parties closure and preventing them from being repeatedly troubled by issues already determined by a competent court. It protects against the wastage of time and resources in endless litigation initiated by persistent pleaders seeking favourable outcomes through multiple suits. Without this doctrine, litigation would be unending, and the judicial process would become a nuisance and lose its credibility.”
37. As it were litigation has to come to an end and this is such one case that the court has to bring any further litigation to a halt.
38. The Petitioner in his submissions argues that the issues raised in the Petition 11 of 2018 are dissimilar to the ones raised in this petition.
- He argues that there is an exemption to the doctrine of Res-judicata where there is potential for substantial injustice if constitutional matter or issue is not heard on merit.
39. As already declared in the ruling by Justice Mbaru this was not a constitutional matter but was purely an issue of an employer and an employee.
- That argument therefore does not hold and it is really an abuse of the court process to file a similar case in a High Court which was dismissed by an Appellate court.
40. In conclusion in the case of The Governor County Government of Kakamega & Others -Vs- Mrs. Catherine Raini Omweno and Others Civil Appeal No. E 176 Of 2024

The Court of Appeal recently held:-

“the upshot is that the Employment and Labour Relations Court is a specialised court established under article 162(2) of *the Constitution* as a superior court with equal status as the High Court. Its mandate is to hear and determine disputes relating to employment and labour relations. What amounts to employment matters is detailed on Section 12(1) of Employment and *Labour Relations Act*.....”



41. The court went further to state-

“These questions related to *the Constitution* constraints and imprimatur in the procedures and standards for removal of Chairpersons and Members of County Public Service Boards, these are matters that do not fall within the meaning of a dispute relating to Employment and Labour Relations.....”

42. In other words, even if the suit herein was not time barred and the Petitioner wanted the court to determine constitutional matters the court may have found it had no jurisdiction per se.

But anyhow there is enough said that this Petition is time barred being an employer/employee dispute and the preliminary objection dated 15<sup>th</sup> May, 2024 is merited and so is allowed having established the petition is res judicata.

43. The court orders respective parties meet their costs herein.

Order accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 26<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

Order

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

A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

