



**Nyaga & 46 others v Embu County Government & 2 others; Kenya County Government Workers Union (Interested Party) (Constitutional Petition E017 of 2023) [2025] KEELRC 788 (KLR) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 788 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI**  
**CONSTITUTIONAL PETITION E017 OF 2023**

**ON MAKAU, J**

**MARCH 13, 2025**

**IN THE MATTER OF: THE ENFORCEMENT OF BILL OF RIGHTS  
 UNDER ARTICLE 22(1) AND 258 (1) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF: ARTICLE 41 OF THE CONSTITUTION OF KENYA, 2010 AND IN THE  
 MATTER OF: CONTRAVENTION OF ARTICLES 10, 27 & 47 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF: THE INTERNATIONAL  
 CONVENTION ON CIVIL AND POLITICAL RIGHTS**

**AND**

**IN THE MATTER OF: THE INTERNATIONAL LABOUR ORGANISATION CONVENTION**

**AND**

**IN THE MATTER OF: THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS**

**AND**

**IN THE MATTER OF: THE COUNTY GOVERNMENT ACT AND  
 IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT**

**BETWEEN**

**DOMINIC MURITHI NYAGA & 46 OTHERS & 46 OTHERS & 46 OTHERS &  
 46 OTHERS ..... PETITIONER**

**AND**

**EMBU COUNTY GOVERNMENT ..... 1<sup>ST</sup> RESPONDENT**

**EMBU COUNTY PUBLIC SERVICE BOARD ..... 2<sup>ND</sup> RESPONDENT**



AND

KENYA COUNTY GOVERNMENT WORKERS UNION . INTERESTED PARTY

### JUDGMENT

1. By a petition dated 17<sup>th</sup> November 2023, the petitioners sought the following reliefs: -
  - a. That this court be pleased to issue an order restraining the respondent from removing the petitioners from the pay roll pending hearing and determination of this application.
  - b. That this court be pleased to issue an order restraining the respondent from removing the petitioners from the pay roll pending hearing and determination of this petition.
  - c. An order be made against the 2<sup>nd</sup> respondent to issue the petitioners with clear and concise terms of contract stating the real position of their terms of employment whether the same are fixed term basis of two year or the same are permanent and pensionable.
  - d. A declaration that the contract of service of the petitioners be and is hereby converted to permanent and pensionable terms.
  - e. Any other order that the court deems fit.
  - f. Costs be borne by the respondents.
2. The petition was supported by an Affidavit sworn on 17<sup>th</sup> November 2023 by the 1<sup>st</sup> Petitioner on behalf of the 47 petitioners. They also filed a Notice of Motion simultaneously with the petition seeking conservatory orders to restrain the respondents from removing the petitioners from the pay roll pending the hearing and determination of the motion and the Petition. On 26<sup>th</sup> November 2023, Manani Judge granted interim orders restraining the respondents from removing the petitioners from the pay roll as prayed in the motion.
3. The respondent opposed both the motion and the petition vide the Replying Affidavit sworn on 7<sup>th</sup> February 2024 by one Amy Ruria, the County Secretary and Head of Public Service, Embu County. The Interested Party did not file any pleadings but it supported the petition by filing written submissions.

#### Factual background

4. The petitioners were employed by the Embu County Government from 2013 to 31<sup>st</sup> October 2023. They were employed as Enforcement Officers, Job Group “D” under fixed term contracts ranging from two (2) years to ten (10) days, and then last contracts were to end on 30<sup>th</sup> October 2023.
5. In August 2023, the 2<sup>nd</sup> Respondent advertised vacancies in various positions including 183 vacancies in the post of Security Warden III (Enforcement Officer). A total of 2441 candidates including the petitioners applied for the post of Security Warden III out of which 530 were shortlisted for interviews. The interviews were conducted from 9<sup>th</sup> to 16<sup>th</sup> October 2023 and on 24<sup>th</sup> October 2023. The 2<sup>nd</sup> respondent then appointed 183 successful candidates to the position of Security Warden (Enforcement Officer) Job Group ‘D’ on a three (3) months contracts with effect from 1<sup>st</sup> November 2023.



6. The petitioners were aggrieved by the outcome and on 21<sup>st</sup> November 2023, they filed the instant petition under certificate of urgency, alleging that the respondents had violated Article 2, 10, 19, 20, 22, 27, 47, 50,73 and 174 of *the Constitution* and Section 41, 43 and 45 of the *Employment Act*.
7. They further alleged that they had legitimate expectation that their contractual appointment would be converted to permanent and pensionable terms as it had happened to some of their colleagues. Besides, their supervisor had in 2016 written a recommendation that their services be converted to permanent and pensionable.
8. They contended that their rights to fair labour practices and fair administrative action were violated by the manner in which they were employed under termly contracts for a long period before being sent away without substantive and procedural fairness. They further averred that they were discriminated and treated in an inhuman manner. Therefore, they prayed for conversion of their contracts to permanent and pensionable terms.
9. The respondents' case is that the petition is an afterthought coming after they went through the recruitment process. They averred that the process of recruiting new Enforcement officers was in accordance with the law because it was open and competitive. It was also their case that the petitioners did not demonstrate how their rights were violated by the said process.
10. It was further respondents' case that the petitioner's contracts lapsed on 31<sup>st</sup> October 2023 by effluxion of time and left the vacancies that were filled by newly recruited Enforcement officers on 1<sup>st</sup> November 2023. They maintained that as at the time when the petitioners filed the suit their contracts had already lapsed and therefore the orders sought were not tenable.
11. It was also the respondents' case that there is an alternative appeal mechanism for ventilating the dispute herein provided under section 77 of the County Government Act and Article 234 of *the Constitution*. They averred that the petition is premature as it offends the exhaustion doctrine. Consequently, they prayed for the petition to be dismissed with costs.

### **Submissions**

12. It was submitted for the petitioners' that since their employment by the 2<sup>nd</sup> respondent in 2013, their contracts were renewed as matter of routine and they were also trained in their roles. As a result, they had a legitimate expectation that their employment contracts would continue to be renewed.
13. For emphasis, reliance was placed on *Keen Kleeners Ltd v Kenya Plantation & Agricultural Workers Union* [2021] KECA 352 (KLR), *Teresa Carlco Omondi v Transparency International Kenya* [2017] eKLR, *Oshwal Academy Nairobi & another v Indu Vishwanth* [2015] eKLR and *Mark Mbau Muthee v Rai Radio Telesiorie Italiana*.
14. It was further submitted that respondents violated the petitioners' constitutional rights under Article 27, 41 and 47 of *the Constitution*. As regards Article 27, it was submitted that the violation was through the failure to renew the petitioners' contracts, abuse of power by failing to delegate duties to the petitioners, discriminating against the petitioners, and acting in manner that prejudiced the petitioners. For emphasis, reliance was placed on *Mohamed Abduba Dida v Debate Media ltd & Another*.
15. As regards Article 41, it was submitted that the violation was through the failure to renew the contracts, and continuing to keep the petitioners at work without delegating duties to them yet there was work to do and they were qualified to perform the same.
16. In view of the above matters, the court was urged to grant the reliefs sought plus costs of the suit.



17. On the other hand, it was submitted for the respondents that the suit is premature as it offends the doctrine of exhaustion of remedies. It was submitted that Article 234 (2) (1) of *the Constitution* and section 77 of the County Government Act vests the Public Service Commission (PSC) with the jurisdiction to hear and determine appeals from certain decisions of County Public Service Boards.
18. It was submitted that the dispute herein is about terms of employment which falls within the ambit of the disputes specified under section 77(2) of the Act, that should first go to the PSC by way of an appeal. It was argued that the petitioners did not have any excuse of not appealing to the PSC and they are only hiding behind Article 22 of *the Constitution* to try and confer jurisdiction upon the court.
19. To fortify the above submission that the suit ought to be struck out for offending the exhaustion doctrine, reliance was placed on *Speaker of the National Assembly v Karume* [2008] 1KLR 425, *Savraj Singh Chana v Diamond Trust Bank (Kenya) Limited & another* [2020] eKLR and *Evans Ladtema Muswahili v Vihiga County Public Service Board & 2 others; Marley Ezekiel Ayiego (Interested Party)* [2022] eKLR.
20. It was further submitted that the petition does not meet the threshold of a constitutional petition and the petitioners were just trying to elevate the dispute to a constitutional matter in order to have audience of the court. It was argued that the petition falls below the threshold set by the court in *Anarita Karimi Njeru v Republic (No.1)* [1979] 1KLR 154 and affirmed by *Mumo Matemu v Trusted Society of Human Rights Alliance* [2013] eKLR.
21. It was submitted that the petitioners’ fixed term contracts lapsed automatically and therefore the petitioners did not show how the respondents violated Article 2, 10, 19, 20, 22, 27, 41, 47, 50, 73 and 174 of *the Constitution* which deal with the supremacy of *the constitution*, national values, equality, fair administrative action and fair hearing. It was argued that the process of recruiting officers to replace the petitioners was fair and lawful.
22. It was further submitted that the petitioners’ fixed term contracts did not contain in provision for renewal or extension, or requirement for hearing before lapsing. Therefore, it was submitted that there was no basis for the petitioners to have legitimate expectation for a renewal. For emphasis, reliance was placed on the *Keen Kleeners Ltd case supra*, and *Kibos Distillers Ltd & others v Benson Ambuti Adegwa & 3 others* [2020] eKLR.
23. It was further submitted that the 3<sup>rd</sup> respondent was wrongly joined in this suit as the 2<sup>nd</sup> respondent was solely mandated to employ and terminate employment under section 57 of the County Government Act. For emphasis, reliance was placed on *Alumark Investments Limited v Tom Otieno Anyango & 4 others* [2018] eKLR.
24. Finally, it was submitted that the reliefs sought in the petition are not tenable since the petitioners’ contracts lapsed by effluxion of time on 31<sup>st</sup> October 2023. Further there are no funds allocated for the former employees whose contracts expired. Consequently, the court was urged to dismiss the petition with costs for lack of merits or strike it out for being filed in the wrong forum.
25. The interested party supported the petition in its submission and submitted that the court has jurisdiction to entertain the petition herein by dint of Article 162(2) of *the Constitution* and section 12 of the ELRC Act. Further that Article 22 of *the Constitution* permits any person to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened.
26. It further submitted that the wording of section 77(1) of the County Government Act is not mandatory but rather permissive as conveyed by the use of words “May appeal to the Public Service



Commission.” It further submitted that section 77 of the Act does not oust this court’s jurisdiction to determine constitutional matters brought by way of constitutional petitions. Reliance was placed on *Abdikad Suleiman v County Government of Isiolo & Another* [2015] eKLR where the court held that the PSC has no jurisdiction to adjudicate on constitutional issues.

27. It was further submitted that there are expectations to the doctrine of exhaustion as discussed by the Court of Appeal in *William Odhiambo Ramogi & 3 others v Attorney General & others* [2020] eKLR. Therefore, it was submitted that the circumstances of the instant petition fall within the exceptions to the doctrine of exhaustion and the court should determine it because constitutional values are at stake including human dignity, fair labour practices, human rights, fairness and social justice.
28. Accordingly, it was submitted that petitioners are entitled to the reliefs sought because the petition meets the competence threshold established in *Anarita Karimi Njeru* case and *Mumo Matemumu* case, *supra*. It was submitted that the petitioners have pleaded and demonstrated how the respondents violated their constitutional rights to fair labour practices by engaging them under termly contracts which were abruptly discontinued despite the legitimate expectation of continuation.
29. Reliance was placed on *Margaret A. Ochieng v National Water Conversation and Pipeline Corporation* [2014] eKLR, and *Oshwal Academy Nairobi & another v Indu Vishwanath* [2015] eKLR to support the claim that the petitioners’ right to legitimate expectation was violated by the respondents’ failure to renew their contracts. In the end the court was urged to find merits in the petition and grant the reliefs sought.

#### Issues for determination

30. There is no dispute that the petitioners were employed by the respondents under fixed term contracts which were routinely renewed since 2013 till 31<sup>st</sup> October 2023 when the last contracts expired and the respondents failed to renew the same. It is also a fact that the petitioners’ posts of Enforcement officer were advertised in August 2023 and new officers were competitively appointed effective 1<sup>st</sup> November 2023. It is also a fact that the petitioners participated in the said recruitment process but they were not appointed. The issues for determination are:
  - a. Whether the petition violates the doctrine of exhaustion of local remedies
  - b. Whether the petition is an afterthought and also overtaken by events.
  - c. Whether the respondents violated petitioners’ constitutional rights and fundamental freedoms.
  - d. Whether the reliefs sought are merited.

#### Exhaustion doctrine

31. There is no doubt that where *the constitution* or a statute provides an alternative procedure of settling dispute, the court should give way to the alternative method to exhaust. This doctrine has been upheld by our courts in many cases including *Speaker of the National Assembly v Njenga Karume*, *supra*, where the Court of Appeal held that: -

“In our view, there is considerable merit in the submission that 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.”



32. With the foregoing guidance, I appreciate that Article 234(2)(1) of *the Constitution* provides that the PSC shall hear and determine appeals in respect of County Governments' Public Service. Further section 77 (1) and 2 of the County Government Act provides that: -

- “(1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission (in this part referred to as the “Commission”) against the decision.
- (2) The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of-
  - a. recruitment, selection, appointment and qualifications attached to any office;
  - b. remuneration and terms of service;
  - c. disciplinary control;
  - d. national values and principles of governance under Article 10, and values and principles of public service under Article 232 of *the Constitution*;
  - e. retirement and other removal from office;
  - f. pension benefits, gratuity and any other terminal benefits; or
  - g. any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.”

33. The foregoing provision of *the constitution* and the statute provides an alternative procedure for determining grievances in County Government Public Service concerning recruitment, terms and conditions of service, and national values and principles of good governance, and also values and principles of public service under Article 10 and 232 of *the Constitution*. The petition herein raises the same issues of terms and conditions of service and the national values and principles of good governance. The petitioners have also not demonstrated that the PSC is not capable of granting appropriate relief and as such no basis has been laid before this court to warrant a waiver of the exhaustion doctrine.

34. Nevertheless, as correctly submitted by the parties, the doctrine of exhaustion does not extinguish the jurisdiction of the court but rather postpones it to allow the alternative remedies to exhaust. Therefore, if the parties submit themselves to the jurisdiction of the court until the hearing is closed, in my view, it would be a mockery to the process of the court for any of the parties to the proceedings to submit that the court should uphold the exhaustion doctrine and strike out the whole proceedings.

35. In the instant case, the respondents submitted themselves to the jurisdiction of the court and filed voluminous response to the petition and the interlocutory motion. They also continued appearing in court until they raised the issue of exhaustion doctrine after the close of the hearing by way of their written submission. It is too late in the day to argue that point and therefore I over rule the same and proceed to determine the petition.



### **Whether the petition is an afterthought**

36. The petitioners confirmed that their contracts lapsed on 31<sup>st</sup> October 2023 and they were not renewed despite their legitimate expectation that they would be renewed. However, there is evidence on record showing that months before the contracts expired, the 2<sup>nd</sup> respondents declared and advertised 183 vacancies in the post of Enforcement Officer and the petitioners failed to protest or challenge that decision either in court or the PSC.
37. Instead, they participated in the process by applying for the job, accepting the shortlisting and finally attended the interviews. It is only after they missed out of the appointment list that they felt aggrieved and mover to this court three (3) weeks after they had been replaced by the newly appointed officers.
38. It is obvious that the petitioners took their late action after the horse had bolted their fate was sealed when they waited for their contracts to expire without seeking the orders set out in the petition. It is now trite that no rights accrue to an employee after a fixed term contract expires. In this case Registered Trustees of the Presbyterian Church of East Africa & 2 others, supra the Court of Appeal held: -
- “ Bearing the foregoing in mind, we note that fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry. Accordingly, any claim based after the expiry of the respondent’s contract ought not to have been maintained.”
39. The court cannot extend the contract term on behalf of the parties nor can it order conversion of a non-existent contract into a permanent and pensionable employment under section 37 of the *Employment Act*. In any event such jurisdiction is only given to this court with respect to casual employment and not fixed-term contracts. Having said that, I find that the petition is just a knee jerk reaction from employees who slept on their rights hoping to get fresh appointment through a process they ought to have rejected and challenged before their contracts expired. In the upshot, I hold that the petition is an afterthought and the reliefs sought are untenable.

### **Constitution violation**

40. In view of my finding above that the petition is an afterthought and the reliefs sought are untenable, I hold that the petition is now a moot case. It will not yield any relief and therefore I hereby dismiss it. Considering that the petitioners are now in the streets without jobs I direct that each party bears own costs.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 13<sup>TH</sup> DAY OF MARCH, 2025.**

**ONESMUS N MAKAU**

**JUDGE**

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N MAKAU**

**JUDGE**

