



Mshambala & 6 others (Suing in Their Capacity as National Executive Committee Officials and Also on Behalf of all Members of the Retired & About to Retire Members Welfare Association) v Teachers Service Commission (Petition E030 of 2025) [2025] KEELRC 1852 (KLR) (26 June 2025) (Ruling)

Neutral citation: [2025] KEELRC 1852 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E030 OF 2025**

B ONGAYA, J

JUNE 26, 2025

BETWEEN

**KEPHA W. MSHAMBALA 1ST PETITIONER
JOSHUA NGORE KIAMBATI 2ND PETITIONER
GICHANA ISAAC MANDUKU 3RD PETITIONER
FRANCIS TKC TONUI 4TH PETITIONER
DAVID THAGUAMBI 5TH PETITIONER
RUTH W. KABUI 6TH PETITIONER
SIMON K. MASILA 7TH PETITIONER**

SUING IN THEIR CAPACITY AS NATIONAL EXECUTIVE COMMITTEE OFFICIALS AND ALSO ON BEHALF OF ALL MEMBERS OF THE RETIRED & ABOUT TO RETIRE MEMBERS WELFARE ASSOCIATION

AND

TEACHERS SERVICE COMMISSION RESPONDENT

RULING

1. In response to the petition dated 05.03.2025, the respondent filed a notice of preliminary objection dated 16.05.2025 through Cavin Anyuor, Advocate. It prayed that the petition be struck out with costs to the respondent on the grounds that:
 - i. The petition before Court is bad in law, incurably defective, frivolous, vexatious and amounts to gross abuse of the court process.



- ii. Pursuant to the provisions of section 89 of the *Employment Act*, the petition before the Honourable Court is time barred and the same ought to be struck as a matter of course.
 - iii. Pursuant to the provisions of section 4[1] of the *Limitation of Actions Act*, the subject matter set out in the instant petition before Court is time barred and statutorily defective.
 - iv. The Honourable Court has no jurisdiction to hear and determine the petition.
 - v. The petition before Court offends the doctrine of constitutional avoidance. The subject matter being promotion of teachers is premised on a contract of employment under the ambit of private law. The same is disguised as a constitutional petition to avoid the rigors of statute law, specifically section 89 of the *Employment Act* read together with section 4[1] of the *Limitation of Actions Act*.
 - vi. The cause of action having arisen in 1996, the petition before Court is beleaguered by undue and inordinate delay hence an afterthought. The same is an abuse of the Court's process.
2. In support of the notice of preliminary objection, the respondent filed its submissions dated 26.05.2025.
 3. The petitioners filed submissions dated 04.06.2025 through Kirui Kamwibua & Company Advocates. They urged the Honourable Court to dismiss the notice of preliminary objection dated 16.05.2025 and proceed to deal with the petition substantively on its merits.
 4. The Court returns as follows:
 - a. The petitioners pray for the prayer that the petitioners are entitled to salary arrears from the year 1996 to 2010 when the salaries were harmonised. It appears to the Court that the petitioners' cause of action accrued sometime in 2010 and for unexplained reasons they did not move the Court until the filing of the instant petition. As urged for the respondent, the cause of action was time barred under section 89 of the Reemployment Act prescribing 12 months of limitation from cessation of a continuing injury [like the instant cause of action] or three years in other cause of actions based on the employment contract. The claimed arrears stopped accruing or were due for payment on monthly basis but the claimants appear to have failed to move the Court promptly within the prescribed time of limitation.
 - b. It therefore appears to the Court that the petitioners invoked the way of a petition to circumvent the time of limitation prescribed in the Act and if an ordinary cause were to be filed. The petition appears to the Court trapped with the avoidance doctrine as urged for the respondent. While alleging discrimination, the primary claim is for arrears accruing in the contract of service and no legitimate bar to file proceedings within the prescribed time of limitation has been pleaded.
 - c. Accordingly, the preliminary objection is upheld. Parties appear to continue in employment relationship or some petitioners may have retired. To balance justice for parties, each will bear own costs of the petition and preliminary objection.
 5. In conclusion the preliminary objection will succeed upon the findings herein with orders:
 1. The petition is struck out.
 2. Each party to bear own costs of the petition and the preliminary objection.



**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
THURSDAY 26TH JUNE, 2025.**

**BYRAM ONGAYA,
PRINCIPAL JUDGE**

