Oduo v Teachers Service Commission (Cause E075 of 2024)
[2025] KEELRC 2138 (KLR) (21 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2138 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE E075 OF 2024

JK GAKERI, J

JULY 21, 2025

BETWEEN

BERNARD OTIENO ODUO ..... CLAIMANT

AND

TEACHERS SERVICE COMMISSION ..... RESPONDENT

JUDGMENT

1. The instant Petition dated 24th September, 2024 was instituted in September 2024. The Petitioner cited the provisions of Articles 23, 25, 27, 28, 31, 41, 47, 48, 50, 73 and 153 of *the Constitution* of Kenya 2010 as the legal foundation of the Petition.

2. Also cited were the provisions of Section 19, 26, 43, 44 and 45 of the *Employment Act* as were the provisions of section 3 and 12 of the *Fair Administrative Action Act* and various Sections of the *Teachers Service Commission Act*.

3. The Petitioner avers that he was employed by the respondent on 6th December, 1984 on permanent and pensionable terms as an untrained teacher but qualified as a PI teacher in December 1994 and obtained a Bachelor of Education of the University of Nairobi in August 2012.

4. The Petitioner avers that he was arrested and arraigned at the Nyando Law Court on 7th June, 2022 and had been interdicted effective 20th November, 2020 and was dismissed vide letter dated 22nd July, 2021, appealed the dismissal but the review was dismissed on 10th March, 2023.

5. It is the claimant's case that as at the date of dismissal his gross salary was Kshs.105,131.00 and had served the respondent for 37 years without any blemish.

6. The Petitioner's case is that the termination of employment was unfair, faulty and unjust as he was falsely accused, the complainant was not a minor, prosecution was extraneous, was acquitted by the court, prosecution did not appeal the acquittal. That the Teachers Service Commission was not an

appellate court or a criminal court, the employer had no good reason to dismiss him from employment and the interdiction and dismissal failed the constitutional test and violated his rights and was not accorded fair hearing among others.

7. The Petitioner prayed for various orders including declarations of violation of rights, Judicial Review Orders of certiorari, mandamus and prohibition, salary arrears Kshs.2,806,266, house allowance, hardship allowance, commuter allowance, leave allowance, total Kshs.3,751,570, terminal dues, lump sum and monthly general punitive and exemplary damages for dismissal and violation of rights, costs of the suit and any other relief the honourable court deemed fit to grant.

8. The respondent responded vide a Replying Affidavit sworn by Hellen Chirure on 28th March, 2025 who deposed that she was the Assistant Deputy Director at the Discipline Division of the respondent. The respondent admitted that the Petitioner was its employee since 30th January, 1985 and had risen to the position of Head Teacher serving at Wenwa Primary School and it was alleged that the Petitioner had had sexual intercourse with one Lavender Akinyi Owade, a Form 3 student at Thurgem Secondary School on March 19th 2020 between 12 noon and 2pm in his office contrary to the respondent's Code of Regulations for Teachers 2015 and preliminary investigation report recommended interdiction of the Petitioner.

9. The affiant deposed that the Petitioner was taken through the disciplinary process, presented his case, cross-examined witnesses and was dismissed from employment and his name removed from the register of teachers, appealed the dismissal and the Review Committee upheld the decision.

10. The affiant deposed that the Petitioner was charged of having carnal knowledge contrary to Clause a(i) of the Third Schedule to the *Teachers Service Commission Act*.

    The affiant prayed for dismissal of the Petition.

11. Discreditably, from 30th October, 2024 when the matter was first placed before the court, the respondent did not appear in court until 12th March, 2023, service notwithstanding and on the hearing date taken by consent counsel informed the court that it had filed a Preliminary Objection dated 25th March, 2025 challenging the court's jurisdiction to hear and determine the suit and sought directions on its disposal.

12. The respondent objects to the suit on the premises that:

    a. This court lacks jurisdiction under the law to entertain interrogate and determine the Petition as it is time barred as it was filed out of time.

    b. That the Petition was filed out of time under Section 90 of the *Employment Act* and the court had no jurisdiction to entertain it in the present form.

Petitioner's submissions

13. As regards the Preliminary Objection, counsel for the Petitioner cited the sentiments of the Court of Appeal in Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd [1969] EA 696, to urge the essence of a Preliminary Objection to urge that the facts are contested by the Petitioner and as such there was no Preliminary Objection.

14. According to counsel the Petition was elaborate on how the Petitioner's rights were violated and the respondent should stop hiding under the alleged Preliminary Objection.

15. Counsel submitted that the claimant was entitled to a fair hearing of the Petition having been in police cells and in court and ought to be accorded time to ventilate the Petition which was not an abuse

of court process, vexation or scandalous. Reliance was placed on the sentiments of Emukule J (as he then was) in Kenya Airways Ltd V. Classical Travels and Tours Ltd as well as the decision in Samuel Mureithi Muriuki & another V Kamahuha Ltd [2018] KECAA 38 (KLR), to urge that the Petitioner was praying for justice.

16. Also cited is the decision in Kenneth Stanley Njindo Matiba V Attorney General [1998] eKLR.

Respondent's submission on the Preliminary Objection

17. As to whether the instant Petition was statute barred, counsel for the respondent relied on the provisions of Section 89 of the *Employment Act* to urge that since the Petitioner's employment was terminated vide letter dated 22nd July, 2021, after the disciplinary process, and removed from the Registrar of teachers and waited for 3 years and 5 months before filing the instant Petition the Petition was statute barred.

18. Reliance was placed on the decision in David Muchira Mathenge V Kenya Power & Lighting Co. Ltd [2018] KEELRC 1742 (KLR), to urge that the suit was filed outside the 3 year period and it was purposely filed as a Petition to circumvent the limitation of time.

19. Counsel submitted that the *Employment Act* addressed the right to fair administrative action and fair hearing and the Petitioner should not be permitted to avoid the provisions of the *Employment Act* by citing Constitutional provisions.

20. Reliance was placed on the sentiments of the court in Gabriel Mutava V Managing Director Kenya Ports Authority [2015] KEELRC 762 (KLR) as well as those in Josephat Ndirangu V Henkel Chemicals (EA) Ltd [2013] KEELRC 890 (KLR) and Peter Ndegwa Nderitu Teachers Service Commission [2019] KEELRC 1702 (KLR).

21. As to whether the court had jurisdiction to entertain the instant Petition, counsel cited the sentiments of the Supreme Court In the matter of Interim Independent Electoral Commission [2011] KESC 3 (KLR), to underscore the proposition that a court of law can only assume the jurisdiction conferred upon it by law and in the instant case the court had no jurisdiction.

22. Also cited were the sentiments of the court in Anadet Kali Musau V Attorney General & 2 others [2020] KECA 723 (KLR) to urge that the court had no jurisdiction to hear and determine a statute barred matter as jurisdiction is everything.

23. Finally, counsel cited the decision in Boniface Waweru Mbiyu V Mary Njeri & another [2005] KEHC 2392 (KLR), Iga V Makerere University [1972] EA 62 and the sentiments of Crabbe JA in Mehta V Shah [1965] EA 321 quoted in Kenya Civil Aviation Authority V W.K. & 2 Others [2019] KECA 400 (KLR), to urge the court to strike out this suit for being vexatious, frivolous and abuse of court process.

24. It is common ground that when a Notice of Preliminary Objection is filed, it ought to be determined at the earliest opportunity because of its potential to dispose the suit at that stage.

25. According to the Petitioner, since the respondent had adduced evidence in its submissions to show that the suit related to a contract under the *Employment Act* as opposed to a Petition, the facts were highly contested and the respondent's Notice of Preliminary Objection was unsustainable and the maters raised can only be determined in the main suit.

26. The respondent's submissions addressed two issues namely; whether the Petition was statute barred and whether the court had jurisdiction to entertain the suit.

27. Because the Petitioner's counsel appears to be challenging the respondent's Notice of Preliminary Objection, it behoves the court to make a determination whether the respondent's Notice of Preliminary Objection meets the threshold of a Preliminary Objection.

28. The most commonly cited sentiments on the essence of a Preliminary Objection are those of Law JA and Sir Charles Newbold P. in the celebrated decision in Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd (supra) as follows:

Law JA

> " ....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 rise to the suit to refer the dispute to arbitration"

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 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".

29. See also in this regard, Hassan Ali Joho & another V Suleiman Shabal & 2 others KSC.

30. Clearly, a Preliminary Objection is a threshold issue and its determination is critical since it determines whether the suit proceeds to hearing and determination or not.

31. Contrary to the Petitioner's contention the respondent had adduced evidence in its submissions, it had not. The respondent's uncontroverted assertion is that the relationship between the parties to the suit was employer and employee which ended on 22nd July, 2021 when the claimant was dismissed from employment, and according to the respondent the instant Petition was filed 3 years and 5 months later, outside the 3 year rule. The Petitioner did not contest any of these facts which are patently discernible from the Petitioner's documents.

32. The respondent's submissions are almost entirely a treatise on sentiments of courts in various decisions on the issues at hand.

33. In the court's view, the respondent's Notice of Preliminary Objection raises a critical issue of whether the Petition herein is statute barred by dint of Section 89 of the *Employment Act*, which implicates the foundational issue of jurisdiction of the court to hear and determine the Petition.

34. From the foregoing, the court is satisfied that the respondent's Notice of Preliminary Objection meets the threshold of a Preliminary Objection. This is because jurisdiction is everything as exquisitely capture by Nyarangi JA in Owners of Motor Vessel "Lillian S" V Caltex Oil (Kenya) Ltd [1989] KLR 1

> " ...Jurisdiction is everything without it a court has no power to make one more step..."

Needless to belabour, jurisdiction is a pure point of law.

35. As to whether the instant Petition is statute barred, the respondent's counsel submitted it was and cited various authorities.

36. It is unclear why the Petitioner's counsel did not address the issue having been raised by the respondent in its submissions dated 10th June, 2025.

37. Documentary evidence provided by the Petitioner reveals that he was employed by the respondent effective 1st January, 1995, having been registered as a teacher on 23rd February, 1985, confirmed 6th November, 1997 rose to the position of Head teacher and was promoted to Graduate Teacher I effective 5th October, 2015.

38. The Petitioner was interdicted vide letter dated 20th November, 2020 and later dismissed vide letter dated 22nd July, 2021 and his appeal for review was declined vide letter dated 10th May, 2023.

39. On the other hand, documents provided by the respondent show that the allegations against the Petitioner were investigated, statements taken, the student was attended to at a hospital and reported the matter to the police who arrested the Petitioner on the same day.

40. Documentary evidence on record clearly show that the Petitioner was issued with a notice to show cause dated 25th June, 2020, responded vide letter dated 2nd July, 2020, was interdicted vide letter dated 20th November, 2020, invited for a disciplinary hearing and informed of his rights, attended on 15th July, 2021, presented his case, cross-examined witnesses and made final remarks expressing gratitude for the hearing and the panel found him culpable and recommended dismissal and the Petitioner was not notified of the right of appeal for review which he exercised.

41. Evidence on record establish beyond peradventure that the instant Petition was filed more than 3 years after the Petitioner's dismissal from employment, a fact the Petitioner did not contest.

42. The Petitioner was aware that the 3 year limitation period had lapsed, which would perhaps explain why the title of the suit framed as a cause and but the document is christened as a Petition and was as a consequence registered as a cause in the Judiciary CTS and remains as such to date.

43. The pertinent question for determination is whether styling the suit as a Petition was sufficient to redeem it, which implicates the rule in Anarita Karimi Njeru V Republic [1979] KLR 154, where the court held:

> " We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed".

44. See also in this regard Kiambu County Tenants Welfare Association V Attorney General & another [2017] eKLR.

45. Paragraph 48 of the Petition which identifies breaches of constitutional rights, identifies the Petitioner's dismissal, withholding of terminal dues, unfair procedure, cruel treatment, unfair administrative action, legitimate expectation, reputation, denial of the right to work, lack of objectivity and justification for the Petitioner's dismissal as the constitutional rights and freedoms infringed upon.

46. From the documentary evidence on record, it is the finding of this court that the instant Petition does not meet the threshold in Anarita's case (supra).

Section 89 of the *Employment Act* provides that:

47. Notwithstanding the provisions of section 4 (1) (cap) 22 of the *Limitation of Actions Act*, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.

48. This provision bars all civil actions based on the *Employment Act* or a contract of service in general from being filed after 3 years or twelve months after cessation of a continuing injury.

49. It is not in dispute that the Petitioner was an employee of the respondent and all the reliefs sought are based on that relationship.

50. Other than the declarations sought which are declaratory in nature, all the substantive reliefs prayed for are based on the contract of employment and could have been litigated under an ordinary claim filed within the 3 years limitation period.

51. *The constitution* for instance, does not provide for the remedy of reinstatement or terminal dues.

52. In sum, all the rights allegedly violated including, fair hearing, fair administrative action among others are enforceable are the provisions of the *Employment Act* and the *Employment and Labour Relations Court Act*.

53. On interdiction, it is unclear what the Petitioner's complain was because interdiction, analogous to suspension of an employee is lawful if permitted by the contract of employment or the law and in this case it was authorized and took place after the Petitioner had responded to the notice to show cause.

54. Flowing from the foregoing, and in the considered view of the court, the instant Petition raise no constitutional issue and ought to have been filed as an ordinary claim as many employees of the respondent have done in the past and was purposely filed as a Petition to circumvent the provisions of Section 89 of the *Employment Act*, as submitted by the respondent.

55. The foregoing is fortified by the sentiments of the Court of Appeal in Gabriel Mutava & 2 Others V Managing Director Kenya Ports Authority & Another (supra) where after a review of comparative jurisprudence from the United Kingdom, Trinidad & Tubago and South Africa, the court expressed itself as follows:

> " Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation...
>
> *The constitution* should not be turned into a thorough fare for resolution of every kind of common grievance. The duty of the employers to act fairly is now recognized in the Act as well as *the Constitution*.
>
> The court is mandated further by *the Constitution* and the Act to resolve all employment disputes expeditiously and its procedures have been rendered less technical.
>
> We are saying all these, in answer the appellant's submission on the twin question of the applicability of the rules of natural justice and *the Constitution* to the dispute. This was purely a labour dispute that could have been resolved by the application of *Employment Act*...

56. Back home and in a string of cases, this Court has severally held that where a fundamental right is regulated by legislation, such legislation, and not the underlying constitutional right, becomes the primary means for giving effect to the constitutional rights. In the case of Daniel N. Mugendi V Kenyatta University & 3 Others [2013] eKLR, the Court observed: -

> "……Citing the case of Alphonse Mwangemi Munga & Others V African Safari Club Ltd [2008] eKLR, the learned judge was persuaded that *the Constitution* had to be read together with other laws made by Parliament. It should not be so construed as to be disruptive of other laws in the administration of justice and that accordingly parties should make use of the normal procedures under the various laws to pursue their remedies instead of all of them moving to the constitutional court and making constitutional issues of what is not. With all the foregoing, the learned judge concluded that the claim placed before her by the appellant was based on employment - a matter that should have instead been taken to the Industrial Court which had constitutional and statutory jurisdiction over such matters and not the High Court in the form of a constitutional reference…
>
> Of course, violations of constitutional rights may nonetheless be different, and more serious than the violations of statutory or contractual rights. There is no clear demarcation however, where one violation begins and ends, and when one violation should attract desperate remedies. In employment matters, such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except to the extent that the terms are contrary to the law; or have been superseded by statute. Certainly invoking the constitutional route in the circumstances of this case was misguided. *The Constitution* should not be turned into a thoroughfare for resolution of every kind of common grievance…
>
> Rules of natural justice are statutory underpinned by Sections 41, 43 and 45 of the *Employment Act*. The duty of employers to act fairly is now recognized in the Act as well as *the Constitution*.
>
> The court is mandated further by *the Constitution* and the act to resolve all employment disputes expeditiously and its procedures have been rendered less technical…
>
> This was purely a labour dispute that could have been resolved by the application of the *Employment Act* as well as the regulations…"

57. The foregoing sentiments of the Court of Appeal which bind this court, apply on all fours to the instant petition.

58. Relatedly, the court was unable to discern any pertinent constitutional issue which could not be determined in the context of the operative statutory architecture on employment, which the Petitioner was endeavouring to out-manoeuvre.

59. See also Josephat Ndirangu V Henkel Chemicals (EA) Ltd (supra) Peter Ndegwa Nderitu V Teachers Service Commission (supra).

60. As adverted to elsewhere in this judgment, this is an archetypal employment dispute which ought to have been filed as a claim but being cognized of the fact that the suit was statute barred, the Petitioner filed a Petition to circumvent the provisions of Section 89 of the *Employment Act*.

61. From the foregoing reasons, it is the finding of this court that the Petitioner herein ought to have instituted an ordinary claim for all the reliefs sought in the Petition and having failed to do until September, 2024, the suit was statute barred and this court lacks jurisdiction to hear or determine it.

    Having found as above, the court has no Petition to determine.

62. In the final analysis the respondents Notice of Preliminary Objection dated 25th March, is merited and the Petitioner's Petition dated 24th September, 2024 is struck out.

63. Parties shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 21ST DAY OF JULY, 2025.

DR. JACOB GAKERI

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 15th March 2020 and subsequent directions of 21st 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 *Civil 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.

DR. JACOB GAKERI

JUDGE