



Willy v Secretary, Teacher Service Commission & 2 others (Petition E005 of 2024) [2025] KEELRC 1997 (KLR) (3 July 2025) (Ruling)

Neutral citation: [2025] KEELRC 1997 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KITALE
PETITION E005 OF 2024
MA ONYANGO, J
JULY 3, 2025**

BETWEEN

MURUNGA ETYANG WILLY PETITIONER

AND

THE SECRETARY, TEACHER SERVICE COMMISSION 1ST RESPONDENT

THE TSC COUNTY DIRECTOR, TRANS NZOIA COUNTY ... 2ND RESPONDENT

THE BOM. YUYA PRIMARY SCHOOL 3RD RESPONDENT

RULING

1. Before me for determination is a preliminary objection filed by the Respondents herein framed as follows:
 - a. The suit is time barred and offends the mandatory provisions of section 90 of the *Employment Act*, 2007 thus the Honourable Court has no jurisdiction to hear and determine the petition
 - b. The Petitioner, having realized the matter is statute barred, seeks to circumvent the *Employment Act* which gives effect to the constitutional rights.
 - c. That the suit is an abuse of court process.
 - d. That the suit is bad in law, frivolous, and amounts to gross abuse of the court process thus ought to be struck out with costs to the Respondents.
2. In support of the preliminary objection the Respondents submitted that though framed as a constitutional petition the substance of the petition is purely a contractual dispute emanating from an employment relationship. That the crux of the Petitioner’s case is violation of his right to fair labour practice and fair administrative action in his dismissal from service by the 1st Respondent. That the



Petitioner is trying to enforce rights under a contract of service. That the petition does not raise any constitutional question and is only disguised as a constitutional matter to purposely circumvent the laws of limitation.

3. The Respondent relied on the decision in Nairobi Civil Appeal No.195 Of 2016 Sumayya Athmani Hassan v Paul Masinde Simidi & another [2019] eKLR where the Court of Appeal held that Article 41 rights are enacted in the Employment Act and Labour Relations Act and that where legislation has been enacted to give effect to a constitutional right, a litigant should not found a cause of action directly on the Constitution without challenging the legislation in question.
4. It is further the position of the Respondent that this Court's jurisprudence is clear that the elevation of a simple labour dispute cannot oust the application of the substantive and procedural law on employment.
5. That in Nakuru Petition 11 of 2018 Peter Ndegwa Nderitu v Teachers Service Commission [2019] eKLR the Court held as follows:

“The ultimate remedy sought by the petitioner in his petition is that his disciplinary matter was not given a fair hearing and as a result the decision should be quashed so that he can be reinstated back to the register of teachers and to his position as teacher with payment of his salary and benefits from 11th June, 2012, Such are remedies only available under section 49 of the Employment Act, 2007 read together with section 12(3) of the Employment and Labour Relations Court Act, 2011. However best the petition is framed, employment and labour relations rights articulated under the petition, though framed in a different name from that of a Memorandum of Claim, the orders sought relate to what an employee claiming under the Employment Act, 2007 should apply.

It is not the filing of a petition which can extend time for the remedy of reinstatement. Such remedy is set out under statute and cannot be circumvented through filing a petition instead of a Memorandum of Claim.

Despite the petitioner citing the violation of his rights under the various articles of the constitution, and supporting the facts of the petition with a chronology of the violations against him, the remedies sought can only issue within the framework of the provisions of section 90 of the Employment Act, 2007.”

6. Similarly, in Msa Petition No. 8 of 2015: Peter Obiero v Kenya Ports Authority [2016] eKLR the Court rejected the elevation of employment contracts to constitutional petitions holding that the Constitution should not be invoked by Parties to remove limitation of time where relevant statutes have set clear timelines for taking action.
7. It is crystal that the relationship that existed between the Petitioner and the 1st Respondent was that of an employer and employee. That the subject matter of the Petition arises out of the Respondents terminating the Petitioners employment and the manner in which the termination was done. Accordingly, the dispute falls within the purview of the Employment Act and the Petitioner cannot escape the application of limitation under the said Act.
8. It is further the submission of the Respondents that the Petition does not satisfy the statutory threshold for judicial review orders in the nature of certiorari and prohibition as prayed in the petition. That the order of certiorari being sought more than 6 years after the impugned letters dated 2nd August, 2016, 18th October, 2016 and 6th March, 2017 and subsequent action taken against the Petitioner.



9. That the order of prohibition sought to stop the Respondent from implementing any decision arising out of the interdiction letters after the Petitioner was dismissed from service will have no consequence as the decision has already been implemented. That the prayers sought are overtaken by events.
10. On the second ground of preliminary objection the Respondents submit that the Petitioner was dismissed on 14th March, 2017. He applied for review and the review decision was rendered on 22nd January, 2018. That from the uncontested facts arising from the pleadings the limitation period lapsed 3 years after 14th March, 2017. That even if termination date is taken to be the date of review the limitation period lapsed in on 21st January, 2021 yet the petition was filed on 15th August, 2024, more than 6 years after the cause of action arose. For emphasis the Respondents cited and relied on the decision in Nyeri Civil Appeal No. 21 of 2015 Attorney General & another v Andrew Maina Githinji & another [2016] eKLR.
11. On the 3rd and final ground of preliminary objection the Respondents submitted that this court has no jurisdiction to entertain the instant petition based on the fact that it is time barred. The Respondents relied on the decision in Mombasa Industrial Court Petition No. 1 of 2013 Josephat Ndirangu v Henkel Chemicals (EA)Ltd [2013] eKLR and Supreme Court Petition No. 5 of 2014 Lemanken Aramat v Harun Meitamei Lempaka & 2 others [2014] eKLR.
12. The Respondents submitted that limitation is a jurisdictional issue that goes to the root of the suit and cannot be cured by Article 159(2)(d) of the Constitution. That once a claim is barred by limitation the court's jurisdiction is extinguished and therefore non-existent.

Petitioner's submissions

13. The Petitioner filed submissions dated 20th May, 2025 in which he avers that the instant petition raises important constitutional issues involving violation of fundamental rights under Articles 27, 28, 41, 47 and 50 of the Constitution. That these issues transcend a mere contractual employer-employee relationship.
14. It is the Petitioner's position that constitutional claims are not controlled by the Employment Act alone, that even though the petition arises out of an employment relationship the underlying essence of the claim is the violation of constitutional rights being fair administrative action and fair hearing issues, which cannot be ventilated under the Employment Act.
15. For emphasis the Petitioner relies on the case of Samuel G. Momanyi v Attorney General & Another [2012] eKLR where the High Court held that:

“Where a cause of action accrues from infringement of constitutional rights, limitation of action under statute law does not apply strictly as it would defeat the very protection afforded by the Constitution”
16. It is submitted for the Petitioner that section 90 of the Employment Act does not in itself terminate a constitutional cause of action, especially when administrative wrongs are under scrutiny. The Petitioner takes solace in the Court of Appeal decision in Kenya Bus Services Ltd & Another v Minister for Transport & 2 Others [2012] eKLR to the extent that:

A claim under the Constitution for enforcement of fundamental rights is different from a claim under private law or statute.
17. The petitioner avers that the Respondents' reliance on technicalities of procedure is misplaced. That Article 159(2)(d) of the Constitution mandates courts to dispense justice without excessive regard



for procedural technicalities. In the case of *Raila Odinga v IEBC & Others* [2013] eKLR, the court reaffirmed that *the Constitution* is a living document and must be interpreted purposively and contextually.

18. The Petitioner maintains that the argument by the Respondents that this suit is disguised as a constitutional claim to avoid time limitations fails to recognize that the courts have consistently held that constitutional claims can arise in employment contexts.

19. It is submitted that the issue of jurisdiction should be determined at the outset in recognition of the decision in the case of *Owner of the Motor Vessel Lillian "S" v Caltex oil Kenya Ltd.* (1989) KLR where the Court of Appeal stated thus:

“without jurisdiction a Court has no power to make one more step, where a Court has no jurisdiction there would be no basis for a continuation of proceedings pending before it. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

20. It is submitted that the gist of the above statement of Justice Nyarangi J affirms that jurisdiction of any court is an important issue and should be ascertained ab initio. That this is also stated at length in the case of *Nick Githinji Ndichu v Clerk, Kiambu County Assembly & Another* [2014] eKLR, the Court held:

“Where an employment relationship raises constitutional questions particularly on fair administrative action — the court has jurisdiction to entertain it under Article 23 of *the Constitution*.”

21. That similarly, in *Charles Omanga & 8 others v Independent Electoral and Boundaries Commission & another* [2022] eKLR, the Court observed:

“Employment-related disputes that invoke constitutional violations, particularly under Articles 27, 41, 47 and 50, are justiciable under *the Constitution*.”

22. It is submitted that the cause of action in this petition is continuous in character and flows from an administrative procedure that ran until the final dismissal decision conveyed on 22nd January 2018. The filing of the present Petition in August 2024 is within six years from said ruling, which is not untimely for constitutional complaints.

23. It is further the Petitioner’s submission that declaratory reliefs, which the Petitioner is also claiming, do not have the same strict time limit as applicable to ordinary civil suits. That in *Attorney General v Andrew Maina Githinji & another* [2016] eKLR, it was held by the Court that such constitutional timelines do not automatically expire by reason of statute of limitation unless expressly stated. That the petition invokes the Court’s constitutional supervisory jurisdiction, which is distinct from the time-limited judicial review jurisdiction under Order 53 of the Civil Procedure Rules.

24. It is submitted that for a preliminary objection to succeed, it must raise a pure point of law, as was settled in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. That the Respondents’ objection involves a determination of facts, like the true nature of the Petition and the timeline of the administrative procedure, and is thus not suited for determination by way of preliminary objection.

25. It is the Petitioner’s submission that the case of *Lemanken Aramat v Harun Meitamei Lempaka & 2 others* (supra) is distinguishable from the instant petition since it is an appeal seeking redress for



fundamental constitutional violations to which the constitution itself does not have a stated limitation period.

Determination

26. The principles for determining what constitutes a Preliminary Objection were set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. At page 700 Pr. D-F Law JA as he then was had this to say:-

“... 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. added the following at pg.701 paragraph B-C:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the 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....”

27. The test to be applied in determining whether or not the appellants’ Preliminary Objection meets the threshold as set out by Sir Charles Newbold in the *Mukisa Case* are the following: First, that the Preliminary Objection raises a pure point of law, second, that there is demonstration that all the facts pleaded by the other side are correct; and third, that there is no fact that needs to be ascertained.
28. Applying these tests to the instant preliminary objection, only the first two grounds qualify to be raised as preliminary objections as they are pure points of law that are discernible from the pleadings and are not contested.
29. The Petitioner pleaded that he was dismissed on 14th March, 2017. He applied for review and the review decision was rendered on 22nd January, 2018. These facts are admitted by the Respondents.
30. The issue of limitation goes to jurisdiction and whenever it is raised, the Court must deal with it before proceeding any further as was stated in the case of *Thuranira Karauri v Agnes Ncheche – Civil Appeal No. 19 of 196*.
31. The Petitioner has submitted that the instant petition raises important constitutional issues involving violation of fundamental rights under Articles 27, 28, 41, 47 and 50 of *the Constitution*. That these issues transcend a mere contractual employer-employee relationship. That constitutional claims are not controlled by the *Employment Act* alone, that even though the petition arises out of an employment relationship the underlying essence of the claim is the violation of constitutional rights being fair administrative action and fair hearing issues, which cannot be ventilated under the *Employment Act*.
32. The side note of section 5 of the *Employment Act* reads “Discrimination in employment”. The section defines what constitutes discrimination in employment and what does not. The section further sets out the obligations of an employer to ensure that the employment arena is free from discrimination including criminalisation of discrimination by an employer and reversal of burden of proof to an employer in cases where an employee alleges discrimination in termination of employment on disciplinary measures.



33. Further, sections 41, 43 and 45 provide for fair termination of employment including prescribing the procedure for fair termination and defining what constitutes unfair termination.
34. The issues raised in the petition can thus all be raised in a claim under the *Employment Act*.
35. The Petitioner seeks the following remedies in the Petition:
- a. A declaration that the 2nd Respondent and 3rd Respondents' failure to reveal to the Petitioner their witnesses, the particulars and evidence that they had against him before the hearing of disciplinary case on 14th March, 2017 was a breach of his right under Article 47 to a fair administrative action as the Respondents were adopting the method of ambushing the Petitioner with charges and denying him adequate time to prepare to defend himself and therefor; all consequential decisions and measures made arising therefrom are null and void.
 - b. A declaration that the Respondents did not comply with the law and regulations that regulated the matter of hearing of disciplinary case on 14th March, 2017, as a consequence of which the 1st 2nd and 3rd Respondents' fell into error and violated/ infringed on the Petitioner's right to a fair hearing as envisaged in Article 47(1) and therefore all consequential decisions and measures made arising therefrom are null and void.
 - c. A declaration that the 1st Respondent as a Constitutional commission is not subject to the control or direction of the School Board of Management or any of the Ministry of Education, Science, and Technology departments or 'committees established under the Basic Education Regulations of 2015 in the lawful discharge of its Constitutional mandate under Article 237 of *the constitution* and therefore the letter dated 3rd August 2015 purporting to direct the 1st respondent to investigate, consider, and determine the allegations made against the petitioner was unconstitutional and therefore null and void.
 - d. A declaration that the case presented/forwarded to the 1st respondent by the 2nd Respondent and 3rd Respondents was aimed to achieve a collateral purpose of getting rid of a hardworking teacher in the school perpetuated by the 2nd Respondent with tacit support of the 3rd respondent and is therefore illegal.
 - e. An order of Certiorari- be and is hereby issued bringing into this honourable court for purposes of quashing the letters of interdiction dated 2nd August, 2016, 18th October, 2016 and 6th March, 2017 presented/forwarded to the 1st respondent by the 2nd Respondent and 3rd Respondents seeking to remove the name of the petitioner from the Register of Teachers.
 - f. A Judicial Review Order removing the proceedings arising out of the letters of interdiction 2nd August, 2016, 18th October, 2016 and 6th March, 2017 presented/forwarded to the 1st respondent by the 2nd Respondent and 3rd Respondents and all consequential decisions and measures made arising therefrom to this court for the purposes of quashing the same as the said proceedings were undertaken and determination made contrary to the law and the rules of natural justice.
 - g. Judicial Review order of prohibition directed at the 1st Respondent to halt forthwith implementation of any decisions arising out the letters of interdiction dated 2nd August, 2016, 18th October, 2016 and 6th March, 2017 and ensure that the petitioner herein be reinstated and receive his full salary and other allowances and benefits that he is entitled to as a teacher withheld by the 1st Respondent from the 14th March, 2017 to date.



- h. An order that the Respondents are individually, jointly, and/or severally liable to compensate the petitioner for their unconstitutional actions.
- i. That, an order of costs does issue payable to the petitioner by the 1st respondent.
36. Prayers 1 to 4 seek declarations which can be granted in a Claim. Prayers 5 to 8 seek Judicial review orders of certiorari, and prohibition both of which under section 9 of the *Fair Administrative Action Act* must be brought within a reasonable period. Prayer 9 seeks compensation which again can be granted under the *Employment Act*.
37. From the prayers in the petition, all the remedies sought by the Petitioner arise from the termination of the employment relationship and not from a violation of a constitutional right that is independent or not dependent on the termination of his employment. The claims are thus employment remedies.
38. Further the *Fair Administrative Action Act* which the Petitioner relies on, states that parties must come to court within a reasonable time. Section 9 of the Act provides for the procedure for judicial review as follows:
1. Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*.
39. Reasonable delay was addressed in *Republic v Attorney General & Another, Baps International Limited (Interested Party) Ex parte* (2020) eKLR. Nyamweya J. (as she then was) stated: -
- “The concept of what is reasonable time is flexible, and will depend on the circumstances of a case, as held in *Law Society of Kenya v Attorney General & 2 others* [2016] eKLR. Relevant circumstance include the nature of the matter to which the inaction relates, any mitigating circumstances on the part of the decision maker, and adverse consequences of delay, and the need to ensure fairness.....”
40. In the instant case the delay was for more than 3 years. The Petitioner was dismissed on 14th March, 2017. He applied for review and the review decision was rendered on 22nd January, 2018. The relevant date of termination is the date of dismissal and not the review which in any event upheld the dismissal from the initial date of the letter of dismissal. The petition is dated 1st August, 2024. The delay was therefore for 7 years. The Petitioner did not even attempt to explain the reasons for the delay.
41. Courts have time and again decried the practice of approaching the court through a constitutional petition where a statutory remedy is available for remedying the wrong or violation. See *Nairobi Civil Appeal No.195 Of 2016 Sumayya Athmani Hassan v Paul Masinde Simidi & another* [2019] eKLR and in *Nakuru Petition 11 of 2018 Peter Ndegwa Nderitu v Teachers Service Commission* [2019] eKLR. The case of *Peter Ndegwa Nderitu* is particularly similar to the instant case.
42. With regard to the Petitioner’s argument that the issue of delay can be cured under Article 159, the courts have held that limitation is a jurisdictional issue that goes to the root of the suit and cannot be cured by Article 159(2)(d) of *the Constitution*. see *Mombasa Industrial Court Petition No. 1 of 2013 Josephat Ndirangu v Henkel Chemicals (EA)Ltd* [2013] eKLR (supra) and *Petition No. 5 of 2014 Lemanken Aramat v Harun Meitamei Lempaka & 2 others* [2014] eKLR (supra).
43. For the forgoing reasons I find merit in the preliminary objection and uphold it. The Petition herein is accordingly struck out. There shall be no orders for costs.



DATED, DELIVERED AND SIGNED ON THIS 3RD DAY OF JULY, 2025.

M. ONYANGO

JUDGE

