



Abura v Coast Water Works Development Agency & 11 others (Petition E009 of 2025) [2025] KEELRC 2354 (KLR) (8 August 2025) (Ruling)

Neutral citation: [2025] KEELRC 2354 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
PETITION E009 OF 2025**

**M MBARÚ, J
AUGUST 8, 2025**

BETWEEN

OUCHO JOHN ABURA PETITIONER

AND

COAST WATER WORKS DEVELOPMENT AGENCY 1ST RESPONDENT

MINISTRY OF WATER, SANITATION AND IRRIGATION . 2ND RESPONDENT

MARTIN TSUMA 3RD RESPONDENT

KATANA DANIEL MWARINGA 4TH RESPONDENT

HAMID MBARAK 5TH RESPONDENT

MOHAMED MASOUDI MWAHMA 6TH RESPONDENT

JUDITH WABOSHA MWAMBURI 7TH RESPONDENT

GEORGE MAINA KARIUKI 8TH RESPONDENT

WALTER OSELU 9TH RESPONDENT

EDWIN MURIMI 10TH RESPONDENT

HAFSWA ABDALLA DELE 11TH RESPONDENT

STATE CORPORATION ADVISORY COMMITTEE 12TH RESPONDENT

RULING

1. The ruling herein relates to the question of whether this is a proper petition. The court invited the parties to file submissions and attended court on 21 July 2025 to make oral submissions.



2. The petitioner submitted that this is a constitutional petition against the respondents and the nature of claim can adequately addressed as herein done. In *Trusted Society of Human Rights Alliance v Attorney General & 2 others* [2012] eKLR, the court held that without overruling the *Anarita Karimi Njeru* case which laid the important rule of constitutional adjudication, that a person claiming constitutional infringement must give sufficient notice to the violation to allow the other party to prepare a response but under the new constitution, where a petition raises substantial issues. The court is directed correctly, and should address such a petition on the merits.
3. The petitioner submitted that in *Kericho ELRC Petition No. E008 of 2022*, the court held that the court should be careful in striking out a petition where the petitioner has addressed the rights and freedoms violated by the respondent. No matter how misguided a petition is, if it is a proper petition where the rights that have been violated are clearly stated, the court should hear it on the merits.
4. Procedural technicalities should not unreasonably restrict the court. Under Rule 10(3) and (4) of *the Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, the court may accept an oral application, a letter or any other informal documentation which discloses a denial, violation, infringement or threat to a right or fundamental freedom. The court should not unreasonably be restricted to procedural technicalities. In *Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & another* [2016] eKLR, the court held that the issue whether the court should determine the constitutional issue raised without compliance with the requirements stipulated under *Anarita Karimi Njeru v Republic* Case is that the decision must be read in light of Article 22(3) (b) and (d) of *the Constitution*. Under these provisions, the formalities and technicalities of pleadings should be to ensure substantive justice rather than procedural technicalities.
5. In this case, the petitioner's case can be discerned from the petition and the reliefs sought. It contains sufficient grounds to support the claims. There are rights that are threatened to be violated by the respondents and the 1st to 6th interested parties. The petition sets the legal foundation with specificity and relied on Article 234(2)(a)(i) of *the Constitution* read together with section 26 and 27 of the *Public Service Commission Act* on the powers and function to establish and abolish offices in the public service which is the exclusive mandate of the 7th interested party. The development or review of the human resource policy instruments of a public service entity such as the 1st respondent should be approved by the 7th interested party and not the 12th respondent. This is thus a proper petition.
6. The 4th, 6th, 7th, 8th, 9th, 10th, 11th respondents and 1st to 6th interested parties submitted that the petition has not met the constitutional petition threshold outlined in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* and the case of *Anarita Karimi Njeru v Republic* [1979] eKLR. A petition must be drawn with precision so that the respondent can respond to the particularized allegations. In *Matindi & 3 others v The National Assembly of Kenya & 4 others; Controller of Budget & 50 others (interested parties) Petition E080, E084, E150 of 2023 (Consolidated)* [2023] eKLR, the court held that a petitioner must with some precision identify the constitutional violations that were alleged to have been violated and how the provisions had been violated from the facts and evidence of the case.
7. *The Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules provide for the contents of a petition. Rule 10 requires that a petitioner state the nature of the injury caused or likely to be caused. These are matters lacking in this petition. The petitioner has failed to demonstrate with precision the rights and freedoms that have been violated. In *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*, the court held that although Article 22(1) of *the Constitution* gives every person the right to file suit claiming that a fundamental right of



freedom has been denied, violated or infringed, such party invoking this article has to show the rights said to be infringed as well as the basis of the grievance.

8. The petitioner has referenced various constitutional provisions without providing details of the allegations or explaining how they infringe on any rights or freedoms. The petitioner purports to set the legal foundation of the petition merely by citing and reciting *the Constitution*. The petitioner has defined himself as a spirited human rights defender and has filed the petition on his behalf and on behalf of the Kenyan public. He however failed to plead any particulars of violation or demonstrate how the conversion of the positions of Deputy Directors within the respondents has violated his rights under *the constitution*.
9. The 4th, 6th, 7th, 8th, 9th, 10th, 11th respondents and 1st to 6th interested parties submitted that the doctrine of constitutional avoidance and ripeness is that a case should be resolved by deciding a constitutional question if it can be resolved in some other fashion. The petitioner alleges irregularities in the conversion of employment terms and conditions and that there is discrimination in promotions and appointments. Such are matters that can well be addressed in a Memorandum of Claim held in *Sumayya Athmani Hassan v Paul Masinde Simidi & National Oil Corporation of Kenya* [2019] eKLR. The rights at work are now addressed under the *Employment Act* and *Labour Relations Act* to explain the rights under Article 41 of *the Constitution*. Further, under Rule 7 of the Employment and Labour Relations Court (Procedure) Rules, a party is allowed to file a claim and urge constitutional rights violations.
10. The court lacks jurisdiction to hear the instant petition. The filing of the petition is an abuse of the court process and should be struck out with costs
11. The 7th interested party supported the petition as properly filed and should be heard on the merits. The court is clothed with jurisdiction to hear constitutional petitions premised under Articles 22 and 258 of *the Constitution* and the *Employment and Labour Relations Court Act*. In *United States International University (USIU) v AG* (2012) eKLR, the court held that this court has jurisdiction under *the constitution* to interpret and apply constitutional provisions in employment and Labour relations disputes. To decline jurisdiction in this case would be to take the jurisprudence built over the years back.
12. The 1st, 2nd, 3rd and 12th respondents submitted that this is not a proper petition and the petitioner has not particularised the rights alleged to have been violated by the respondent. The petitioner had filed a Notice of Withdrawal of the Petition, which should be applied in terms of Order 25 of the Civil Procedure Rules, and the petition was dismissed.

Determination

13. The petitioner filed the Notice to withdraw the petition but this was not adopted as the order of the court. He later filed a Notice to Withdraw the Notice.

In the given circumstances, the petition is alive.

The petitioner is seeking the following orders:

- a. A declaration that the appointment of the employees of the 1st respondent previously on contract terms into substantive positions as permanent and pensionable without a comprehensive process is invalid, unlawful, unconstitutional and thus null and void.
- b. A declaration that the actions and conduct of the respondents and the interested parties are in breach and offend the express provisions of article 27 (3) of *the constitution* and also violates



the petitioner's legitimate expectations that actions of the respondents and interested parties shall be within the confines of the law.

- c. A declaration that the conversion of Coast Water Service Board terms of service to Coast Water Works Development Agency terms of service were not transparently done and should be revoked.
 - d. The court be pleased to revoke the appointment of the 3rd respondent as the acting chief executive officer of the 1st respondent.
 - e. The court be pleased to issue [...] revoking the appointment the 1st, 2nd, 3rd, 4th, 5th and 6th interested parties as the deputy directors of the 1st respondent.
 - f. The court be pleased to issue an injunction restraining the 3rd respondent from acting and performing the duties of the acting chief executive officer of the 1st respondent and or from continuing to hold such officer and or from withdrawing any salaries and allowances from the exchequer.
 - g. This court be pleased to issue an injunction restraining the 1st to 6th interested parties from acting and performing the duties of the deputy directors of the 1st respondent and or from continuing to hold office and or from withdrawing any salaries and allowances from the exchequer.
 - h. An order directing the 1st respondent to surcharge and recover all monies and allowances paid out to the 3rd respondent and the 1st to 6th interested parties.
14. A constitutional petition is allowed seeking to address the violation of any rights and freedoms. Indeed, under *the Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, a party seeking to file a petition is guided. However, the Supreme Court in the case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2015] KESC 15 (KLR) held that where statutory remedies exist, constitutional claims should not be entertained. The doctrines of constitutional avoidance and exhaustion demands that the statutory mechanism established to address any grievance mechanisms be applied first before taking the constitutional petition route as held in Chepkoech & 3 others (Suing as former members of the 2nd Respondent, for themselves on behalf of 143 other former members of the Union) v Kenya Plantation and Agriculture Workers Union (KPAWU) & another [2025] KEELRC 2054 (KLR).
15. In this regard, the Court of Appeal in the case of Sumayya Athmani Hassan v Paul Masinde Simidi & another [2019] KECA 107 (KLR) held that;

The right to fair Labour practices is part of the human rights secured by the Bill of Rights under Article 19 of *the Constitution*. By Article 21(4) of *the Constitution*, the State is required to enact and implement legislation to fulfill its international obligations in respect of Human Rights and Fundamental Freedoms.

By Article 22(1) as read with Article 22(3) and *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 - Legal Notice No. 117 of 2013, the Bill of Rights is enforced by filing a petition in the High Court and by Article 23(3), the Court may grant appropriate relief including a declaration of invalidity of any law that violates the Bill of Rights. The *Employment Act*, 2007 as revised in 2012 – after the coming into operation of the current Constitution, indicates in the preamble that one of its objects is to “declare and define the fundamental rights of employees”. Section



3 thereof provides that the Act applies to all employees employed by an employer under a contract of service except the classes of employees specified therein.

The [employment and Labour Relations Court Act](#) stipulates the procedure for the enforcement of employment rights.

16. In addressing the petition that had been filed before the court, the court further held that;

The Article 41 rights are enacted in the [Employment Act](#) and [Labour Relations Act](#). The two Acts and the rules made thereunder provide adequate remedy and orderly enforcement mechanisms. The 1st respondent filed a petition directly relying on the provisions of [the Constitution](#) for enforcement of contractual rights governed by the [Employment Act](#) without seeking a declaration of invalidity of the provisions of the [Employment Act](#) or alleging that the remedies provided therein are inadequate. The petition did not raise any question of the interpretation or application of [the Constitution](#).

17. Unless a petition seeks the interpretation or application of [the constitution](#), a petitioner should file a claim.

18. Under Rule 10(3) of the Employment and Labour Relations Court (Procedure) Rules, a party is allowed to urge its case and also;

3 Notwithstanding anything contained in this rule, a p e r s o n m a y seek the enforcement of any constitutional right and freedom or any constitutional provision in a statement of claim or other sui t f i l e d before t h e C o u r t .

19. In a Memorandum of Claim, a party is allowed to urge its case including the enforcement of constitutional provisions. Indeed, in this case, the orders sought by the petitioner, cited above, all relates to various declarations and the appointments of the respondents and interested parties without any matter seeking for the interpretations of [the constitution](#). The case for the 7 interested party and its constitutional mandate can also well be addressed in a Memorandum of Claim.

20. Invoking the constitutional route in this regard is unnecessary. Where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on [the Constitution](#) without challenging the legislation in question. See Communication Commission of Kenya & Others v Royal Media Services Limited & 5 others [2014] eKLR.

21. The court invited parties to address the instant matter. The arguments were rich and fostered the jurisprudence of the court.

22. Accordingly, the court finds this is not a proper petition and is hereby struck out. No orders on costs.

DELIVERED IN OPEN COURT AT MOMBASA, THIS 8 AUGUST 2025.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

