



**Kimiti v Teachers Service Commission & another (Petition
E086 of 2023) [2023] KEELRC 1786 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1786 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E086 OF 2023**

B ONGAYA, J

JULY 24, 2023

**IN THE MATTER OF ARTICLES 2(1), 3, 10, 22, 27, 35, 47,
50 AND 237 OF THE CONSTITUTION OF KENYA, 2010**

IN THE MATTER OF THE EMPLOYMENT ACT

**IN THE MATTER OF RULES 4(1), 10 (1) & (2), 23 AND 24 OF
THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

IN THE MATTER OF THE TEACHERS SERVICE COMMISSION ACT

IN THE MATTER OF THE STATUTORY INSTRUMENTS ACT NO. 23 OF 2013

**IN THE MATTER OF THE TSC HUMAN RESOURCE POLICIES
AND PROCEDURES MANUAL FOR SECRETARIAT STAFF, 2018**

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
UNDER ARTICLES 22, 27, 31, 47, AND 50 OF THE CONSTITUTION OF KENYA, 2010**

BETWEEN

ROBERT KYALO KIMITI PETITIONER

AND

TEACHERS SERVICE COMMISSION 1ST RESPONDENT

KENNETH MARANGU 2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Monday 24th July, 2023)

RULING

1. The petitioner filed an application by the notice of motion dated April 12, 2023 through Njeri Ngunjiri Advocates. The application invoked Article 35 (1) (b) of the [Constitution of Kenya, 2010](#),



Sections 68(1) and 69 of the Evidence Act, Section 1A, 1B, 3A, and 22 (a) of the Civil Procedure Act (Cap 21) and Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of law. The petitioner prayed for orders that the Court to issue an order directed at the 1st respondent to produce and avail within 14 days from the date of the order various documents in regards to matters in question in the petition and in particular:

- a. Proceedings of the disciplinary hearing held on September 1, 2021.
 - b. The investigation report that lead to the suspension and dismissal of the petitioner.
 - c. The auditor report in relation to an alleged loss of Kshs 150, 776.85.
 - d. The witness statement of the person who testified against the petitioner during the hearing on September 1, 2021.
 - e. A copy of the letter from the pensions department relating to thr retirement claim of Mr. Zablon Moruri Kengwerere TSC 145092.
2. The petitioner further prayed that the Court be pleased to make any further other orders within its inherent jurisdiction; and, costs of the application be provided for.
3. The application was based on the annexed petitioner’s affidavit and upon the following grounds:
- a. The petitioner was dismissed from employment on September 1, 2021 and thereafter wrote the letters dated September 28, 2021, November 25, 2021 and June 14, 2022 requesting to be supplied with various documents to use in the appeal but the 1st respondent did not reply the letters and the petitioner was locked out of the appeal process.
 - b. The petitioner’s advocate wrote the demand letter dated March 1, 2023 requesting for the documents and the 1st respondent responded by asking the petitioner pays Kshs 6, 700.00 for 67 paged documents and the amount was promptly paid at the respondent’s bank account. The petitioner has thereafter visted the 1s respondent more than four times requesting to be provided the documents so as to challenge his dismissal but he has been taken in circles and the documents not provided at all.
 - c. Under Article 35 the petitioner has a right to be provided the documents so as to enable determination whether the disciplinary panel was properly constituted and whether the instrument that was used by the 2nd respondent in dismissing the applicant was subjected to public participation as per Article 10 (2) (c).
 - d. The applicant will suffer irreparable harm if the documents are not provided as prayed for.
4. The respondents opposed by the suit by filing the notice of preliminary objection dated. It is urged that the 2nd respondent is protected from person liability per section 22(1) of the Teachers Service Commission Act No 20 of 2012. The suit does not raise justiciable issue or reasonable cause of action against the 2nd respondent. Thus, it was urged that the 2nd respondent is a misjoinder.
5. The respondents also filed the replying affidavit of Dr. Julius Olayo, respondent’s Director for Human Resource Management and Development. It is stated as follows:
- a. The claimant never delivered the letters dated September 28, 2021, November 25, 2021 and June 14, 2022 requesting for documents from the 1st respondent and the receipt stamp is missing on the exhibited letters. The 1st respondent received the petitioner’s Advocates’ letter dated March 10, 2023 requesting for various documents from the 1st respondent. The 1st



respondent assessed the amount it would cost to avail the documents internally per memo dated March 16, 2023 and the available documents were assessed at 67 pages and the Advocates for the petitioner asked to make necessary payment per section 117(2) of the HR Manual. The petitioner or the petitioner's Advocates provided no evidence of payment of the requisite fees. The respondents have become aware of the payment per exhibit RKK-IV in the supporting affidavit but which appears ineligible.

- b. That the respondent has not refused to supply the documents. There is no need for a Court order compelling the respondent to supply the documents.
6. The petitioner filed his further affidavit dated May 22, 2023 urging that he has made specific allegations and prayers against the 2nd respondent.
7. Parties have filed their final submissions on the preliminary objection.
8. To answer the 1st issue the Court returns that the presence of the 2nd respondent is necessary for the efficient, effective, conclusive and complete determination of the matters in dispute. The 2nd respondent may not be held liable for the things done in his official capacity and in good faith. However, that by itself does not mean that in the instant case where specific allegations have been made and prayers or claims said to have been made, the 2nd respondent would thereby become unnecessary party. The Court considers that whether the 2nd respondent acted in good faith is an issue of fact to be determined at or after the full hearing of the petition - and so on that account it appears such contested fact renders the preliminary objection to fail to meet the threshold of a pure point of law based on undisputed facts.
9. As to whether the prayer in the application should issue, the respondents have stated that they have not refused to provide the documents but it was only that the payment had not been confirmed. In the circumstances the documents be served upon the respondent's counsel by August 5, 2023.

In conclusion, the application and the preliminary objection is hereby determined with orders:

- a. The preliminary objection is dismissed.
- b. The 1st respondent to serve upon the claimant's Advocates the documents as prayed for in the notice of motion by August 5, 2023 and an affidavit of service be filed in court for the 1st respondent accordingly.
- c. The parties to fix a mention date for further directions in the petition.
- d. Costs of the preliminary objection and the application in the cause.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS MONDAY 24TH JULY, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

