



**Karanja v Teachers Service Commission & 8 others (Constitutional Petition 24 of 2021) [2022] KEELRC 4102 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4102 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CONSTITUTIONAL PETITION 24 OF 2021  
DN NDERITU, J  
SEPTEMBER 22, 2022**

**BETWEEN**

**JOSEPH NGETHE KARANJA ..... PETITIONER**

**AND**

**TEACHERS SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY RESPONSIBLE FOR BASIC  
EDUCATION ..... 2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**KENYA UNION OF POST PRIMARY EDUCATION TEACHERS  
(KUPPET) ..... 4<sup>TH</sup> RESPONDENT**

**KENYA NATIONAL UNION OF TEACHERS (KNUT) ..... 5<sup>TH</sup> RESPONDENT**

**KENYATTA UNIVERSITY ..... 6<sup>TH</sup> RESPONDENT**

**MOUNT KENYA UNIVERSITY ..... 7<sup>TH</sup> RESPONDENT**

**RIARA UNIVERSITY ..... 8<sup>TH</sup> RESPONDENT**

**KENYA EDUCATION MANAGEMENT INSTITUTE ..... 9<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**I. Introduction**

1. In a petition dated 27<sup>th</sup> September, 2021 filed in court on the same date, the Petitioner is seeking following:-



1. Declaration that in formulating and seeking to implement the teacher professional development (TPD) programme, the respondents failed to observe and uphold Articles 10, 41, 47 and 232 of the *Constitution* of Kenya.
  2. A permanent order of injunction restraining the Respondents or any of its employees, officers or agents from implementing and/or further enrolling teacher professional development (TPD) programme.
  3. A declaration that the 1<sup>st</sup> Respondent's directive requiring compulsory teacher professional development (TPD) module is illegal and unconstitutional, an affront to teachers fair labour practices and therefore null and void.
  4. A declaration that the Collective Bargaining Agreements between the 1<sup>st</sup> Respondent and 4<sup>th</sup> & 5<sup>th</sup> Respondents are null and void to the extent that they recognize that every member shall undertake the professional Teacher Development programmes.
  5. A declaration that the appointment of the 6<sup>th</sup> – 9<sup>th</sup> Respondents was irregular, illegal, and therefore null and void.
  6. A declaration that Regulation 48 of the *Teachers Service Commission Code of Regulations for Teachers Regulations*, 2015 is unconstitutional thus null and void ab initio.
  7. Costs of this petition.
2. The petition is supported by an affidavit sworn by the Petitioner on even date with several annexures thereto.
  3. Along with the petition was filed a Notice of motion dated 27<sup>th</sup> September, 2021 seeking for some interim/conservatory orders but the same was withdrawn on 7<sup>th</sup> October, 2021 to pave way for the expeditious hearing and disposal of the petition.
  4. In response to the petition the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> Respondents filed replying affidavits on record to which several attachments are annexed.
  5. On 7<sup>th</sup> October, 2021 Counsel for all the parties consented that the petition be heard and disposed of by way of written submissions. Subsequently, submissions were received on record from the Petitioner and the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents.

## II. Parties To The Petition

6. The Petitioner, Joseph Ng'ethe Karanja, describes himself as a Kenyan citizen and an education consultant, residing and working for gain within the Republic of Kenya. However, he has not alluded to the qualifications as such consultant and or whether he works in the education section. He is represented by Githui & Co. Advocates in this petition.
7. The 1<sup>st</sup> Respondent is a constitutional Commission under Article 252 of the *Constitution* of Kenya and its establishment and roles are spelt out under the *Teachers Service Commission Act* No. 20 of 2021 (TSC Act).
8. The 2<sup>nd</sup> Respondent is the Cabinet Secretary in-charge of the ministry responsible for all matters relating to basic education in the Republic of Kenya.
9. The 3<sup>rd</sup> Respondent is the Attorney General of the Republic, the Chief legal advisor to the Government of Kenya.



10. The 4<sup>th</sup> and 5<sup>th</sup> Respondents are duly registered trade unions under the provisions of the *Labour Relations Act* representing the interests of teachers and drawing membership from members of the teaching profession.
11. The 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> Respondents are either public or private universities duly established under the *Universities Act* (Cap 210B), offering various courses of higher education within the Republic and regionally.

### III. Petitioner's Case

12. The Petitioner posits that pursuant to Regulation 48 of the *Teachers Service Commission Code of Regulation for Teachers*, 2015 (Code of Regulation) every registered teacher is required to undertake a teacher professional development programme recommended by the 1<sup>st</sup> Respondent from time to time.
13. Further, the Petitioner states that vide separate collective Bargaining Agreements (CBAs) between the 1<sup>st</sup> Respondent on the one hand and the 4<sup>th</sup> and 5<sup>th</sup> Respondents on the other, both dated 13<sup>th</sup> July, 2021 the parties acknowledged the contents of the foregoing paragraph paving the way for members of the 4<sup>th</sup> and 5<sup>th</sup> Respondents to undertake the teacher professional development programme training.
14. The Petitioner alleges that on or around 22<sup>nd</sup> September, 2021 the 1<sup>st</sup> Respondent launched the aforesaid programme which shall henceforth determine the promotion and continued employment of teachers by the 1<sup>st</sup> Respondent.
15. The Petitioner alleges that all teachers are now required to undertake six (6) modules each lasting a period of five (5) years and that it shall take 30 years for each teacher to complete the training.
16. Further, the Petitioner alleges that each teacher is expected to pay Kshs.6,000/= per annum for the said training to be offered exclusively by the 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, and 9<sup>th</sup> Respondents.
17. The Petitioner argues that the teachers and other stakeholders in the education sector were not engaged or consulted by the 1<sup>st</sup> Respondent in the developing the contents of the modules of the training. He further argues that it is unfair for the costs of the training to be transferred to the teachers rather than being met by the 1<sup>st</sup> Respondent, the employer.
18. The Petitioner is protesting that the appointment of the 6<sup>th</sup> to 9<sup>th</sup> Respondents as the exclusive providers of the training was arbitrary and unprocedural.
19. On the basis of the foregoing allegations the Petitioner contends that the Respondents have violated various constitutional provisions as hereunder.

### IV. Alleged Constitutional Violations

20. The Petitioner alleges that in taking the steps alluded to above, the Respondents, and particularly the 1<sup>st</sup> Respondent, violated the national values and principles of governance in Article 10 of the *Constitution* which provides as follows:-
  - (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them--
    - (a) applies or interprets this Constitution;
    - (b) enacts, applies or interprets any law; or
    - (c) makes or implements public policy decisions.



- (2) The national values and principles of governance include--
- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
  - (b) human dignity, equity, social justice, inclusiveness, equality, human rights non-discrimination and protection of the marginalised;
  - (c) good governance, integrity, transparency and accountability; and State and religion.  
National symbols and national days. National values and principles of governance. 16  
The *Constitution* of Kenya
  - (d) sustainable development.
21. The Petitioner alleges that the 1<sup>st</sup> Respondent in conjunction with the other Respondents introduced the compulsory teacher professional development programme training without undertaking public participation, without engaging stakeholders including teachers, and unprocedurally and arbitrarily appointed the 6<sup>th</sup> to 9<sup>th</sup> Respondents as the sole providers of that service without following open and transparent tendering process as provided in law.
22. The Petitioner also alleges that the Respondents, and particularly the 1<sup>st</sup> Respondent, violated Article 41 of the *Constitution* in that subjecting the teachers to compulsory training amounts to unfair labour practice.
23. Article 41 of the *Constitution* provides as follows:-
- 41.
- (1) Every person has the right to fair labour practices.
  - (2) Every worker has the right— (a) to fair remuneration; (b) to reasonable working conditions; (c) to form, join or participate in the activities and programmes of a trade union; and (d) to go on strike.
  - (3) Every employer has the right— (e) to form and join an employers organisation; and (f) to participate in the activities and programmes of an employers organisation.
  - (4) Every trade union and every employers’ organisation has the right –
    - (a) to determine its own administration, programmes and activities;
    - (b) to organise; and
    - (c) to form and join a federation.
  - (5) Every trade union, employers’ organisation and employer has the right to engage in collective bargaining.
24. The Petitioner alleges that in pegging further employment and promotion of teachers on the said training the Respondents, and particularly the 1<sup>st</sup> Respondent, was unilaterally imposing unfair and unreasonable conditions of employment. This, the Petitioner alludes, coupled with the costs imposed on the teachers will adversely affect career and professional development of many teachers. He alleges that the 1<sup>st</sup> Respondent has acted ultra vires Article 41 of the *Constitution* on fair labour practices.
25. Further, the Petitioner alleges that the Respondents have violated and abused Article 47 by unlawfully, unreasonably, and unprocedurally denying teachers fairness in the manner that the programme has



been rolled out. He argues that the implementation of the programme is an administrative action as envisaged in Article 47 of the Constitution.

26. Article 47 of the Constitution provides as follow:-

47.

- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
- (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
  - (a) provide for the review of administrative action by a court or if appropriate, an independent and impartial tribunal; and
  - (b) promote efficient administration.

27. Lastly, the Petitioner alleges that the Respondents, and particularly the 1<sup>st</sup> Respondent, violated Article 232 of the Constitution for failing to engage stakeholders, and moreso the teachers who are directly affected, before rolling out the programme.

28. Article 232 is on values and principals of public service and provides as follows:

- (1) The values and principles of public service include—
  - (a) high standards of professional ethics;
  - (b) efficient, effective and economic use of resources;
  - (c) responsive, prompt, effective, impartial and equitable provision of services;
  - (d) involvement of the people in the process of policy making;
  - (e) accountability for administrative acts;
  - (f) transparency and provision to the public of timely, accurate information;
  - (g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;
  - (h) representation of Kenya’s diverse communities; and
  - (i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of -
    - (i) men and women;
    - (ii) the members of all ethnic groups; and (iii) persons with disabilities.
- (2) The values and principles of public service apply to public service in-
  - (a) all State organs in both levels of government; and
  - (b) all State corporations.



- (3) Parliament shall enact legislation to give full effect to this Article.
29. The Petitioner attached copies of the CBAs between the 1<sup>st</sup> Respondent and the 4<sup>th</sup> Respondent and the other one with the 5<sup>th</sup> Respondent as exhibits, among other exhibits.
30. It is on the basis of the foregoing, together with the submissions by his Counsel, that the Petitioner prayed that the orders sought for in the petition be granted.

#### V. 1<sup>st</sup> Respondent's Case

31. The case and position taken by the 1<sup>st</sup> Respondent is contained in the replying affidavit of Dr. Reuben Nthambiri Mugwuku sworn on 29<sup>th</sup> November, 2021 together with the annexures thereto and the written submissions filed by its Counsel instructed by M/S Mirugi Kariuki & Co Advocates.
32. The deponent states that the 1<sup>st</sup> Respondent is established under Article 237 of the Constitution as follows:-
- (1) There is established the Teachers Service Commission.
  - (2) The functions of the Commission are—
    - (a) to register trained teachers;
    - (b) to recruit and employ registered teachers;
    - (c) to assign teachers employed by the Commission for service in any public school or institution;
    - (d) to promote and transfer teachers;
    - (e) to exercise disciplinary control over teachers;
    - (f) to terminate the employment of teachers.
  - (3) The Commission shall -
    - (a) review the standards of education and training of persons entering the teaching service;
    - (b) review the demand for and the supply of teachers; and
    - (c) advise the national government on matters relating to the teaching profession.
33. The deponent states that the 1<sup>st</sup> Respondent has mandate to review the standards of education and training of persons joining the teaching profession and also advise the Government on matters relating to the teaching profession.
34. The 1<sup>st</sup> Respondent argues that under Section 11 of the Teachers Service Commission Act (TSC Act) No. 20 of 2012, which operationalises Article 237, the 1<sup>st</sup> Respondent has mandate to formulate policies to achieve its mandate, ensure that teachers comply with the prescribed teaching standards, facilitate career progression and professional development for teachers, monitor the conduct and performance of teachers in service, and do all such other things as may be necessary for the effective discharge of its functions and powers, among other things.
35. To further illuminate on its function in requiring every registered teacher to undertake career progression and professional development programmes training, the 1<sup>st</sup> Respondent has cited Section 35 of the TSC Act and Regulations 48 and 49 of the Teaches Service Commission Code of Regulations



*for Teachers*, 2015. In particular, Regulation 48 provides that “(1) Every teacher shall undertake the professional teacher development programmes prescribed or recommended by the commission from time to time.”

36. Regulation 49 provides that upon completion of a professional teacher development programme each teacher shall be issued with a teaching certificate which shall indicate the effective date and shall be valid for five (5) years or for such other period as the 1<sup>st</sup> Respondent may prescribe. A teacher who fails to undertake the training, and after being allowed two years to comply, may be terminated from service. Newly registered teachers are issued with a teaching certificate which shall be valid for five (5) years.
37. The 1<sup>st</sup> Respondent disputes and discounts the allegation by the Petitioner that it will take 30 years for a teacher to complete the training and obtain a certificate. The 1<sup>st</sup> Respondent states that after taking one module the certificate will be issued and be valid for five (5) years.
38. The deponent argues that unlike other professions where members are required to take out a certificate annually, at the cost of such members, the 1<sup>st</sup> Respondent has been fair and reasonable not to burden the teachers by requiring them to pay only Kshs.6,000/= for a certificate valid for five(5) years before going back to be trained on another module and renew the certificate.
39. The deponent states that what the 1<sup>st</sup> Respondent has done in launching the training is not ultra vires but it is executing the mandate donated to it by Article 237 of the *Constitution*, Sections 11 and 35 of the *TSC Act*, and Regulations 48 and 49 of the *Teachers Service Commission Code of Regulations for Teachers*, 2015.
40. The 1<sup>st</sup> Respondent posits that the 4<sup>th</sup> and 5<sup>th</sup> Respondents, being lawful representatives of the teachers, were fully engaged in the development of the modules and launching of the programme as contained in the CBAs executed to that effect as exhibited by the Petitioner in his supporting affidavit to the petition.
41. The 1<sup>st</sup> Respondent has alluded that it had launched the programme in 2018 but the 5<sup>th</sup> Respondent successfully challenged the said launching in court. However, after a lengthy and a painful period of negotiations and consultations, the parties, including the teachers represented by the 4<sup>th</sup> and 5<sup>th</sup> Respondents, agreed that the programme be rolled out in September, 2021.
42. The 1<sup>st</sup> Respondent argues that this training for the teachers is what is referred to as continuing professional development in other professions. In the legal profession, for example, lawyers pay to attend the programmes for continuous development of their skills each year and are then issued with annual certificates. The 1<sup>st</sup> Respondent states that there is nothing unreasonable or unfair if the teachers are required to pay a meagre fee of Kshs.6,000/= to earn a certificates that is valid for five (5) years. The 1<sup>st</sup> Respondent views the arrangement as fair and reasonable considering all the relevant factors.
43. Contrary to what is alleged by the Petitioner, the 1<sup>st</sup> Respondent denies that attending the training programmes is or forms the basis for teachers promotion and states that teacher promotion is based on an entirely different criteria founded on different rules and regulations.
44. The 1<sup>st</sup> Respondent argues that besides the fact that the training is provided for in law, it is also good in improving the standards and professionalism of teachers leading to better quality education. The 1<sup>st</sup> Respondent states that the Petitioner has either misapprehended the law relevant to the programme and training or that he has deliberately set out on a mission to mislead the court in this petition.
45. For the all reasons stated above the 1<sup>st</sup> Respondent argues that the petition fails short of the standards set out in *Mumo Matemu V Trusted Society Of Human Rights Alliance & 5 Others* (2013) eKLR and hence prays that the same be dismissed with costs.



## VI. 2<sup>nd</sup> And 3<sup>rd</sup> Respondents' Case

46. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not file a replying affidavit to the petition, there is none in the court file. However, they filed joint written submissions through Chepkirui Janet, a Senior Litigation Counsel in the office of the 3<sup>rd</sup> Respondent.
47. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are opposed to the petition and view the same as frivolous and an abuse of the court process and pray for the dismissal of the same with costs. The submissions by counsel shall be considered along with the others at a later part of this judgment.

## VII. 4<sup>th</sup> Respondent's Case

48. The position taken by the 4<sup>th</sup> Respondent is contained in the replying affidavit of Akelo M. T. Misori and the written submissions by Counsel instructed by Tripple A Advocates. The deponent is the Secretary General of the 4<sup>th</sup> Respondent, a trade union whose membership is exclusively made of teachers.
49. The deponent states that the carrier progression guidelines for the teaching service were developed by the 1<sup>st</sup> Respondent and became operational with effect from 8<sup>th</sup> November, 2017. He further stated that vide a letter dated 2<sup>nd</sup> May, 2018 the 1<sup>st</sup> Respondent invited stakeholders to read and comment on the guidelines. The teachers and members of the public were free to comment as well.
50. The deponent states that several meetings were held where the teachers through their unions made their comments on and contributions to the guidelines and the modules. He states that meetings and retreats were held on 17<sup>th</sup> October, 2021, 16<sup>th</sup>, 17<sup>th</sup> September, 2021, and 11<sup>th</sup> November, 2021 wherein the feedback from the stakeholders were assessed and incorporated into the programme and the modules content.
51. He depones that the 4<sup>th</sup> Respondent represents over 11,000 teachers and that it entered into the CBA dated 13<sup>th</sup> July, 2021 with the full consent, mandate and authority from the said membership. He states that the 4<sup>th</sup> Respondent is in full support of the programme rolled out by the 1<sup>st</sup> Respondent as mandated by Regulations 48 and 49 of the *TSC Code of Regulation for Teachers*, 2015. He argues that the programme enhances the professional capacity and performance for all the teachers.
52. While the deponent admits that there is room for improvement in the programme, he states that there is nothing unlawful in the manner the 1<sup>st</sup> Respondent launched the same and prays that the petition be dismissed with costs as the same does not meet the threshold set in the Anarita Karimi Njeru and the Mumo Matemu decisions.

## VIII. 5<sup>th</sup> Respondent's Case

53. The 5<sup>th</sup> Respondent filed a replying affidavit sworn by the Secretary General, Henry Collins Oyuu, on 17<sup>th</sup> February, 2022 and written submissions by their Counsel instructed by Oraro & Co. Advocates.
54. The 5<sup>th</sup> Respondent is opposed to the petition and took a similar position to that of the 4<sup>th</sup> Respondent. The 5<sup>th</sup> Respondent takes issue with the petition for not meeting the threshold set out in the Anarita Karimi Njeru and the Mumo Matemu decisions and prays that the petition be dismissed with costs in li mine.
55. The deponent alludes that the Teacher Professional Development (TPD) is properly anchored in the law specifically Sections 11 and 35 of the *TSC Act* and Regulations 48 and 49 of the *Code of Regulations of Teachers*, 2015.



56. The deponent acknowledges that the 5<sup>th</sup> Respondent had challenged the launching of the TPD programme in 2018 through court but that the case has since been compromised and the differences resolved. To that extent the deponent argues that this court has no jurisdiction to hear and determine this petition. He attached a copy of the judgment and the order of stay from the Court of Appeal.
57. The deponent states that the 5<sup>th</sup> Respondent entered into a CBA with the 1<sup>st</sup> Respondent as a representative of thousands of teachers and that the 5<sup>th</sup> Respondent is in concurrence with the 1<sup>st</sup> Respondent on the launching and rolling out of the TPD in September, 2021. He has attached a copy of the CBA.
58. On the basis of the foregoing, the 5<sup>th</sup> Respondent prays that this petition be dismissed with costs.

#### **IX.6<sup>th</sup> Respondent's Case**

59. The 6<sup>th</sup> Respondent is opposed to the petition and in so doing filed a replying affidavit sworn by Dr. Olivia Opere sworn on 27<sup>th</sup> January, 2022 and written submissions by Lawrence Mungai & Co. Advocates. The deponent is the coordinator for TPD Programme and team leader of the same for the 6<sup>th</sup> Respondent.
60. She depons that in February, 2018 the 1<sup>st</sup> Respondent made a public advertisement inviting qualified and competent service providers to submit their expression of interest in the provision of the TPD training and related programmes for registered teachers in Kenya. She annexed a copy of the said advertisement.
61. She sates that in accordance with Regulations 51 of the *Teachers Service Code of Regulation for Teachers*, 2015 the 6<sup>th</sup> Respondent expressed interest to provide the service as advertised. The said regulation allows the 1<sup>st</sup> Respondent “to enter into agreements with such other bodies or organisations as it may consider appropriate to facilitate continuous professional teacher development programmes.”
62. The 6<sup>th</sup> Respondent submitted its expression of interest and following what the deponent considers to have been a competitive and transparent tendering process, the 6<sup>th</sup> Respondent was accredited by the 1<sup>st</sup> Respondent to be one of the institutions to offer the training in TPD programmes and modules.
63. The deponent has annexed a copy of the expression of interest document and the contract executed between the 6<sup>th</sup> Respondent and the 1<sup>st</sup> Respondent.
64. The deponent states that the Petitioner has failed to point out any irregularities in the tendering and procurement process and that the petition fails to meet the threshold set in the Anarita Karimi Njeruand the Mumo Matemudecisions and prays that the petition be dismissed with costs.

#### **X .7<sup>th</sup> Respondent's Case**

65. The position taken by the 7<sup>th</sup> Respondent is expressed in the replying affidavit of Dr. Christopher Mutembei and the written submissions by Adera & Kenyatta Advocates.
66. Without the need of reproducing the contents, the 7<sup>th</sup> Respondent lays its case in a similar manner as that of the 6<sup>th</sup> Respondent above. The 7<sup>th</sup> Respondent expressed an interest to offer the TPD Programme training following an advertisement on the website of the 1<sup>st</sup> Respondent on 12<sup>th</sup> February, 2018.
67. After what the 7<sup>th</sup> Respondent considers to have been a transparent and lawful tendering and procurement process the 1<sup>st</sup> Respondent appointed the 7<sup>th</sup> Respondent as one of the institutions to



offer the TPD training and related programmes for registered teachers in Kenya. The deponent has annexed a copy of the expression of interest document and the contract entered into between the 7<sup>th</sup> Respondent and the 1<sup>st</sup> Respondent for the service.

68. The deponent posits that the petition has not pointed out any irregularities in the tendering and procurement process and or violation of law or the Constitution. Further, the deponent states that the regulations, and moreso Regulations 48 and 49, have been in force since 2015 and the same have not been challenged and what the 1<sup>st</sup> Respondent has now undertaken is implementation of the same.
69. On the basis of the foregoing, the 7<sup>th</sup> Respondent states that the petition is baseless and misconceived and prays for dismissal of the same with costs.

#### **XI. 8<sup>th</sup> Respondent's Case**

70. The 8<sup>th</sup> Respondent filed a replying affidavit sworn by Dr. Julius Otundo, the Director and acting Dean of department of education, on 26<sup>th</sup> November, 2021. There is also joint written submission for the 7<sup>th</sup> and 8<sup>th</sup> Respondents filed by Adera & Kenyatta Advocates.
71. To a large extent, the 8<sup>th</sup> Respondent has taken the same position as that of the 7<sup>th</sup> Respondent in opposition to the petition.
72. The 8<sup>th</sup> Respondent expressed an interest in offering the TPD programme training following an advertisement placed on the website of the 1<sup>st</sup> Respondent on 12<sup>th</sup> February, 2018.
73. Following what the 8<sup>th</sup> Respondent considers to have been a lawful tendering and procurement process it was identified as one of the suitable institutions to offer the training. The deponent has annexed a copy of the expression of interest and the contract with the 1<sup>st</sup> Respondent.
74. The 8<sup>th</sup> Respondent is of the view that the Petitioner has not pointed out any violations of the Constitution or the law and that the Petitioner has either misapprehended the entire programme and the law applicable or that he has deliberately decided to mislead the court by misrepresenting facts and the law obtaining. On the basis of the foregoing the 8<sup>th</sup> Respondent prays that this petition be dismissed with costs.

#### **XII. 9<sup>th</sup> Respondent's Case**

75. The 9<sup>th</sup> Respondent filed a replying affidavit sworn by Dr. Maurice Odongo on 7<sup>th</sup> February, 2022 in opposition to the Notice of motion dated 27<sup>th</sup> September, 2021, but Counsel instructed by Gathumbi & Co. Advocates informed the court that they did not wish to file written submissions. I have not seen any response filed in reply to the petition. The replying affidavit to the petition, allegedly sworn by the said deponent on 2<sup>nd</sup> February, 2022 as per Counsel, is not on record.
76. As such this court shall proceed without the benefit of the response from the 9<sup>th</sup> Respondent.

#### **XIII. Issues For Determination**

77. From the foregoing analysis of the various positions taken by the parties it is the view of this court that the following issues commend themselves to this court for determination:-
  - (a) Is this court clothed with the necessary legal and constitutional jurisdiction to hear and determine this petition?
  - (b) If (a) above is in the affirmative, does the petition meet the legal threshold required?



- (c) If (b) above is in the affirmative, is the Petitioner entitled to the orders sought?
- (d) Costs.

#### **XIV. Jurisdiction**

78. The profound statement by Nyarangi J in the *Owners of Motor Vessel Lilian S v Caltex Oil (Kenya) Ltd* (1989) KLR stands and holds true to this day. A court can only handle and deal with matters that are within its legal mandate and anything done without jurisdiction is ultra vires, illegal, null, and void.
79. This court is established under Article 162(1)(2)(a) of the *Constitution* and its jurisdiction is delineated under Section 12 of the *Employment and Labour Relations Court Act*, No. 20 of 2011.
80. There is no argument that the issues at the core of this petition relate to an employment and or labour relationship between teachers and their employer, the 1<sup>st</sup> Respondent Other than stating that he is a consultant in matters education, there is no evidence that the Petitioner is a teacher or a registered teacher in Kenya. There is also no evidence that the Petitioner is a member of the recognised and duly registered teachers trade unions being the 4<sup>th</sup> and 5<sup>th</sup> Respondents herein.
81. However, be that as it may, this is a Constitutional Petition founded on Article 22 of the *Constitution* which provides as follow:-
- (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
  - (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by-
    - (a) a person acting on behalf of another person who cannot act in their own name;
    - (b) a person acting as a member of, or in the interest of, a group or class of persons;
    - (c) a person acting in the public interest; or
    - (d) an association acting in the interest of one or more of its members.
  - (3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that--
    - (a) the rights of standing provided for in clause (2) are fully facilitated;
    - (b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;
    - (c) no fee may be charged for commencing the proceedings;
    - (d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and (e)



an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court.

- (4) The absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court.

82. Going by the materials placed before court the Petitioner has anchored his petition on Article 22(c) of the Constitution, that he is acting in public interest.
83. Good quality education can only be delivered by good and well trained professional teachers and in turn affects the development of the Republic in all spheres. In this simple context, the matters in this petition are in nature of public interest. It is in the interest of every conscious nation that the foundation of its future leaders, engineers doctors, lawyers, teachers, economists, et al, be grounded on good educational foundation disseminated by professional and well trained teachers right from the basic education level.
84. However, the issue of jurisdiction has been raised by the 5<sup>th</sup> Respondent who argues that this matter was deliberated on by this court (ELRC) and the Court of Appeal and a decision made. The 5<sup>th</sup> Respondent, in so many words argues that this petition is either res judicata or that similar issues as those raised in this petition are still pending in court.
85. This court has gone through the judgment of Ongaya J in Nairobi ELRC Petition No. 151 of 2018 delivered on 12<sup>th</sup> July, 2019 and the consent order recorded in the Court of Appeal in Nairobi Civil Application No. 73 of 2020. The subject matter of the petition before Ongaya J was substantially different from the matter before this court. The parties were also different and there is no information on the status of the appeal, or intended appeal, in the Court of Appeal.
86. The Petition before Ongaya J related to legality or otherwise of a strike that had been called by the 5<sup>th</sup> Respondent herein (KNUT) as a result of which the 1<sup>st</sup> Respondent herein had gone to court to challenge the same. The parties to that petition were encouraged by the court to engage and iron out their issues including issues of TPD trainings, transfers of teachers, fees on TPD trainings, among other issues. These are very different issues from those raised by the Petitioner in this petition as outlined in Part I of this judgment.
87. It is unfortunate that as at the time of writing this judgment page 9 of the 5<sup>th</sup> Respondent's Counsel written submissions is missing and as such this court does not enjoy the benefit of the arguments therein on this issue. However, based on the foregoing paragraphs of this judgment this petition is neither res judicata nor ultra vires the legal jurisdiction and mandate of this court. The first issue is hence determined in the affirmative.

## **XV.Threshold**

88. This court shall deal with the issue of threshold simultaneously with that of burden of proof such that as the court deals with the question of whether this petition meets the constitutional and legal requirements of a petition it shall also determine whether the allegations made by the Petitioner have been proved.
89. In his petition the Petitioner alleges violation of Rights or Fundamental Freedoms under Articles 10, 33, 41, 347, 232, and 237 of the Constitution. However, while the Petitioner has listed the particulars of alleged violation or breach of the other Articles, he has not given particulars in respect of Articles 33 and 237. Be that as it may, it is not adequate to plead Articles of the Constitution and providing the



particulars of the alleged violations or breaches. A Petitioner must prove the petition to the required standard.

90. The leading authority on the threshold of a constitutional petition which has withstood the test of time and hence quoted and cited over and over again is the Anarita Karimi Njeru case. Among the most prominent cases that have followed and applied the same principles is the Mumo Matemu case. So, what is the threshold?
91. A Petitioner has to plead with clear and concise specificity the particulars provision of the constitution that are alleged to have been violated or breached. More importantly, a Petitioner has to provide and avail evidence to prove the alleged violation or breach.
92. The above two decisions have been relied upon by the Respondents in support of the argument that this petition does not meet the threshold. In Anarita Karimi Njeru the following passage illuminates on the threshold:-

“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, and the provision said to infringed, and the manner in which they are alleged to be infringed.”
93. Besides what is extracted above from the Anarita Karimi Njeru case, to state what should rather be obvious, a Petitioner, besides stating the constitutional provision(s) allegedly violated with precision and giving the particulars of the violation or breach, has to prove the same as required by law.
94. This court shall now proceed to examine each of the provisions allegedly violated or breached and determine whether the same has been proved. To reiterate the above, it is not in the nature of the law for a Petitioner to throw a petition to the face of the court alleging violation or breach of some constitutional provisions and expect the court to automatically remedy the same without proof regardless of whether the petition is defended or not.
95. The Petitioner alleges that the Respondents, and in particular the 1<sup>st</sup> Respondent, has violated Article 10 of the Constitution for purporting to introduce compulsory TPD programme without first conducting public participation. As stated in an earlier part of this judgment, it is on record that meetings were held and the representatives of the teachers, the 4<sup>th</sup> and 5<sup>th</sup> Respondents, attended the fora and gave their input.
96. Further, the 1<sup>st</sup> Respondent entered into CBAs with the 4<sup>th</sup> and 5<sup>th</sup> Respondents to iron out the differences that existed in 2018 as captured in Petition No. 151 of 2018 between the 1<sup>st</sup> Respondent and the 5<sup>th</sup> Respondent and the other parties thereto.
97. The 4<sup>th</sup> and 5<sup>th</sup> Respondents, duly registered trade unions, whose membership is exclusively made up of registered teachers have availed evidence of participation and consultations before the rolling out of the programme in their respective replying affidavits and the annexures thereto.
98. The Petitioner has not provided any evidence that any member in the teaching profession or public who wished to give an input was denied the opportunity of doing so. As noted elsewhere in this judgment, any person who wished to participate in the introduction, launching, and rolling out of the programme was given a chance to do so by way of an open invitation from the 1<sup>st</sup> Respondent.
99. This court is of the considered opinion that unless the law otherwise provides, the basic and cardinal rule of evidence is that he who alleges must prove based on Section 107 of the Evidence Act (Cap 80).



This is exactly what the court restated in *Abdulmajid Ramadhan & 3 Others* (2017) eKLR when it stated that “The onus was upon the Petitioners to show the court in what manner their constitutional rights have been threatened or violated.” Likewise, in *Dr. Rev Timothy Njoya v The AG. & Others* the court had this to say about the burden of proof:-

“The Petitioner cannot come to court to seek facts and information he intends to use to prove the very case that he is arguing before the court.”

100. This court notes that what the Petitioner is challenging is not the law and or policy applied by the 1<sup>st</sup> Respondent but rather the manner of implementation of the said law and policy. This court has outlined the law applicable in the TPD training tracing the same way back from Article 237 of the *Constitution*, Sections 11 and 35 of the *TSC Act*, and Regulations 41, 48, and 49 of the *Code of Regulation for Teachers*, 2015.
101. The Petitioner has not provided any evidence on how the 1<sup>st</sup> Respondent or indeed any of the other of the Respondents violated the above provisions of the *Constitution* and the law. Likewise, there is no evidence availed by the Petitioner on how the CBAs entered separately between the 1<sup>st</sup> Respondent and the 4<sup>th</sup> and 5<sup>th</sup> Respondents respectively are unlawful or invalid.
102. The other front raised by the Petitioner is that the 6<sup>th</sup> to 9<sup>th</sup> Respondents were arbitrarily appointed by the 1<sup>st</sup> Respondent to offer training in the TPD programme. However, beyond that allegation the Petitioner has not provided any evidence of violation of the procurement laws. There is no evidence of a complaint from a bidder who failed to win the award complaining of the bidding, tendering, and procurement process. As stated elsewhere in this judgment, it is not enough for a party to make an allegation and expect the court to automatically find in its favour. A party in a case, unless the law provides otherwise, always bears the burden of proof.
103. The other Article that the Petitioner alleges has been violated by the Respondent is Article 41. The particulars given by the Petitioner is that the compulsory TPD programme amounts to unreasonable working condition as “imposed” by the 1<sup>st</sup> Respondent. Firstly, the 1<sup>st</sup> Respondent has not “imposed” the programme and the training on the teachers as it has been found above that the same is properly grounded in law. Secondly, the 1<sup>st</sup> Respondent has substantiated that the training is not the basis or criteria upon which teachers are promoted. The Petitioner did not reply to that assertion by the 1<sup>st</sup> Respondent.
104. It is a matter of public notoriety that almost all professional people in the Republic undergo professional development programmes and training and obtain an annual certificate in order for them to remain in good professional standing. Whether it is lawyers, doctors, engineers, surveyors etc, all members of these professions undergo periodic, annual, and or regular professional development programmes and training, at their own costs, in order to obtain annual licences to enable them to carry on their trade for the period indicated on the certificate and the same is renewed upon expiry.
105. This court is in agreement with Counsel for the 1<sup>st</sup> Respondent that teachers have for a long time been left behind in professional development and this gives credence to the 1<sup>st</sup> Respondent’s action in implementation of TPD programme and training launched in September, 2021 which is now the subject of this petition. The giant trade unions for the teachers, 5<sup>th</sup> and 6<sup>th</sup> Respondents, negotiated with the 1<sup>st</sup> Respondent and even agreed on the cost. There is no evidence on record from any teacher or a member of the union on record to support the allegation by the Petitioner. The Petitioner is neither a teacher nor a member of the said trade unions. There is absolutely no evidence that the



Respondents, and particularly the 1<sup>st</sup> Respondent, have violated or breached the provisions of Article 41 of the *Constitution*.

106. Further, the Petitioner alleges that the Respondents violated Articles 47 and 232 of the *Constitution*. As stated above, the 1<sup>st</sup> Respondent fully engaged the teachers' unions, 5<sup>th</sup> and 6<sup>th</sup> Respondents, and invited members of the public and stakeholders to contribute and comment before rolling out the programme. The Petitioner has not provided any evidence on any person, including himself, who was denied a chance and or opportunity to submit views. The Petitioner has not identified the other stakeholders that he alleges were denied an opportunity to participate at giving their views. To this extent, the allegations by the Petitioner are hollow, unsupported, unsubstantiated and hence not proved.
107. For all the reasons stated above, inasmuch as the Petitioner crafted a petition alleging violation of specific Constitutional provisions and Articles, he has fallen short in adducing evidence to the required standard to prove the said violations. In fact, the petition, in my view has made generalised allegations incapable of mastering the threshold set out in the Anarita Karimi Njeru and Mumo Matemu decisions. The second issue for determination is hence returned in the negative.

## **XVI. Reliefs**

108. This court has by now said enough in the foregoing paragraphs to demonstrate that this petition has no merits. However, for completeness, this court has carefully examined the reliefs/prayers sought for and finds none of the prayers merited.
109. In respect of prayer 1 the court has found above that the Respondents have not breached Articles 10, 41, 47, and 232 of the *Constitution* as the Petitioner has failed to adduce evidence to prove the allegations made.
110. There thus exists no basis upon which a permanent order of injunction may be granted restraining the Respondent or their employees, agents or others howsoever from implementing the TPD programme and training. The petitioner in that regard falls far short of the requirement set out in *Giella v Cassman Brown*. On that account prayer 2 must fail.
111. In regard to prayer 3, the 1<sup>st</sup> Respondent is simply implementing the law as set out elsewhere in this judgment. The Petitioner has flatly failed to demonstrate how the 1<sup>st</sup> Respondent and indeed all the other Respondents are in violation of the law.
112. In respect of prayer 4 the same is hollow and empty and completely devoid of merit. What is illegal or unlawful in the separate CBAs between the 1<sup>st</sup> Respondent and the 5<sup>th</sup> and 6<sup>th</sup> Respondents? That is another mere allegation by the petitioner that is not supported by evidence and the same must fail.
113. Prayer 5 seeks a declaration that the appointment of the 6<sup>th</sup> to 9<sup>th</sup> Respondents to offer the TPD programme training was irregular, illegal, null, and void. This court has dealt with this issue extensively in another part of this judgment arriving at the conclusion that there is no evidence at all that the bidding, tendering, and procurement process was flawed. The court is in the circumstances denying this prayer in toto.
114. Prayer 6 seeks a declaration that Regulation 48 of the *Teachers Service Commission Code for Teachers, 2015* is unconstitutional. This court has carefully gone through the petition, the supporting affidavit, and the written submissions by his counsel and there is no evidence or any legal argument in support of the allegation of unconstitutionality of Regulation 48.



115. For avoidance of doubt Regulation 48 provides as follows:-

“ 48. Professional teacher development programmes

- (1) Every teacher shall undertake the professional teacher development programmes prescribed or recommended by the commission from time to time.
- (2) The commission shall approve training institutions to conduct teachers development programmes.
- (3) The approved institutions shall issue certificates to teachers upon completion of the programme.”

116. The above Regulation flows from the provisions of Article 237 of the *Constitution* and Sections 11 and 35 of the *TSC Act*. The Petitioner has not demonstrated how the above regulation offends Article 237 or indeed any other provision in the *Constitution*. To state what is by now rather obvious, it is not sufficient for a Petitioner to make allegations of violation of constitutional provisions and give whatever details he deems to apply to such violations. A Petitioner bears the eternal duty and obligation of proving such alleged violations.

117. This court is, even if it closes its eyes to the lack of evidence on the part of the Petitioner, unable to establish anything unconstitutional about Regulation 48 above and hence prayer 6 must, like all the others, fail.

## **XVII. Costs**

118. Other than stating that he is a consultant in education, the Petitioner did not disclose the qualifications that he deems to qualify him as a consultant or an expert in matters education. He did not disclose in what capacity he has filed this petition and it was left to this court to discern that he has filed this petition in an alleged public interest. There is no other capacity that may be assigned to him under Article 22 of the *Constitution*. He has not disclosed whether he is a teacher or a former teacher, a member or a former member of the 5<sup>th</sup> or 6<sup>th</sup> Respondents.

119. The Petitioner has not disclosed the other stakeholders in the education sector that he suggests he could be representing or fronting for in this petition.

120. Award of costs is to a large extent in the discretion of the court. Ordinarily costs follow the event and under ordinary circumstances the Petitioner should be ordered to meet the costs of this petition which has been found to have no merits on all the counts.

121. Although this petition has been found not to be res judicata, in view of the 2018 petition between the 1<sup>st</sup> Respondent and the 6<sup>th</sup> Respondent, the status of the appeal therefrom has not been disclosed to this court by the concerned parties and in any event the subject matter has been found by this court to be substantially different.

122. However, as far as the matters in this petition are concerned, this court hopes that through this judgment the same have been settled and that any party dissatisfied shall move to the next stage with the necessary dispatch. This is what informs this court not to award costs against the Petitioner, notwithstanding that he has failed miserably in proving his case. For that reason each party in this petition shall meet own costs.



### **XVIII. Gratitude**

123. This court thanks the parties and their respective Counsel for the industry, maturity, and effort that has gone into research all the way from the pleadings to the written submissions. This court has gone through all the materials placed before it and the same have invaluable informed the decision that this court has arrived at.
124. By way of a recommendation, this court suggests to all the Respondents to work together to ensure that the training is availed and offered across the country to enable all the registered teachers to meaningfully benefit from the same at a mitigated cost. For a while now the teaching profession is devoid of strikes and boycotts. The 1<sup>st</sup> Respondent is encouraged, as the employer, to continue engaging the other Respondents, and more so the 5<sup>th</sup> and 6<sup>th</sup>, for continued harmony in the sector.

### **XIX. Orders**

125. The net effect of all the above is that the petition dated 27<sup>th</sup> September, 2021 is hereby dismissed in its entirety and each party is ordered to meet own costs.

**DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 22ND DAY OF SEPTEMBER 2022.**

.....

**DAVID. NDERITU**  
**JUDGE**

