



**Kennedy v Teachers Service Commission (Petition 94 of 2019)
[2022] KEELRC 13049 (KLR) (3 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13049 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 94 OF 2019
L NDOLO, J
NOVEMBER 3, 2022**

BETWEEN

WARUI G. KENNEDY PETITIONER

AND

TEACHERS SERVICE COMMISSION RESPONDENT

RULING

1. On June 3, 2019, the petitioner filed a petition alleging violation of his constitutional rights by the respondent.
2. In response, the respondent filed grounds of opposition dated September 11, 2019, seeking dismissal of the petition on the following grounds:
 - a. The petition is based on a cause of action which is statute barred pursuant to the provisions of section 4(1) of the *Limitation of Actions Act*;
 - b. The petition does not reveal contravention of constitutional or fundamental rights to warrant the intervention of the court and has therefore not met the threshold set in the *Anarita Karimi Njeru* and *Mumo Matemu* cases;
 - c. The court has no jurisdiction to grant the prayers and/or relief set out in the petition;
 - d. The orders sought if granted, will amount to usurpation of the respondent's constitutional, statutory and administrative mandate;
 - e. The petition does not meet the test and threshold of a constitutional petition;
 - f. The petition is frivolous, vexatious and amounts to an abuse of the court process since the same has not raised any justifiable issue and/or reasonable cause of action against the respondent;
 - g. The petitioner is guilty of unreasonable delay and is not entitled to the prayers sought;



- h. The respondent is likely to suffer irreparable loss, damage and injustice should the prayers sought in the petition be granted.
3. The parties urged their respective positions by way of written submissions.
 4. The primary objection by the respondent is that the petition is time barred and the court therefore lacks jurisdiction to entertain it.
 5. On his part, the petitioner submits that limitation of actions does not apply to constitutional petitions. He relies on the decision in [Elias Kibathi & another v Attorney General \[2021\] eKLR](#) where Nduma J stated that matters of general limitation of actions are not canvassed in the [Constitution](#) of Kenya, 2010.
 6. The petitioner further relies on the decision in [Safepark Limited v Henry Wambega & 11 others \[2019\] eKLR](#) where the Court of Appeal affirmed the position that the period of limitation in the [Limitation of Actions Act](#) does not apply to matters involving violation of rights and freedoms guaranteed under the [Constitution](#).
 7. The respondent accuses the petitioner of camouflaging an ordinary employment claim as a constitutional petition, so as to circumvent the law on limitation of actions.
 8. In this regard, the respondent relies on the decision in [Gabriel Mutava & 2 others v Managing Director, Kenya Ports Authority & another \[2016\] eKLR](#) where the Court of Appeal held that where a right is regulated by statute, such legislation and not the underlying constitutional right ought to be the primary means for giving effect to the right in question.
 9. The respondent also cited the decision in [Josephat Ndirangu v Henkel Chemicals \(EA\) Limited \[2013\] eKLR](#) where it was held that:

“...a litigant should not avoid the provisions of the [Employment Act](#) regarding unfair termination or wrongful dismissal by going behind the statute and seeking to rely directly on article 41 of the [Constitution](#) on the right to fair labour practices. The purpose of the [Constitution](#) is that the right to fair labour practices is given effect in various statutes of which the [Employment Act](#) and [Labour Relations Act](#) are primary. The primary legislation should not be circumvented by seeking to rely directly on a constitutional provision. Both the [Employment Act](#) and the [Labour Relations Act](#) give effect to constitutional rights.”
 10. The court was also referred to the decision in [Peter Ndegwa Nderitu v Teachers Service Commission \[2019\] eKLR](#) where it was held that the framing of a claim as a petition does not make it so and cannot serve to extend time in a matter that is statute barred.
 11. In the matter now before me, the remedies sought by the petitioner fall within the purview of the [Employment Act](#) and there is nothing to place the matter outside the operation of statutory provisions, including the one on limitation.
 12. That said and in view of the undisputed fact that the cause of action arose in 2006, the matter filed in 2019 is clearly out of time and the court lacks the jurisdiction to entertain it.
 13. Consequently, the petitioner’s petition dated May 31, 2019 is struck out.
 14. Each party will bear their own costs.
 15. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 3RD DAY OF NOVEMBER 2022



LINNET NDOLO

JUDGE

Appearance:

Mr Gachuba for the petitioner

Miss Njau for the respondent

