



**Nyangongo v Public Service Commission & another (Employment and Labour Relations  
Petition E005 of 2023) [2023] KEELRC 2559 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2559 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS PETITION E005 OF 2023  
HS WASILWA, J  
OCTOBER 19, 2023**

**BETWEEN**

**EVANS MORARA NYANGONGO ..... PETITIONER**

**AND**

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

**TEACHERS SERVICE COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner herein commenced the following proceedings vide a ‘statutory statement’ dated 6<sup>th</sup> April, 2023 and filed on even date. Contemporaneously, he filed a notice of Motion seeking inter alia for conservatory orders staying the processing of applications, shortlisting, interviewing, merit listing and appointment of trainers arising from the PSC adverts in the standard newspaper of 28<sup>th</sup> March, 2023 and PSC website of 29<sup>th</sup> March, 2023. He also prayed for the Motion to be heard together with the main suit.
2. The main suit sought for the following reliefs; -
  1. A declaration that PSC advert dated 28<sup>th</sup> and 29<sup>th</sup> March, 2023 for recruitment of technical and Vocational trainers is defective, unlawful, null and void.
  2. An order to quash the said PSC advert dated 28<sup>th</sup> and 29<sup>th</sup> March, 2023 for recruitment of Technical and Vocational trainers.
  3. An order prohibiting the 1<sup>st</sup> Respondent, PSC and its agents of the state departments from making an advert relating with recruitment of Technical and vocational trainers.
  4. An order directing the 2<sup>nd</sup> Respondent, TSC, to advertise within 30 days for recruitment of the said 1300 vacancies for Technical and Vocational Trainers in accordance with its constitutional mandate.



5. An order to the 2<sup>nd</sup> Respondent, TSC to engage its stakeholders and table in Court an appropriate Technical Trainers Career progression guideline.
6. An order for exemplary and aggravated damages jointly and severally by the Respondents to compensate the petitioner for violation of his fundamental rights to fair labour practices and fair administrative actions under Article 41 and 47 of *the Constitution*.
7. Award of interest at court rates.
8. Cost of the suit.

**Petitioner's case.**

3. The petitioner states that he is a teacher by profession, appointed by the Teacher Service Commission (TSC) and deployed as a trainer to Kisii National Polytechnic.
4. He states that the 1<sup>st</sup> Respondent, Public Service Commission, (PSC), lacks constitutional mandate to advertise and recruit Technical and Vocational trainers as the said mandate is exclusively reserved for TSC under Article 237 of *the constitution*. Further that the TSC is mandated under the TSC Act to register, recruit and effectively manage teachers' trainers who are instructors in TVET institutions.
5. He contends that *the Constitution* has not been amended to transfer that function to PSC, neither does the TVET Act makes provisions for transfer of the Technical training functions from TSC to PSC, Ministry of Education and STI.
6. That the issues in this suit arose when the Respondents jointly and severally by collusion and fraud transferred 3780 technical teachers vide Circular no 17 of 2018. This circular was later quashed by Justice Abuodha in his judgement dated 1<sup>st</sup> March 2018 that declared the circular unconstitutional, null and void.
7. The Petitioner states that the subsequent advertisements made by PSC on 28<sup>th</sup> and 29<sup>th</sup> March, 2023 contradicts; sections 17(1-2) and 25 of part IV of the TVET Act, Legal orders of the National Polytechnics and TVET Act that assigns the governing Council of the TVET institutions operational independence to recruit, appoint its trainers among qualified, registered and licensed persons as per Part IV sections 28 and 29 (l)&(m) of the TVET Act.
8. He notes that PSC usually carries out recruitment and direct the TVET principals to only issue appointment letters. Further that these adverts are oppressive as it does not indicate that there are no negotiated, approved and published scheme of service or mandatory qualification guidelines for registration licensing and accreditation of Technical Trainers to make them legible for recruitment.
9. It is the petitioner case that the Respondent's scheme of service dated May, 2016 does not provide for technical trainers, transfer, discipline, re-designation and promotion. Further that the 1<sup>st</sup> Respondent has not approved and published qualification framework to guide registration, licensing and accreditation of technical trainers by TVET in accordance with TVET Act. Therefore, that there is nothing that can guide the recruitment of the said trainers.
10. He states that the said advert does not comply with section 37 of the PSC Act, as the requirements listed for the said positions are not drawn from an approved and published scheme of service for Technical and Vocational trainers.



11. He contends that the advert was discriminatory for not including non-technical qualifications such as English, French, Social work, Business, journalism, Special need education, project management, maths, statistics, and guiding and counselling.
12. It is averred that in the said advert, the mandatory requirement for trainer registration and licensing by TVET was unlawfully waived imposing a risk of Kshs 1,000,000 or 3 years' imprisonment to innocent job seeking trainers without knowledge.
13. The petitioner states that the adverts have had an effect of creating uncertainty in the education section as there is duplication of roles between the PSC, TSC and TVET Authority.
14. He states that he is affected by the said adverts because he is among the 3780 persons transferred from TSC to PSC without any consent, when the said PSC does not provides for any career progression for Technical trainers unlike their previous employer, TSC.
15. The Petitioner is concerned that the employment of the said trainers will also fall in the hands of PSC, that does not have powers to manage the said trainers or provide any scheme of service. Further that if the said adverts are allowed to stand and the trainers recruited, their employment will be marred by unfair labour practices and unfair administrative actions, when the said rights are guaranteed under Articles 41 and 47 of *the Constitution*.
16. He maintained that the Respondents should be held jointly responsible for failing to comply with TVET Act and Section 37 of the PSC Act in making the said advertisements.
17. He concluded that the issues raised herein are of public interest because it touches on a large number of education stakeholders and that he brings this suit in his pursuit to protect, promote and defend *the Constitution* and the rule of law.
18. The Legal grounds of the Petition are as follows; -
  - i. That Article 237 and 234(3)(c) clearly delineates the constitutional mandates of respondents.
  - ii. That Part V Paragraph 29 (L) of the TVET Act no 29 of 2013 assign the TVET governing Councils and Boards the function of recruiting and appointing its staff starting from advertisement which is based on their peculiar needs thus the 1<sup>st</sup> respondent advert is a contradiction to statute.
  - iii. That Part IV sections 17 (2)&(4) and 25 of the TVET Act no 29 of 2013, mandatorily require registration, licensing and accreditation of qualified trainers by TVET Authority be done within 6 months from the commencement of this Act. Further that it imposes a penalty of one million and or 3 years' imprisonment for a trainer who will practice before registration and licensing by TVET Authority. This requirement should have been included in the advertisement.
  - iv. That the 1<sup>st</sup> respondent was limited for qualified and eligible candidate in Technical areas of specialty whose qualification guidelines have neither been developed nor approved and adopted by its stakeholders.
  - v. That the advert is unlawful and inconsistent with Part IV Paragraph 25 that demand qualified, registered and licensed trainer particulars to be in TVET Board register.
  - vi. The respondents advert violates section 9 and 10 of the *Employment Act* 2007 that mandatorily require negotiated, approved and published technical trainers scheme of service precede the recruitment but in this case the trainer will be appointed without a scheme of service.



- vii. That the 1<sup>st</sup> respondent advert violates all the provisions of section 37 of the PSC Act 2017.
  - viii. That the 1<sup>st</sup> respondent Scheme of Service dated May 2016 is inapplicable and has no provisions for the jobs/positions and Cadres of Technical and Vocational Trainers.
  - ix. That the respondent advert contradicts PART IV paragraph 8 (a and b) of the Legal Orders of the National Polytechnics that assign the governing councils operational independence to recruit, appoint its trainers from among the qualified and duly registered and licensed in accordance with Part IV 28 and 29 (l) and(n) of the TVET Act.
19. On 4<sup>th</sup> July, 2023, the Petitioner sought to highlight his evidence and be cross examined by the Respondents. The petitioner testified on 31<sup>st</sup> July, 2023 and stated that he filed this petition on his behalf and behalf of the trainers generally. That he currently works in Kisii National polytechnic. He stated that the advert by the 1<sup>st</sup> Respondent did not comply with its own Act. He stated that an advert must have terms of service, duties, responsibilities among others which was not the case herein as the advert in the standard newspaper did not adhere to the provisions of the law and thus is defective.
  20. It was his testimony that section 55 of the Public Service Act, require that before an advert is brought out, terms of service must be developed. Further that the Advert is in contempt of Justice Abuodha and Justice Maureen Onyangos Orders.
  21. He maintained that the issue of advertising is a preserve of TSC and having been made by PSC is in violation of; section 29(m) of the TVET Act and contrary to the National Polytechnic legal orders at Part IV paragraph 8(b). He added that since no appeal has been preferred to the Court of Appeal the Orders of Justice Abuodha still stands and stay granted has since lapsed.
  22. Upon cross examination by Iseme Advocate, the petitioner confirm that the word trainer does not appear in Article 237 of *the Constitution*. He also admitted that at the bottom of the advert, it provides that the application should be forwarded to the governing Councils of the various institutions.
  23. On cross examination by Mulaku Advocate, the petitioner testified that the TSC mandate is provided for under Article 237 of *the Constitution* but that the advert was not done by TSC. He testified that the decision staying justice Abuodha judgement is not exhibited in Court. The petitioner also admitted that he does not have any authority from other trainers to institute this suit on their behalf., however that Articles 2 and 58 allows him to file this suit independently.
  24. The petitioner also admitted that he was not aware of section 20 of the TSC Act that allows delegation of Commissioners duties.

### **1st Respondent (PSC) case**

25. The Public Service Commission in response to the Application and the Petition filed grounds of opposition dated 4<sup>th</sup> May, 2023 based on the following grounds; -
  1. That the first respondent was perfectly within its mandate and powers, under Articles 234 as read with section 37 of the Public Service Act to advertise both on a widely circulated newspapers and on its website on 28<sup>th</sup> March, 2023 and 29<sup>th</sup> March, 2023 respectively for and on behalf of germane Technical and Vocational Training Institutions, hereinafter referred to as TVETs.



2. Further that, as per the germane advertisement the 1<sup>st</sup> Respondent is not the recruiting authority but the various TVET Boards and Councils. This is clear and discernible from page 42 of the advertisement in issue where it is captured that; -
 

“Interested and qualified persons are requested to submit their applications directly to the institutions where vacancies exist by filling one (1) PSC 2 (Revised 2016) application form and attaching copies of the national ID Card, academic and professional certificates, transcripts and any other testimonials....so as to reach the respective Boards/ Councils on on behalf April 17, 2023.”
3. That in line with the constitution and pursuant to Article 201(d) that provides that all public bodies and Commissions shall apply and use public money money in a prudent and responsible manner, the 1<sup>st</sup> respondent working with the state department for Technical and Vocational Training on the TVETS workforce establishment, did the composite advertisement and consequently saved the individual TVETs and the taxpayer from the financial burden of making individual advertisements for the vacancies in the daily newspapers.
4. That pursuant to section 26(1)(a) &(c) and (2) of the Technical and Vocational Education and Training Act, No. 29 of 2013 as read with definition of a person in Article 259 of the Constitution. TVETS are corporate bodies with perpetual succession, capable of suing and being sued. The Respondents herein are wrongly sued and the orders sought at the interim or final, cannot in law issue.
5. Further that the recruiting authorities are the individual Boards and Councils of each TVET institutions that have sought to recruit trainers, the petitioner ought to have sued them individually as distinct corporates.
6. Further that a lock out of the recruiting Boards and Councils from these proceedings is a violation of their Constitutional rights to fair hearing as espoused under Article 50 of the Constitution. That granting the orders sought, at the interim or ultimately, will affect persons who are not party to this case and who ought to have been made parties and will therefore be unfair to them and in violation of their right to fair trial.
7. That pursuant to the Court of Appeal decision in Public Service Commission & 4 Others V s Cheruiyot & 32 others (Civil Appeal 199 & 139 of 2017) (Consolidated) [2022] eklr the claimant has no locus standi to bring and canvass issues where he has no legal, direct and demonstrable interest like in this case. The Petitioner lack locus because; -
  - a. The employer-employee relationship herein is not in issue-the Applicant’s contract of employment is not in issue.
  - b. The claim has not defined persons who are likely to suffer any legal consequences as a result of the advertisement. It is speculative.
  - c. The petitioner is already a PSC employee and a trainer.
  - d. The alleged recruitment(grievances) does not affect him or his contract of employment.
8. Further that it is not in the place and competence of the Applicant/ Petitioner herein to empirically determine the trainer needs of the TVETS across the country, their qualifications,



their placement and accreditation. The Petitioner lacks locus standi to question the qualification set out in the advertisements in question herein

9. That the application is premised on the wrong interpretation and application of Article 237 of *the Constitution* as read with the TSC Act on establishment and role of TSC. The TSC has no role in the recruitment of TVET trainers, trainers are recruited by individual institutions TVET Boards and Councils, pursuant to section 29(l) of the TVET Act. To the extent that the application and the petition are premised on the wrong interpretation of the relevant laws, the same is unmerited and the order sought should be declined.
10. That the claim of employing trainers who are not registered by the TVET Authority and therefore exposing them to various penal consequences is speculative. It has not happened and this can only be ascertained upon placement of the recruited trainers.
11. Further that the definition of teacher under section 2 and 23-32 of the TSC Act as compared to that of a trainer under Section 2 and 23(1) of the TVET Act confirms the existence of two unique and different registrations regimes and cadres of public servants. One becomes a trainer only upon being registered as such by the TVET Authority, while one becomes a Teacher by being trained and registered as one. The application herein is bad in law for failing to distinguish the accreditation of the two and the accrediting regimes of the two.
12. That on the face of the advertisement question, the recruitment in question has invitations from across section of the professions and professionals; persons who do not qualify to be registered as teachers under the TSC Act.
13. That the Application and the Petition herein lacks the specific factual basis upon which they are founded. They are omnibus and are drafted contrary to the decision in the Mumo Mutemu vs Trusted Society pf Human Rights Alliance & 5 others, Civil Appeal No. 290 of 2012[2013] eKLR and therefore incompetent because; -
  - a. They do not detail the adverse grievances of the Applicant.
  - b. They do not detail any of the alleged concealed material facts in the impugned advert.
  - c. They do not detail the duplicated mandates of PSC, TSC and the Boards/ Councils of the individual TVET Institutions.
  - d. They do not give details of fraud in the advert.
  - e. They allege psychological and irreversible financial distress on the successful applicants without giving details. This is speculative.
14. That to the extent that the Petition herein is a petitioner in Nakuru ELRC No. 12 of 2012 and Kisumu ELRC No. E007 of 2022, where he is again challenging the mandate of the PSC and TSC on recruitment, deployment, discipline and dismissal and the legitimacy of legal notice No. 7 of 2018 which transferred approximately 3700 teachers to TVETS, the petitioner is engaging in forum shopping and he is abusing the process of this Court. Consequently, this Court should invoke Rule 3(8) of *the constitution* of Kenya (Protection of Right and Fundamental freedoms) practice and Procedure Rules, 2013 as this application and petition are red herrings and meant to supplement his efforts in the other two cases.
15. Further that to the extent that paragraph 1.10 of the Certificates paragraphs 1.10, 1.13, 1.18 of the motion and 2.11, 2.13, 2.18, 2.24, 2.24, 2.25 and 4.48 of the petition, the Applicant/ petitioner is canvassing issues touching legal notice no. 7 of 2018 which have been canvassed



before Court of concurrent jurisdiction and that have been stayed in the Court of Appeal, the same is an abuse of Court process and this Court is functus officio as held by Rika J's Ruling in Rose Nyambura Chege and 4 others V Teachers Service Commission and 2 others [2021] eKLR and Justice Baari Ruling in Evans Morara Nyangongo & 2 others Vs The CS-Ministry of Education and 6 others.

16. That to the extent that the application and the petition herein are supported by a verifying affidavit and the petition is wrongly titled and not brought under Articles 22 and 23 of the Constitution, the same are incompetent and should be struck out.
17. That it is in the public interest that the orders sought are not granted, that the populating of the trainers in the TVETS is important for purposes of the training of the many Kenyans already admitted for the various training courses offered.
18. That the Application and the petition filed herein are bad in law, frivolous and an abuse of Court process. The same should be dismissed with costs to the Respondent.

### **2nd Respondent (TSC) case**

26. The TSC opposed the petition and the application by a replying affidavit of Dr. Julius Olayo, the Director in charge of Human Resource management, deposed upon on the 22<sup>nd</sup> May, 2023.
27. The in the affidavit, the affiant stated that TSC is a Commission established under Article 237(1) of the Constitution with its principal objectives and functions set out in Article 237(2) and part III of the TSC Act to inter alia; train, recruit, register and employ teachers and deploy them to public schools and institutions. Further that TSC is tasked with conducting disciplinary control over all teachers and terminate employment of teachers.
28. The affiant stated that the petitioner has not raised any cause of action against TSC, because from the reading of the petition it's clear that the commission was not involved in the advertisement at any stage. Furthermore, that none of the prayers have been sought against the 2<sup>nd</sup> Respondent, therefore that TSC should be expunged from the proceedings.
29. The deponent refuted the allegations that it has flouted the TSC Act and reiterated that the TSC Act was enacted in 2012 and not 2016. Therefore, that any reference made to alleged TSC Act of 2016 is misleading.
30. It is contended that from the reading of the petition, it is discerned that the petitioner is contesting his transfer from TSC to the Ministry of Education that is managed by PSC. He expounded on the transfer and stated that on 27<sup>th</sup> July, 2018, the 2<sup>nd</sup> Respondent issued a circular No. 17 of 2018 transferring its technical training function to the ministry of education as a result 3780 TVET lecturers who were then in the employment of the 2<sup>nd</sup> Respondent were transferred to the ministry of education, department of Vocational and Technical training. The petitioner herein was one of the said trainers.
31. It is stated that the KUPPET was aggrieved by this transfer of services and filed a case in Employment and Labour Relations Court at Nairobi serialized as Nairobi ELRC CAUSE No. 85 of 2018. Similarly, five other TVET lecturers challenged the circular in Constitutional Petition No. 97 of 2018, where they were all consolidated as they raised similar issues, in the end, the case was considered and determined by Abuodha J who found the transfer null and void and quashed the circular.
32. The Hon Attorney General immediately moved the Court for stay of the said Judgement and orders, which orders were granted and continue in force since the same orders have not been set aside. This position was amplified by Rika J in his ruling 9<sup>th</sup> November, 2021.



33. The Deponent maintained that the functions of the TSC, PSC and TVETs are distinct and none has been duplicated by the other. Also that the TSC was not involved in the recruitment process in question herein and thus cannot be held liable for any acts carried out by other bodies.
34. It was further stated that the petitioner has not exhibited any evidence to support his allegations that the TSC was fraudulent and concealed material facts of the advertisement.
35. On the prayers sought, the deponent stated that TSC is an independent Commission that cannot be directed or controlled by any person as intimated in the prayer 3.4 sought by the Petitioner. Further that the Court should decline the invitation to direct the commission in the way it should carry out its constitutional mandate.
36. On the prayer for aggravated and punitive damages, it was submitted that the said prayer has is not justified since the petitioner has not demonstrated the personal injury it has suffered to warrant payment of the damages sought.
37. In conclusion, the Affiant urged this Court to dismiss the Petition with costs to the Respondent for being vexatious, cantankerous and an abuse of Court process.

### **Rejoinder.**

38. By leave granted by this Court on 29<sup>th</sup> May, 2023, the petitioner filed response to the grounds of opposition by the 1<sup>st</sup> Respondent and the replying affidavit by the 2<sup>nd</sup> Respondent.
39. In the rejoinder the petitioner maintains that Article 237 has not been amended to transfer some of the functions to PSC which was later donated to the Boards and Councils of TVETs. Further that sections 22(b), 23, 25 and 29(1) of the TVET Act, 2013 is inconsistent with Article 237 of *the constitution* and the same should be declared null and void.
40. He reiterated that the sections of the TVET Act listed above are acting in excess of the purpose of the Act as it usurps the constitutional mandate of the 1<sup>st</sup> Respondent in purporting to register and license trainers without any approved and published qualification framework.
41. He states that no prejudice will be occasioned on the TVET Boards and Council, when the petitioner herein demands for a proper advert to be made that follows the law and is done by the proper body.
42. He defended his locus to bring the suit herein and stated that he is a public spirited citizen who is enabled by Articles 2, 3,10,22,23,232,258 and 259 of *the constitution* to file this suit.
43. The Petitioner states that the TSC has failed in its mandate to develop, approve and publish trainer qualification as a quality control measure to avert masquerades in the profession.
44. On the allegations that the judgement was stayed, the petitioner stated that Justice Maureen Onyango in her decision of 10<sup>th</sup> December, 2021 quashed the consent orders and stay of executions orders, therefore the judgement that had quashed the circular is still in operation.
45. The petitioner maintains that it properly relied on Articles 22, 23 and 159 of *the Constitution* in filling this suit as such the correct sections of the law have been invoked. In any event that substantive justice takes precedence over procedural technicalities.
46. The petitioner took issues with the form of the grounds of opposition, in that it was signed by the director of legal services contrary to Article 156(4)(a)&(b) of *the Constitution*. Further that the grounds of opposition have raised several issues of fact contrary to Rule 15(1) of the Constitutional practice and



procedure Rules, 2013 and Rule 17(9) of the Employment and Labour Relations Court (Procedure) Rules.

47. On the 2<sup>nd</sup> Respondent's replying affidavit, the petitioner stated that the application was filed on 22.5.2023 contrary to Rule 6 and 15(1) of *the constitution* of Kenya practice and procedure Rules. Further that the replying affidavit was sworn by Dr, Julius Olayo, a DHRM officer who is neither a member of the Commission, nor authorized.
48. He also took issue with the fact that the replying affidavit was drawn and filed by Patrick Mulaku advocate and stated that the same is contrary to Article 156(4) that bestows representation powers to the Attorney General., therefore that the affidavit is fatally defective.
49. On the allegations that stay orders are still in force, the petition stated that the 2<sup>nd</sup> Respondent concealed material facts from this Court and failed to indicate that the stay of execution orders were granted *ex parte* till hearing on 21<sup>st</sup> March, 2021. That the said orders were never extended, neither did the Respondents pursue the case on appeal, thus the stay orders lapsed. Also that the fact that stay Orders were issued by a concurrent court was suspect.
50. He stated that the contents of paragraphs 1,4,5,6,7,8,9,10,11,12,13,14,15,16,17,18,19,20,21 and 22 are misrepresentation of material facts which this Court should expunge from record.
51. I have examined all evidence and submissions of the parties herein. The issues for this court's consideration are as follows;-
  1. Whether the petitioner has locus to file this petition.
  2. Whether this petition is res-judicata.
  3. Whether there are constitutional and legal provisions infringed by the respondents herein against the petitioner.
  4. What remedies to grant in the circumstances.

#### **Issue No. 1: Locus**

52. It has been submitted by the respondents herein that the petitioner lacks locus to file this petition against the respondents. The respondents cited PSC & 4 Others Versus Cheruiyot & 32 Others CCA No. 199 & 139 of 2017) Supra where the court held that the claimant has no locus to bring a claim where he has no legal, direct or demonstrable interest in the case.
53. The respondents submitted that the petition lacks locus because he has not defined that he is likely to suffer any legal consequences as a result of the advertisement and that the alleged advertisement does not affect him or his contract of employment.
54. The petitioner however indicated that he has locus to bring this petition as enabled by Articles 2, 3, 10, 22, 23, 232, 258 & 259 of *the constitution*.
55. In this petition the petitioner indicated that he is a teacher working at Kisii National polytechnic having been appointed by the TSC.
56. He indicated that the advertisement made by the PSC directly affects him as a trainer as it introduces new charges including trainer regulation and licencing by TVET waiver.
57. He contends that he is affected by the advert as he is among the 3700 persons transferred from TSC to PSC without his consent.



58. I do agree with the petitioner that the advertisement indeed directly affects him as an individual teacher whose services were transferred from the TSC to PSC.
59. Other than this fact, Article 22 (1) & (2) of *the constitution* is clear and states as follows;

“ 22. Enforcement of Bill of Rights

- (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.
60. In this regard the law is clear that a person as an individual can file a constitutional petition claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.
61. That being the position, the submission that the petitioner lacks locus to file this petition is found without merit and disregarded.

**Issue No. 2: Is this petition res-judicata?**

62. The respondents also submitted that the issues in this petition have been canvassed before courts of concurrent jurisdiction and have been stayed in the Court of Appeal and therefore the petition is an abuse of the court process.
63. They cited a ruling by Rika J in *Rose Nyambura Chege & 4 Others Vs TSC & 2 others (2021) eKLR & J. Baari’s ruling in Evans Morara Nyangongo & 2 others Vs The Ministry of Education & Others*.
64. The respondents also aver that the petitioner is also a petitioner in Nakuru ELRC 12 of 2012 and Nakuru ELRC 07/2022 challenging also the mandate of the PSC and TSC on recruitment, deployment, discipline and dismissal and the legitimacy of Legal Notice No.17 of 2018 which transferred approximately 3,700 teachers to TVETS.
65. The 2<sup>nd</sup> respondent supported this position and indicated that it is true that the 2<sup>nd</sup> respondent had issued a Circular No. 17 of 2018 transferring its technical training function to the Ministry of Education and as a result 3,700 TVET lecturers were then transferred to the Ministry of Education, Department of Vocational & Technical Training and the petitioner was one of the said trainers.
66. That KUPPET being aggrieved by the circular filed Nairobi ELRC Cause 85 of 2018. Other 5 lecturers also filed Petition 97 of 2018 challenging the circular.
67. The 2 causes and petition were considered and determined by J. Abuodha who found the transfer null and void and quashed the circular.
68. That the Hon. AG appealed the decision and obtained stay orders of the judgment and which orders remain to date.



69. That the position was amplified by Rika J. in his ruling of 9<sup>th</sup> November, 2021.
70. In response to this position, the petitioner indicated that in her judgment of 10<sup>th</sup> December, 2021 Justice Onyango quashed the court order and stay of execution orders and therefore the judgment that quashed the circular is still in operation.
71. I have seen a consent order in Pet 97/2018 between the parties therein and the respondents the TSC, PSC, Technical & Vocational Education Training Authority that the stay of execution and decree issued by Hon. Byram J. on 14/3/2019 staying execution of judgment and decree flowing from the judgment given on 1/3/2019 by Abuodha J to remain in force amongst other orders (App J03.3).
72. J. Abuodha had found in favour of petitioner and allowed the petition.
73. The orders by J. Ongaya of 14<sup>th</sup> March 2019, allowed stay pending hearing and determination of the intended appeal.
74. I have not been shown any other order lifting the order of J. Ongaya.
75. What emerges is that the issues being canvassed by the petitioner herein emanate from the contention that there was a circular issued which transfers 3,700 TVET teachers to the PSC.
76. The advertisement of vacant position by the PSC also emanate from the same circular which is the subject of the stay orders issued by J. Ongaya pending appeal.
77. It is my finding that the legality or otherwise of the circular and subsequent actions by the PSC have been subject to litigation and handled by courts of concurrent jurisdiction and the petition is therefore res-judicata before this court.
78. In the circumstances of this case and in order to avoid duplication of efforts and defeat the cause of justice, I will down my tools and await determination of the decision from the Court of Appeal.
79. I will therefore not delve into the merit or otherwise of this petition but will find the petition without merit. I strike it out accordingly.
80. There will be no order of costs.

**DATED AND DELIVERED IN OPEN COURT THIS 19<sup>TH</sup> DAY OF OCTOBER, 2023.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Evan Morara present (in person)

Jusa holding brief for Mulaku for 2<sup>nd</sup> respondent TSC – present

Court Assistant – Fred

