



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISCELLANEOUS APPLICATION NO. 511 OF 2016

AND

JUDICIAL REVIEW NO. 7 OF 2016

NAPHTALY OMIDO.....APPLICANT

VERSUS

THE SECRETARY TO THE BOARD OF MANAGEMENT,

NAMUNDERA MIXED SECONDARY SCHOOL.....RESPONDENT

R U L I N G

1. The Applicant herein has been involved in a long running dispute with the Respondent. The original proceedings are before the court of appeal in Kisumu. The Applicant was dismissed from his position as a teacher at the Respondent School. He feels that the disciplinary procedure that was used to remove him was unfair and therefore subject to appeal and/or judicial review.
2. The original suit was transferred to the Employment and Labour Relations Court on a date which is not readily apparent. That suit was heard to its logical conclusion and a decision rendered. The decision is the subject of an Appeal. In the Court of the initial proceedings, the Applicant obtained an order for the production and/or delivery up of the minutes of the Meeting held on 25th September 2009. He felt what he was given was not a genuine and/or true record for various reasons including they were not dated nor stamped.
3. The Applicant therefore has brought an application by two (2) Notices of Motion filed on 8th February 2020 and 29th September 2020 asking for Orders that:-

First Application

1. (a) THAT this Honourable Court summons Mr. Moses Wanyama Barasa to either own or disown the Respondent Board's Minutes dated 25th September, 2009.

(b) THAT this Honourable Court directs that said Mr. Moses Wanyama Barasa to appear in this Honourable Court with a copy of the original Minutes of the Respondent Board dated 25th September 2009.

2. Costs be provided for.

Second Application

1. THAT this Honourable Court does find the Respondent herein unable to comply with the orders of this Honourable Court dated 16th May 2017 instructing him to issue the Petitioner herein with Minutes of the Respondent Board that came immediately after the 22nd May 2009 one.

2. Costs be determined.

4. In addition he has filed a Memorandum of Appeal that the Learned Judge ignored the fact about the respondent herein being in **contempt**

of a valid court order issued by the High Court in Kakamega on the 16th day of May 2017 by the Honourable Justice J. Njagi directing the respondent herein issues me with a certified copy of his own proceedings dated **17th April 2009** and **25th September 2009**. The proceedings which the HC Judge in Kakamega directed I be issued with, the Learned Judge herein ignored my protest that the aforesaid proceedings were neither signed nor dated and as a result not admissible in a court of law. In their current state, they are possibly forged by the respondent herein mainly for the purpose of being perceived to comply with the aforesaid 16th May 2017 court order.

5. It seems to this Court that if the Respondent is arguing that it followed the correct procedure in dismissing the Applicant, the onus is on the Respondent to demonstrate that it through its Board acted procedurally and fairly. The existence of various versions of the events of the same day does not demonstrate on a balance of probabilities that what is said to have been done was actually done. That question must be decided within the main suit.

6. The Respondent has responded by way of Grounds of Opposition as follows:-

1. The application has no merit, is misconceived and bad in law and fatally defective.
2. The Application is frivolous, vexatious and amounts to abuse of the Court Processes.
3. The Applicant herein has failed to adduce sufficient, compelling and reasonable grounds to support the prayers sought in the Application.

The Respondent opposes the Application. It seems that the Application is repetitious. The Respondent has filed various responses including to say that the Application is res judicata as well as misconceived and an abuse of the process.

7. However, the Respondent has failed to raise the fundamental issue in relation to this file. That is that the suit was transferred to the ELRC in Kisumu. That is the Court that has jurisdiction. Following transfer, this file should have been closed, and remained closed. The High Court does not have jurisdiction to hear this matter. Although the High Court has unlimited jurisdiction, in this case the dispute is being heard elsewhere and therefore there is nothing to be gained by the High Court making any orders. The Court does not act in vain.

8. In the circumstances, all the applications filed after the first transfer shall be transferred to ELC Kisumu to be heard within the original file.

9. The applicant is forbidden from making any further applications in this file without leave of the Court.

10. Each party to pay its own costs.

Order accordingly,

FARAH AMIN

JUDGE

DELIVERED, DATED AND SIGNED THIS THE 19TH DAY OF NOVEMBER 2021 IN KAKAMEGA VIRTUALLY IN COMPLIANCE WITH THE COVID 19 PROTOCOLS

Note: Date of Delivery changed because court was on Circuit in Vihiga on 20th – 24th September 2021 and thereafter at JTI training.

In the presence of:

Court Assistant: Dennis Wasilwa

No appearance for the Applicant

No appearance for the Respondent