



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

PETITION NO. 3 OF 2015

IN THE MATTER OF

THE CONSTITUTION OF KENYA 2010 ARTICLES 2, 3, 23, 27, 35, 47, 50, 236, AND 237

AND

IN THE MATTER OF

INDUSTRIAL ACTION

AND

IN THE MATTER OF

INTERDICTION OF TEACHER GAITHO NGANGA

PETER GAITHO NGANGA	PETITIONER
v	
BOARD OF MANAGEMENT	
BANITA SECONDARY SCHOOL	1ST RESPONDENT
TEACHERS SERVICE COMMISSION	2ND RESPONDENT

JUDGMENT

1. Peter Gaitho Nganga (Petitioner) was employed by the Teachers Service Commission (2nd Respondent) around 13 August 1994 and was posted to Gaichanjiru Boys Secondary School. He was thereafter transferred to Muhingia Secondary School and ultimately to Banita Secondary School.
2. On 5 March 2015, the Board of Management of Banita Secondary School (1st Respondent) handed the Petitioner a letter dated the previous day requesting him to appear before the 1st Respondent to answer allegations of immoral behaviour.
3. On 15 April 2015, the Petitioner received a letter dated 25 March 2015 from the 2nd Respondent's Director for Nakuru County. The letter was interdicting him and requesting him to give a written statement regarding allegations outlined in the interdiction letter, within 21 days. The letter advised the Petitioner that the interdiction was to allow for investigations.
4. The Petitioner responded to the interdiction letter through a letter dated 13 April 2015 (there could

- be a typo with the dates).
5. On 5 May 2015, the Petitioner commenced the proceedings herein alleging that his rights had been violated.
 6. Together with the Petition was a Notice of Motion seeking conservatory orders against the Respondents. The Court certified the motion urgent and directed that it be served for *inter partes* hearing.
 7. At the *inter partes* hearing, the Court directed that the status quo be maintained and that the Respondents do file their Responses before 27 May 2015.
 8. The Respondents filed a Preliminary Objection on the morning of 27 May 2015 to the effect that the Petition did not disclose a cause of action against Banita Secondary School, and a replying affidavit.
 9. However, on 27 May 2015, the Petitioner sought and got leave to amend the Petition. An amended Petition was also filed on the same day and it brought on the Board of Management of Banita Secondary School as the 1st Respondent instead of the School. The amendment effectively rendered the preliminary objection superfluous.
 10. On 22 June 2015 and arising from the amendment of the Petition, the Respondents filed what they referred to as *Respondents Amended Replying Affidavit* (in the view of the Court it is debatable whether an affidavit can be amended- Respondents had been given leave to file further affidavit).
 11. At the mention on the same date, the parties agreed that the Petition could be determined on the basis of record and written submissions. To this end, the Petitioner filed his submissions on 10 July 2015 while the Respondents submissions were filed on 19 October 2015 (both submissions were filed outside the agreed timelines).

Petitioner's case

12. The Petitioner's case is that he was entitled to fair administrative action and that he was not afforded reasonable opportunity to make representations before the 1st Respondent on 5 March 2015.
13. The Petitioner also submits that he should have been informed of the substantive allegations against him and given ample opportunity to prepare to meet the allegations.
14. According to the Petitioner, the less than 1 day notice he was given was not adequate/fair and was in contravention of Article 47 of the Constitution. He also urges that he should have been allowed to confront his accusers.
15. Further, the Petitioner contends that a representative of his Union (KUPPET) should have been notified and be present during the proceedings on 5 March 2015 by dint of section 41 of the Employment Act, 2007. He relied on an affidavit by the Union's Executive Secretary Nakuru Branch.
16. The Petitioner contended that the process followed by the Respondents was devoid of natural justice.
17. He also challenges the proceedings by the 1st Respondent on 5 March 2015 on the ground that there was no lawfully constituted Board of Management and therefore the persons who met had no jurisdiction to determine the allegations.
18. In this regard, the Petitioner contended that the 2nd Respondent had not come up with a Code of Regulations in terms of the Teachers Service Commission Act, 2012 and that the Code of Regulations, 2005 were not of any legal force.
19. According to the Petitioner, even if the 2005 Code were in force, the 2nd Respondent had delegated disciplinary powers to Boards of Management but the 1st Respondent was not in existence and that there is no mention of the County Director in the disciplinary process.
20. In this respect, the County Director could not purport to exercise any disciplinary control over his case as an agent of the 2nd Respondent.
21. In the view of the Petitioner, his interdiction by the County Director was arbitrary, capricious, unfair and without due process because the Director relied on proceedings which were a nullity. The Director did not carry out any investigations.
22. The action of the Director, according to the Petitioner violated his rights as enshrined in Articles 27, 35, 47 and 50 of the Constitution.

23. The Petitioner cited the decisions in Nairobi Cause No. 17 of 2013, *Gilbert Mwangi Njuguna v AG, Gladys Boss Shollei v Judicial Service Commission & Ors* (2014) eKLR, *Naftaly Rugara Muiga v Jomo Kenyatta University of Agriculture and Technology (JKUAT)* (2015) eKLR among other decisions.

Respondents' case

24. The 2nd Respondent's Director, Administration swore an affidavit. An amended affidavit was also filed. According to the Director, the 2nd Respondent's operations are governed by the Constitution, the Teachers Service Commission Act, Code of Regulations for Teachers and a myriad other statutory instruments.
25. He deposed that the Respondents received allegations against the Petitioner from November 2014 to March 2015 and therefore it caused investigations to be carried out by its agent on the ground as a result of which witness statements were recorded.
26. Thereafter, the Petitioner was invited to answer to the allegations and he was interrogated and given time to defend himself on 5 March 2015 after which the 1st Respondent referred the case to the County Director, Nakuru.
27. The reason for referring the matter to the County Director was because the term of the members of the 1st Respondent at that time had expired.
28. The County Director evaluated the material presented and decided to interdict the Petitioner but gave him time to make representations within 21 days, and that the interdiction was part of a process but not a punishment. The interdiction was procedural and conformed to the law and rules of natural justice.
29. According to the deponent, a disciplinary panel had not yet been constituted to hear the case against the Petitioner if any.
30. According to the Respondents and as evidenced by the minutes of the 1st Respondent, the Petitioner was informed of the allegations to confront and was afforded an opportunity to make representations and thereafter the case cascaded to the County Director because the term of the Board had expired.
31. In the submission of the Respondents, the 1st Respondent and the County Director exercise delegated authority and pursuant to regulation 5(2)(a) of the Code of Regulations, the 2nd Respondent is not prevented from exercising the delegated powers itself.
32. Similarly, County Directors were appointed in pursuance of the constitutional requirement to devolve services (Article 237 of Constitution) and the duties of the Directors include disciplinary matters.
33. The interdiction was to allow investigations and could be made by an agent pursuant to regulation 66 of the Code of Regulations but the Petitioner was yet to appear before the Disciplinary Panel and so invoking the assistance of the Court was premature.
34. The Respondents urged that it should be allowed to continue with its internal investigative process and the case of *Nancy Makokha Baraza v Judicial Service Commission & 9 Ors* (2012) eKLR was cited.

Evaluation

35. The Petitioner identified 3 issues for determination. In my view the issues can be collapsed into 2 with issues 2 and 3 as identified being all closely interlinked.

Whether action taken by Respondents was fair, reasonable and just

36. The prejudicial action taken against the Petitioner was the interdiction. The interdiction letter was clear that it was to facilitate investigations.
37. The agreed terms of engagement between the Petitioner and the Respondents provide for interdiction (the Code of Regulations).
38. The interdiction is a preliminary step in the disciplinary process. The Petitioner may as well be vindicated by the investigations and that would be the end of the matter. Any pecuniary loss he

- may have suffered during the interdiction can be restored as provided for in the Regulations.
39. Considering that interdiction is contractually provided for and that the Regulations are underpinned by statute, the Court is of the considered view that the interdiction did not and has not violated any of the Petitioners contractual, statutory or constitutional rights.
40. The conclusion does not mean or suggest that the Court is powerless to intervene in the disciplinary process where the justice of the case requires its intervention. As the authorities suggest, that intervention should be in the clearest and exceptional of situations.

The process/natural justice

41. The Boards of Management of Schools and County Directors of Education exercise delegated authority. It would be an absurdity in law and an affront to common sense to suggest that a person or authority which has donated power cannot exercise the power itself.
42. Even if not expressly provided for, a donor of a power will have a residual authority to exercise the power.
43. In the case at hand, it is admitted that the term of the members of the 1st Respondent had expired, but I cannot find anything offensive or prejudicial to the Petitioner when the Principal of the School cascaded the complaints to the County Director to take appropriate action in the absence of a Board of Management.
44. The Petitioner had also contended that the process and action of the Respondents was not in consonance with the principles of natural justice.
45. The minutes of the 1st Respondent leave no doubt that the Petitioner was informed of the allegations against him and that he was questioned and given an opportunity to make representations.
46. The 1st Respondent did not in any case make any adverse decision against the Petitioner, it cascaded the matter to the 2nd Respondent.
47. The 2nd Respondent's agent, the County Director in turn set out the allegations against the Petitioner in the interdiction letter and sought written representations from the Petitioner within 21 days.
48. Allegations of the type against the Petitioner are serious and deserved investigations. Persons such as the Petitioner have been given responsibility over vulnerable members of society and must keep and maintain high standards of conduct.
49. Whether the Petitioner was faithful to the standards expected of him should be part of the process he is required to undergo and thus far, he has not demonstrated any violations.
50. He should with fortitude undergo the process and should he feel shortchanged, it is still open to him to return to the seat of justice at the end of the process. He would still have very effective remedies should the Respondents ultimately breach his contractual or constitutional rights.

Conclusion and orders

51. The upshot of the foregoing is that the Amended Petition is dismissed.
52. Costs do not follow the event under the statutory scheme established by this Court's establishing Act. The Court orders that each party bears its own costs.

Delivered, dated and signed in Nakuru on this 27th day of November 2015.

Radido Stephen

Judge

Appearances

For Petitioner
Advocates

Mr. Nganga instructed by E.N. Nganga & Co.

For Respondents
Commission

Ms. Mambo, Legal Officer, Teachers Service

Court Assistant

Nixon