



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISII**

**PETITION NO. 29 OF 2012**

**IN THE MATTER OF: ARTICLES 20, 21, 22, 23(3), 27(1), 47 & 50(1) OF THE CONSTITUTION,  
2010**

**AND**

**IN THE MATTER OF: VIOLATION AND/OR INFRINGEMENT ON THE PETITIONER'S  
CONSTITUTIONAL RIGHTS**

**AND**

**IN THE MATTER OF: TEACHERS SERVICE COMMISSION ACT, CHAPTER 212 AND THE  
REGULATIONS THEREUNDER**

**AND**

**IN THE MATTER OF: REVOCATION/SUSPENSION OF PROMOTION**

**AND**

**IN THE MATTER OF: DISCRIMINATION AGAINST PERSONAN**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION  
AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL)  
HIGH COURT PRACTICE AND PROCEDURE RULES, 2006**

**AND**

**IN THE MATTER OF: SECTION 19 (SIXTH SCHEDULE) OF THE CONSTITUTION, 2010**

**BETWEEN**

**JOASH OKELO ALOO.....PETITIONER**

**VERSUS**

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

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

## JUDGMENT

1. The petitioner herein **Joash Okello Aloo** by the petition dated 24<sup>th</sup> August, 2012 seeks the following prayers:-
  - a. **Declaration be issued to the effect that the petitioner is entitled to protection under the Constitution.**
  - b. **Declaration that the petitioner has been denied and/or deprived of a right to be fairly heard by the authorities to whom the petitioner is subjected to (sic) prior to any adverse decision(s) being taken and/or made.**
  - c. **Declaration that the decision by and on behalf of the 1<sup>st</sup> Respondent conveyed and communicated vide letters dated 13<sup>th</sup> January, 2012 and 16<sup>th</sup> May, 2012, revoking, cancelling and/or suspending the petitioner's promotion, was irregular, illegal, invalid, ultra vires and amounts to contravention of the petitioner's constitutional rights under the constitution of Kenya, 2010.**
  - d. **An order of Judicial Review, in the nature of certiorari to bring to court the decision(s) vide letters of the 1<sup>st</sup> respondent dated 13<sup>th</sup> January, 2012 and 16<sup>th</sup> May, 2012 respectively, unto this honourable [Court] and same be quashed.**
  - e. **Costs of the petition be borne by the respondents jointly and/or severally.**
  - f. **The honourable Court be pleased to issue such orders and or writs as the court may deem fit and or expedient.**
2. The petition was supported by an affidavit sworn by the petitioner on 24<sup>th</sup> August 2012 in which he raises the following facts.
3. The petitioner was recruited and employed as a teacher by the 1<sup>st</sup> respondent in or about December, 1997 and was assigned TSC Number 388898. Upon his recruitment he was posted to various stations including Bodi Mixed Secondary school between 2002-2009 and thereafter to Daraja Mbili Mixed Secondary school between September, 2009 to date. By the time he was leaving Bodi Secondary School, he was a Principal and thereafter transferred in the same capacity to Daraja Mbili, Mixed Secondary school.
4. Thereafter, on or about 23<sup>rd</sup> November, 2004, the 1<sup>st</sup> Respondent issued a letter of promotion in favour of Komira James Peter Oumo TSC Number 352329 which letter was directed through the petitioner by virtue of being the Principal of Bodi Mixed Secondary school. Komira James Peter Owino's letter of promotion indicated that same was to be effective from 6<sup>th</sup> December, 2004 and that failure to report to new station by appointment date would result into cancellation of the appointment.
5. However, the letter under reference was posted vide ordinary mail and same was only received and acknowledged by petitioner on 13<sup>th</sup> day of December, 2004 and by that time, the affected teacher Komira James Peter Owino TSC Number 352329 was engaged in the marking of KCSE Kiswahili national examinations, which meant that the said letter was not handed over to the affected teacher immediately upon receipt of same on 13<sup>th</sup> day of December 2004.
6. Nevertheless, the petitioner personally handed over the letter of promotion to the affected teacher on 20<sup>th</sup> December, 2004 upon return of the affected teacher from his engagement in the KCSE national marking exercise. That upon handing over the letter of promotion to the affected teacher the affected teacher abandoned school and deserted duty, upon opening of the schools in January, 2005 upto and including 1<sup>st</sup> July, 2005.
7. Subsequently, the 1<sup>st</sup> respondent interdicted the affected teacher, and during the interdiction proceedings against Komira James Peter Owino, the petitioner was called as a witness in the affected teachers disciplinary case where upon he was exonerated of any blame and blameworthiness over and in respect of the delay in handing over the letter of promotion to the affected teacher. Consequently the affected teacher was appropriately and suitably disciplined by

- the 1<sup>st</sup> respondent.
8. Thereafter, the petitioner applied for and was shortlisted for interview for Job Group “N”. He was interviewed and promoted on 14<sup>th</sup> day of November, 2007, and by the time of the said promotion the issue involving the handling of the affected teacher’s promotion had already been concluded. In or about September, 2011 the petitioner was again invited to attend a promotional interview to Job Group “P” which interview was held on 4<sup>th</sup> October, 2011. He passed the interview and subsequently his name was posted on the 1<sup>st</sup> Respondent’s website that is [www.teachersonline.go.ke](http://www.teachersonline.go.ke). The promotion was effective from 10<sup>th</sup> November, 2011.
  9. However, in an unprecedented move, the 1<sup>st</sup> respondent issued a letter dated 13<sup>th</sup> January, 2012 revoking, cancelling and/or suspending his promotion to job Group P. Upon receipt of the said letter, he complained to 1<sup>st</sup> respondent, whereupon the 1<sup>st</sup> respondent purported to suspend the promotion for 1 year vide letter dated 16<sup>th</sup> May, 2012. The petitioner avers that the decisions by the 1<sup>st</sup> respondent are conflicting, confusing and devoid of clarity.
  10. Furthermore, that the issue relating to neglect and/or negligence of duty and the handling of the promotional letter for Komira James Peter Owino, TSC Number 352329 neither arose nor was same canvassed during his interview to Job Group P, and that the same has been raised to hamper/suffocate his promotion, long after the promotion had been earned and/or awarded and long after the issue had been raised and decided conclusively. The petitioner avers that the issue was subsequently used against him without affording him an opportunity to be heard.
  11. In addition, that the decision of the 1<sup>st</sup> respondent to purport to use the issue of neglect/or negligence of duty and the handling of the promotional letter for Komira James peter Owino, TSC number 352329, to revoke the Petitioner's promotion has occasioned double jeopardy to him in so far as the same 1<sup>st</sup> respondent had previously exonerated him and given him a clean bill of health for any future promotions.
  12. It is the petitioner's case that the 1<sup>st</sup> respondent's actions constitute or amount to a violation and/or infringement of his constitutional rights under Articles 20,27,47 and 50 of the Constitution, 2010.
  13. The 1<sup>st</sup> respondent on their part filed a replying affidavit dated 5<sup>th</sup> December, 2012 through the Director of Administration at the teachers service commission one Simon Musyimi Kavisi. He confirmed that the 1<sup>st</sup> respondent is a creature of the Constitution under **Article 237 (1)** and has a broad legal mandate including the power to promote teachers in its service subject to the provisions of the Code of Regulations for teachers and administrative guidelines developed from time to time; that the 1<sup>st</sup> respondent invited the petitioner to attend a promotional interview on 14<sup>th</sup> October 2011 to job Group ‘P’. Whereupon the names of all applicants who were successful in the interview were published by the commission. The deponent of the Replying Affidavit further avers to the following matters:-
  14. That shortly before petitioners letter of promotion was processed; and upon perusal of his personal file, it was noted that a complaint had been registered against the petitioner by Mr. James Komira Otieno TSC NO. 352329 concerning the promotion/deployment letter issued by the 1<sup>st</sup> respondent on 23<sup>rd</sup> November, 2004 through petitioner. The complainant alleged that the petitioner abused his office by maliciously failing to hand him the said promotion letter which had a deadline of reporting to the new station of duty (by 6<sup>th</sup> December, 2004) thereby leading to cancellation of the said letter on the mistaken ground that the complainant had refused to take the appointment while in fact it was petitioner who had sat on and or failed to transmit the letter in time.
  15. Accordingly, the 1<sup>st</sup> respondent conducted inquiries on the complainant's complaint, exchanged letters with the complainant and upon careful evaluation of the facts the commission determined that indeed the petitioner received the said promotion/deployment letter but only handed it over to the complainant on 20<sup>th</sup> December, 2004 two weeks after the deadline for reporting by the complainant to his new station. That the petitioner’s action of unnecessarily retaining complainant’s letter of promotion and denying him promotion for about 6 years was irregular, amounted to professional misconduct and an outright abuse of office on his part and in strict adherence to the principle of natural justice and the provisions of **Articles 47 and 50** of the **Constitution**, the 1<sup>st</sup> respondent invited the petitioner vide a letter dated 22<sup>nd</sup> September, 2011

and the petitioner did indeed reply to the said 'show cause letter' denying the allegations causing the 1<sup>st</sup> respondent to further evaluate the circumstances of the case by perusing relevant correspondences and applying the facts of the case to the relevant regulations governing the service. In addition to this, the 1<sup>st</sup> respondent also considered the petitioner's explanation to the allegations made against him, and reached the decision to serve him with a warning letter, same dated 22<sup>nd</sup> December 2011.

16. Therefore, based on the warning letter, the commission deferred the petitioner's promotion for one year as provided under **Regulation 35 (iv)** of the **Code of Regulations** for Teachers. The disciplinary proceeding against the complainant in 2005 were based on inter alia negligence of duty and insubordination which was in no way related to the issue of the complainant's promotion/deployment as alleged and thus has no bearing on these proceedings. That petitioner's constitutional rights have not been infringed in any action as he was availed opportunity to defend himself against allegations. He was also treated with courtesy and given detailed reasons why his promotion was deferred vide written and verbal correspondence.

17. In conclusion, the 1<sup>st</sup> respondent avers that:-

**i. The petitioner has misconstrued, misdirected and/or misapplied the relevant law and has arrived at an erroneous position.**

**ii. The commission is a public institution which has a constitutional mandate to promote constitutionalism and the rule of law and in this case it has diligently adhered to this mandate through administrative policies and regulations.**

**iii. The petitioner has come to court with unclean hands and withheld material facts from the court and thus is not entitled to reliefs sought.**

18. The petitioner in reply to the 1<sup>st</sup> respondent's affidavit filed a replying affidavit dated 7<sup>th</sup> January, 2013 in which he avers that the respondent's decision to defer his promotion for one year on the basis of the provisions of **Regulation 35** of the **Code of Regulations** for teachers was unlawful and irrelevant to his case because he was never given a hearing but was instead condemned unheard and found to be guilty. That the section cited namely **Section 35 (iv)** only applies to teachers who have gone through a disciplinary process, found guilty and suspended which has never been the case with him. In addition, that such a teacher must have appeared before a disciplinary committee, that he had never been summoned before a disciplinary committee since he was employed by TSC nor faced any disciplinary action.

19. I have now carefully considered oral submissions made by learned counsel for both petitioner and 1<sup>st</sup> respondent when they appeared before me on 11<sup>th</sup> February, 2014. I have also read the written submissions filed by counsel for the petitioner on 4<sup>th</sup> February, 2013. The court has seen the issues framed by the petitioner for the determination of this court. The said issues broadly cover the gist of the contest herein and in the circumstances, I will adopt these issues as the issues to be determined by this court. They are:-

- 1. Whether the 1<sup>st</sup> Respondent was seized of jurisdiction to revoke and/or suspend the promotion of the petitioner;*
- 2. Whether the officer who (sic) took the offensive action, was seized of capacity to suspend the promotion;*
- 3. Whether the circumstances relied on to revoke and/or suspend the promotion of the petitioner were tenable;*
- 4. Whether the petitioner's right to natural justice were violated and/or abrogated;*
- 5. Whether the petitioner has been unfairly treated and/or discriminated against;*
- 6. Whether the petitioner's constitutional and/or fundamental rights have been violated;*
- 7. Whether the provisions of **Section 35** of the **TSC Code of Regulations** applied to the petitioner's case.*

- 20.No doubt in sifting the above issues this court will of necessity seek to establish whether the petitioner negligently withheld the letter of promotion for Komira James Peter Owino and whether the warning letter issued by the 1<sup>st</sup> Respondent on 22<sup>nd</sup> December 2011 amounted to disciplinary action envisaged by **Section 35 (iv) of the TSC Code of Regulations** and whether, in light of the above quoted provision, the 1<sup>st</sup> Respondent was justified in suspending the petitioner's promotion for 2 years.
- 21.Regarding the first issue, it is not in doubt that the Petitioner did not deliver the letter of promotion sent to Mr. Komira James Peter Owino within the stipulated time. The petitioner stated that he received the letter on 13<sup>th</sup> December 2004, which was a week after the date on which Mr. Owino was to have accepted the promotion. The reason the petitioner gives is that the letter was sent via ordinary postage. There is also evidence by the 1<sup>st</sup> Respondent that the persons to whom Mr. Owino's letter were sent also received their copies late, namely after 6<sup>th</sup> December 2004.
- 22.The above notwithstanding, it is clear that the petitioner's case concerning his alleged negligence of duty over Mr. Owino's letter was dealt with by the 1<sup>st</sup> Respondent and concluded long before the Petitioner appeared for interview on 14<sup>th</sup> October 2011. During the hearing of the case against Mr. Owino, the petitioner was a witness for the TSC. Thereafter, the petitioner got a promotion on 14<sup>th</sup> November 2007 to Job Group N and on 14<sup>th</sup> October 2011, the petitioner was interviewed for a position to Job Group P. While communicating the successful result of the interview, the author of the letter dated 13<sup>th</sup> January 2012, one Mary C. Rotich (Mrs.) signing on behalf of the Secretary TSC informed the petitioner that because of Mr. Owino's case, he (petitioner) was not liable for promotion until completion of 2 years.
- 23.The question that pops up in the mind of the court is whether the suspension of the petitioner's promotion was an issue that arose during the interview on 14<sup>th</sup> October 2011 or whether it was an issue that arose subsequent to the interview? From the Respondent's replying affidavit, and in particular paragraphs 12 through to 16, the issue that gave rise to the suspension of the promotion was not part of the interview on 14<sup>th</sup> October 2011. In my considered view therefore, if, and since that issue did not arise during the interview on 14<sup>th</sup> October, 2011, so as to give the petitioner an opportunity to appropriately respond to the same, the 1<sup>st</sup> Respondent's decision to suspend the promotion was without basis. Though the 1<sup>st</sup> Respondent had general jurisdiction to amend the decision of the Board that interviewed the petitioner on 14<sup>th</sup> October 2011 how that decision was taken was flawed. There is no evidence by the 1<sup>st</sup> Respondent that the decision to suspend the promotion was a decision of the Board and not just a decision of the officer who signed the letter on behalf of the Secretary to the Commission. In effect therefore I have reached the conclusion that, with regard to the first and second issues the 1<sup>st</sup> Respondent did not properly exercise its jurisdiction to revoke and/or suspend the petitioner's promotion, and further that the officer who authored the letter dated 13<sup>th</sup> January 2012 lacked the capacity to suspend the promotion of the petitioner which he had earned competitively when he appeared before the interviewing panel on 14<sup>th</sup> October 2011.
- 24.In any event, the warning letter, the basis of the suspension was issued to the petitioner more than one month after he had sat and passed the interview. For that letter to have been applied retrospectively was clearly an action that was not well intentioned on the part of the 1<sup>st</sup> Respondent and thereby marred the process by which the promotion was suspended.
- 25.Having stated the above findings with regard to issues 1 and 2, I find that the circumstances relied upon to suspend the petitioner's promotion to Job Group P were not tenable. First and foremost, those circumstances were not raised during the interview on 14<sup>th</sup> October 2011. Paragraph 7 of the Replying Affidavit states:-

**“7. THAT shortly before the Petitioner's letter of promotion was processed, and upon perusal of his personal file, it was noted that a complaint had been registered against the petitioner by Mr. James Komira Otieno TSC No.352329, a teacher also in service with the Commission.”**

26. On this issue, it is submitted on behalf of the petitioner that during the interview, the interviewing Board had in its possession the personal/employment file of the petitioner, which had all the documents pertaining to the petitioner's integrity and discipline record and that someone did not have to make a contrary decision long after the petitioner had been interviewed and found fit to be promoted to Job Group P. Further, that if indeed the issue involving Mr. Owino was the real issue for suspending of the petitioner's promotion to Job Group P, then the petitioner's promotion which he earned on 16<sup>th</sup> April 2007 should also have been revoked or suspended.
27. With all the above circumstances in mind, I have reached the conclusion that the circumstances relied upon to revoke and/or suspend the petitioner's promotion to Job Group P were not tenable. The court finds the process flawed. It follows therefore that a subsequent and contrary decision to the one made by the interviewing Board on 14<sup>th</sup> October 2011, clearly violated the petitioner's right to natural justice. There is also no doubt in my mind that the petitioner was unfairly treated and/or discriminated against vide the unilateral decision to suspend his promotion for 2 years without justification or good cause.
28. Under **CHAPTER FOUR -THE BILL OF RIGHTS** – of the **Constitution** and in particular **Articles 20, 27 and 47** thereof, every person “**shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.**” In the instant case, the petitioner was entitled to know the whole case against him when he appeared for interview before the interviewing Board on 14<sup>th</sup> October 2011. There was no provision for a second interview at which he could have defended himself against the 1<sup>st</sup> respondent's claims communicated to him vide the letter dated 13<sup>th</sup> January 2012. By the time he received that letter, the petitioner had been condemned unheard. The administrative action by the 1<sup>st</sup> respondent condemning the petitioner unheard was neither lawful nor reasonable. It was also not procedurally fair. Thus the petitioner's constitutional and fundamental rights as envisaged under **Article 47** of the **Constitution** were violated.
29. The final issue for determination is whether the provisions of **Section 35 (iv)** of the **TSC Code of Regulations** were applicable to the petitioner's case. **Section 35** deals with conditions for consideration for promotion. Under **Section 35 (iv)** it is provided as follows:-

**“A teacher who has had a discipline case and was found guilty shall not be considered for promotion until he/she has completed two years teaching service AFTER THE RESUMPTION OF DUTY. [Emphasis is mine].”**

30. According to the petitioner, this section is not applicable for the reason that the petitioner's service with the 1<sup>st</sup> respondent has never been disrupted. That apart from the “**offensive**” letter dated 13<sup>th</sup> January 2012, the petitioner has never had a disciplinary case, nor has he ever been found guilty and suspended. That the application of the said sub section is relevant where a teacher has been suspended upon interdiction and thereafter reinstated. Counsel for the petitioner relied on the case of **Kenya National Examinations Council -vs- Republic & 10 others – Court of Appeal Civil Appeal No. 66 of 1996** (unreported). In the said case, and particularly at page 404 of the judgment, the Court of Appeal made an effort to distinguish between the writs of prohibition, mandamus and certiorari. The gist of that distinction is that in dealing with applications such as the present one, the court's mandate is not to determine whether any powers by the inferior tribunal have been exercised but how such powers are exercised. In this case, counsel for the petitioner submitted that the 1<sup>st</sup> respondent did not properly exercise the power to suspend the petitioner's promotion.
31. Counsel for the 1<sup>st</sup> respondent submitted that the 1<sup>st</sup> respondent acted within the provisions of **Section 66 (6)** of the **TSC Code of Regulations** in suspending the petitioner's promotion.
32. After carefully weighing the two contending views, I have reached the conclusion that **Section 35 (iv)** relied upon to suspend the petitioner's promotion is not applicable and secondly, I have reached the conclusion that the manner in which the 1<sup>st</sup> respondent went about suspending the petitioner's promotion was neither fair nor reasonable.
33. While I am aware of the fact that “the prerogative of the employer in managing its business and administration of its staff, should not be unduly stifled by judicial intervention through issue of provisional injunctive measures” (see **Industrial Cause No.1200 of 2012 – Prof. Giitile J. Naithi**

**-vs- University Council Multimedia University of Kenya** (unreported) it is not lost to me that how such management is exercised is of prime importance in judicial review cases.

34. Having made the above findings I enter judgment for the petitioner by way of the following declarations and orders:-

1. *The Petitioner is entitled to protection under the Constitution.*
2. *The petitioner has been denied and/or deprived of his right to be fairly heard by the authorities to whom the petitioner is subjected prior to any adverse decision being taken and/or made.*
  
3. *The decision by and on behalf of the 1<sup>st</sup> Respondent conveyed and communicated vide letters dated 13<sup>th</sup> January 2012 and 16<sup>th</sup> May 2012, revoking, cancelling and/or suspending the petitioner's promotion was irregular, illegal, invalid, ultra-vires and amounts to contravention of the petitioner's constitutional rights under the Constitution of Kenya, 2010.*
4. *An order of JR in the nature of certiorari do and is hereby issued to bring to court the decision(s) vide letters of the 1<sup>st</sup> respondent dated 13<sup>th</sup> January 2012 and 16<sup>th</sup> May 2012 respectively unto this Honourable Court and same be and are hereby quashed.*
5. *The petitioner shall have costs of this petition to be borne by the 1<sup>st</sup> respondent.*

35. Orders accordingly.

**Delivered, dated and signed at Kisii this 31<sup>st</sup> day of July, 2014**

**RUTH NEKOYE SITATI,**

**JUDGE.**

In the presence of:-

Miss Nekesa for Oguttu Mboya for the petitioner.

N/A (Mr. Sitima) for the respondents

Mr. Bibu - Court Clerk.