



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

PETITION NO. 18 OF 2013

MOSES KINYUA MIRITI.....1ST PETITIONER
MURIKI KIRIMI FREDRICK..... 2ND PETITINER
SABINA KANANU MUGAMBI.....3RD PETITIONER
NKIROTE MARION.....4TH PETITIONER
KARIMI MARTHA.....5TH PETITIONER
KINYUA JOSEPHAT.....6TH PETITIONER

VERSUS

IGEMBE NORTH DISTRICT STAFFING OFFICE.....1ST RESPONDENT
IGEMBE SOUTH DISTRICT STAFFING OFFICER.....2ND RESPONDENT
DIRECTOR, TSC MERU COUNTY.....3RD RESPONDENT
THE TEACHERS SERVICE COMMISSION.....4TH RESPONDENT

RULING

The petitioners/applicants through an application dated 5th September 2013 brought pursuant to Article 22, 23, 25, 159 and 165 of the Constitution of Kenya Rules 3,4,5,8, 19, 23 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 and Rule 3 of the High Court (Practice and Procedure) Rules made under section 10 of the Judicature Act Cap 8 Laws of Kenya seek that pending the hearing of this petition conservatory Order do issue, directing the respondents, their successors, employees, servants, agents and anybody else acting for, through or at their behalf or at behest direction and an instruction, from issuing letters of appointment to and/or deploying/posting all the P1 (primary school) teachers made public on or about 27th August 2013, who are due for employment in Igembe North and South District, within Meru County, after selection during July-August-September 2013 recruitment exercise for P1 (Primary School) teachers. The petitioners/applicants also sought costs of the applications be provided for.

The application is based on the grounds on the face of the application inter alia that the applicants are qualified P1 teachers who applied for recruitment as P1 teachers in 2013 but the respondents sidelined them and discriminated against them. That the applicants qualified in 2007 but the respondents intend to employ some of the P1 teachers who qualified much later in 2008, 2009 and 2010 and exclude the applicants in the employment. That Igembe North District was allocated 41 vacancies while Igembe

south District was allocated 39 vacancies which can comfortably cater for the number of unemployed remnants who qualified as P1 teachers in 2007. That the respondents blatantly flouted the known selection criteria of considering FIRST, the year of qualification (graduation), SECOND, the chronological ages of the applicants and THIRD the grade (P.T.E points) which has all along been applied in 2007, 2008, 2009, 2010, 2011 and 2012 and even in previous years beyond 2007.

The applicants further based their application on the ground that the respondents even ignored the applicants written complaints and are in process of issuing letters of appointments and posting the applicants who were recruited in a skewed manner to the detriment of the petitioners/ applicants.

The petitioners/applicants further contend unless the relief sought are granted the respondents shall carry out the deployment/posting exercise, which would eventually render the main petition a moot and academic exercise and worthless. The applicants further contended that they hail from Igembe North and South District and are entitled to be employed there, being the oldest unemployed P1 teachers qualifiers remnants of 2007. They further contended if the relief sought is not granted the applicants shall suffer profound and irreparable harm, loss and damage in the form of depreciation of an employment opportunity to which they are rightly entitled.

The application is further supported by affidavit of Moses Kinyua Miriti, 1st Petitioner/Applicant on his behalf and his co-applicants. The applicants aver that they qualified a P1 teachers in 2007 and annexed bundle of their respective certificates. That all come from the two respective districts. They also listed their respective TSC registration numbers as 513118, 510808, 511640, 538114, 531515 and 513151. That on 31/07/2013, the 4th respondent advertised among others, P1 vacancies and called for applications from qualified teachers vide an advertisement dated 31/7/2013 copy whereof the applicants annexed as annexure "MKM 2". That the applicants in pursuance of the said advertisement applied for the post of P1. That on 27/8/2013 the respondents published a list of the teachers who were picked for employment excluding the petitioners/Applicants some of whom had qualified much later than the petitioner; that is to say in the year 2008, 2009 and 2010 and even the petitioners named the teachers as **Leah Mwenda Aluma**, **Nanis Kaaria Isaiah**, and **Samuel Kirimi** from Igembe North District.

The petitioners further deposed that they promptly lodged verbal complaints with 1st, 2nd and 3rd respondents who advised them to lodge written complaints, as required by the aforesaid advertisement dated 30/7/2013 and as such they did so and have annexed bundle of letters marked "MKM3". The applicants averred that their complaints have not been addressed to date. The petitioners averred that they have as such been discriminated against, treated unfairly, unequally, and their rights violated by failing to be employed in their home districts or elsewhere because the respondents gave priority to some 2008, 2009 and 2009 qualifiers at the applicants expense. That they were remnants of unemployed P1 teachers who graduated in the year 2007. That their complaints were not addressed. That the applicants' juniors were employed and deprived them of an employment opportunity to which the applicants are rightly entitled having satisfactorily attained all the requirements for a P1 teacher. The applicants further averred that the respondents violated the applicants' constitutional rights to be accorded equal and fair treatment as citizens of Kenya.

The respondents upon being served with the application filed Replying Affidavit dated 13th September 2013 and further replying affidavit dated 20th September 2013.

The Respondents response is that the Commission is established under Article 237 of the constitution of Kenya 2010 and specifically Article 237 (2) and (3) thereto empowers the commission to inter alia register trained teachers, recruit and employ registered teachers, promote and transfer the teachers so recruited and employed in public teaching service, exercise disciplinary control over them, and may when circumstances warrant, terminate a teacher's employment, as well as review the general demand and supply of teacher's across the country. That from the aforesaid it is clear that in exercising its constitutional mandate, the commission is empowered to inter alia recruit any teacher to its employment to public institution in discharge of its function. The commission may either act directly and/or to cause such recruitment or employment to be carried out by its agents/or officers at the local administrative levels. The respondents further deposed that the 1st, 2nd and 3rd respondents were at all material times

to this petition employees of the commission deployed at Igembe North, Igembe South, Meru County offices to perform all teacher management functions in liaison with the head office. The respondents admit in discharge of its constitutional mandate under Article 237 (2) (b) of the constitution, it advertised on 31st July 2013 teaching vacancies in public primary and post primary institutions and outlined the basic recruitments and procedure for all candidates applying for posts. It annexed a copy of the advertisement dated 31/7/2013 as annexure “DM-1”. The recruitment guidelines for candidates applying for the posts were extracted from **Teachers Service Commission circular No.9 of 2013 on guidelines for recruitment of Primary School teachers 2013** developed and published by the commission ostensibly to facilitate the exercise. The guidelines provided inter alia for scoring points/grades for every candidate. The same is annexed to the respondents affidavit as “DM-2”.

The said recruitment exercise expressly provided that any candidate with grievances related to recruitment exercise should write to the Teachers Service Commission County Director and copy the same to the Commission's Head Office immediately but not later than seven (7) days after the selection exercise. The Guidelines together with the conditions set out in the advertisement of 31st July 2013 formed the sole instruments upon which the recruitment exercise was carried out throughout the county, including Igembe North and Igembe South sub-counties. The respondents further deponed that the recruitment guidelines set out three (3) fundamentals areas:

a. Professional Qualifications:

where each candidate was to be graded based on the strength of his/her professional certificate/s attained at the teacher training college level; being a Distinction, credit or Pass. It is noteworthy that the grading was based on the best six (6) subjects excluding the teaching practice;

b. Length of stay after Graduating from the teaching training institution/s:

where candidates who graduated earlier were accorded a slight preference to those who completed their college education later,

c. Age of Applicant:

where the candidate/s was to be graded based on their age. Older candidates in age were awarded slightly higher scores than the younger ones.

The guidelines also provided that in the event of a tie amongst the candidates, recruiting panel would break the tie by:

a, Giving preference to candidates who graduated earlier;

b. Use the quality of the academic certificates (KACE/KCE/KCSE)

C. Use the grade obtained in Teaching Practice.

The respondents further deponed that the 1st, 3rd, 5th and 6th petitioners/Applicants submitted their applications for employment to Igembe North sub county while the 2nd and 4th petitioners/Applicants applied at Igembe South sub-county respectively. That after the conclusion of the recruitment exercise the District Recruitment Committee of the two districts convened to consider all applicants and thereafter prepared a merit list based on the guidelines. That each candidate was awarded the marks he/she deserved on the strength of their professional qualification, length of stay since graduation and the age of their respective ages. The respondents annexed merit list “DM-3(a)” and (b) which respectively reveals inter alia that the petitioners/applicants attained the following scores:-

- | | |
|---------------------------|----------|
| a. Moses Kinyua Miriti | 45 marks |
| b. Muriki Kirimi Fredrick | 50 marks |

- c. Sabina Kananu Mugambi 49 marks
- d. Nkirote Marion 49 marks
- e. Karimi Martha 49 marks
- f. Kinyua Josephat 45 marks

The respondents deponed that an analysis of the individual scores of the petitioners and other candidates drawn from the annexure DM-4, reveals that while the petitioners/applicants graduated from college in 2007 and may have been older in age, all of them had relatively weak professional grades which contributed to their relatively poor overall score as compared to other candidates as per respondents annexure DM-5 (a), and (b), being bundle of the score sheets for all the selected applicants in Igembe North and south Igembe respectively. The petitioners scored an aggregate PASS in their professional grades compared to other recruited candidates who attained either distinction or Credit in their professional grades as per respondents annexure DMK-6 being a copy of analysis of petitioners scores.

The respondents deponed that the entire recruitment exercise both in Igembe North and Igembe South and indeed in the county adhered strictly to the guidelines which provided from a multifaceted criteria for selection and that no criteria was developed and/or used with a view to disadvantage of the petitioners and other applicant. The respondents further averred that the guidelines was careful balance to ensure that all the applicants would be given opportunity to complete fairly based on merit, professional competence and this does not amount to any discrimination as envisaged under Article 27 of the Constitution.

The respondents responded that the petitioners' assertion that they ought to have been selected on such basis that they graduated in 2007 and are older in age is grossly erroneous, discriminating, unfair and found on a mental inclination to grossly violate the fundamental principles of public service outlined under Article 232 of the constitution.

The respondent further deponed that in an endeavor to bring fairness to the recruitment exercise, the commission has established a **vetting committee** at its Head Office to address all complainants arising from the teachers recruitment exercise, hence it asserted that the Petitioners/Applicants approach to the court for redress as the vetting committee commission is yet to be seized with the matter is premature. The respondents sought the application to be dismissed.

The counsel filed submissions and highlighted on the same. This court has carefully considered the application, supportive affidavit and supplementary affidavit. It has also considered the replying affidavit and further replying affidavit as well as written submission and counsel oral submissions. It has also considered the counsel opposing positions and authorities in support.

The applicants in their application are seeking conservatory orders to be issued against the respondents to stop the respondents from posting P1 teachers, in terms of prayer 3 of the petitioners application.

The principles on which this court acts on such cases are well settled and are that the applicant must show he has a prima facie case with a likelihood of success.

Secondly, the court should not grant an interlocutory injunction where damages are likely to be adequate compensation and thirdly that, if it is in doubt, the injunction should be granted on balance of conveniences.

As can be seen from the petitioners/applicants case in this petition, the applicants who were aggrieved with the selection were given an opportunity to take up the issue with the respondents which the petitioners/Applicants have. The respondents do not deny having received the petitioners/applicants' grievances but state that the applicants have come to this court having not exhausted the dispute resolution mechanism provided under the Guidelines as set out by the Commission in establishing a vetting committee at commission's Head Office to address all complaints from the teachers recruitment

exercise. The applicants do not controvert the respondents assertion that there is already a set out dispute resolution mechanism to address their complaints . They have not convinced this court that they have exhausted the dispute resolution mechanism provided for under the guidelines before they moved to this court. Where there is a laid down dispute resolution mechanism the applicant is obligated to exhaust such a process as provided before moving to court. This court can only act if it is shown that the commission acted contrary to the laid down provision or acted in a discriminatory manner or it ignored to carry out its mandate as per the provision of the law. In this case that has not been demonstrated. Where there is a provision providing for a procedure be observed , in settlement of a dispute, the court should not act on an application until the laid down procedure has been followed. The court can only act if it is shown that the body that is supposed to carry out its mandate in ensuring determination of a dispute such as Teachers Service Commission in this matter has not carried out its mandate or it has acted contrary to the laid down procedure or ignored it altogether and denied the applicant right to be heard.

I find that the issues raised by the petitioners/applicants are premature at this stage and it would be too early to invoke the provisions of the constitution and grant the application.

Looking at the merits of the applicants application it is observed that the commission being a public institution with a constitutional mandate to ensure adherence to democratic values and principles, promote constitutionalism and the rule of law and therefore obliged to conduct a recruitment process that encapsulates the fundamental provisions of the constitution as set out under its Recruitment Guidelines which was carefully balanced to meet the principles of non- discrimination in employment, granting equal opportunity to all applicants and fairness has not acted in breach of its provisions. The guidelines were not meant to favour any applicant or discriminate against any applicant and given time the commission would effectively determine the applicants' complaints and then bring to an end in one way or another as per its mandate.

I find there is no evidence that the applicants did not score the marks shown in the respondents annexure as there was no affidavit controverting the same.

In view of the foregoing it appears that the applicants have not established a prima facie case with probability of success.

On damages, the applicants, have not established that if conservatory orders are not granted they would suffer irreparable injury, which would not be adequately compensated by way of damages.

On balance of convenience, it is noted that the applicants have not exhausted the dispute resolution mechanism provided by the Commission. It would be improper to issue orders sought when the applicants have come to this court prematurely. The applicants would suffer no injustice if the injunction is not granted. They have already lodged their grievances with the Commission which would be addressed together with any other complaints. The balance of convenience in my view would therefore appear to be against the granting of the conservatory orders.

The upshot is that the application dated 5th September 2013 is dismissed. Each party to bear its own costs.

DATED AT MERU THIS 31ST DAY OF OCTOBER 2013.

J. A.MAKAU

JUDGE

Delivered in open court in presence of :-

Mr. C.Mbaabu for applicants - Present

Mr. Situma for respondents - absent

J.A. MAKAU

JUDGE.