REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION 381 OF 2012

THE CONSTITUTION

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IN THE MATTER OF THE BILL OF RIGHTS UNDER THE CONSTITUTION OF KENYA

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IN THE MATTER OF THE TECERS SERVICE COMMISSION ACT, 2012

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THE STRIKE NOTICE ISSUED BY THE KENYA NATIONAL UNION OF TEACHERS (KNUT) & KENYA UNION OF POST PRIMARY EDUATION TEACHERS (KUPPET)

BETWEEN

VALLERIE NAMTILU WAFULA ……..……. 1ST PETITIONER

SUSAN WANGARI MUHORO……..……..……2ND PETITIONER

AND

THE KENYA NATIONAL UNION OF TEACHERS (KNUT)

D OKUTA OSIANY (SECRETARY GENERAL (KNUT)…..…1ST RESPONDENT

KENYA UNION OF POST PRIMARY EDUCATION (KUPPET)

AKELO MISORI (SECRETARY GENERAL)…..……2ND RESPONDENT

TEACHERS SERVICE COMMISSION……..……..…….. 3RD RESPONDENT

RULING

Introduction

1. The matter before me is a Constitutional Petition instituted by the two petitioners who claim to be parents with children currently enrolled and/or studying in public schools in Kenya. The 1st and 2nd respondents are Trade Unions duly registered in Kenya representing the interests of Teachers in primary

and post primary schools in Kenya together with their respective secretary generals. The third respondent is a Constitutional Commission established under Article 237(1) of the Constitution whose primary function is the management of teachers employed for service in public schools.

2. By a notice dated 20th August 2012, the 1st respondent notified the Minister for Labour of the existence of a Trade Dispute between it and the 3rd respondent and pursuant to sections 62-76 of the Labour Relations Act 2007 gave the said Minister a seven days' notice of intended industrial action by way of strike action effective from 3rd September 2012. It is this notice that provoked the institution of the instant petition.

3. However, at the expiry of the said notice the said industrial action was put into effect. Similarly, the 2nd respondent also joined into the said action thus paralyzing the education system in this country.

The Petition

4. The petitioners herein, **Vallerie Namtilu Wafula** and **Susan Wangari Muhoro** vide a petition dated 31st August 2012 and filed the same day herein, seek the following **orders**:

a. Conservatory stay orders against the intended strike by the Respondents pending the hearing and determination of this petition.

b. The Strike Notice issued by the 1st and 3rd Respondents be nullified and declared illegal.

c. The 3rd Respondent be compelled to negotiate with the other respondents on a mutual and reasonable mode of settling the remuneration issues.

d. Further or any orders as the Court may deem fit and just to grant in the circumstances.

5. Together with the petition the petitioners filed a Notice of Motion dated 31st August 2012 which motion was amended on 6th September 2012 which is the subject of this ruling.

The Application

6. The said amended Notice of Motion seeks the following orders.

a) That this Application is extremely urgent and need to be heard immediately during this High Court Vacation and Orders be made as the Respondents herein have called for national teachers strike on the 3rd and 5th day of September 2012 respectively.

b) That this matter be certified as urgent and the same be heard during this High Court vacation to prevent the strike called by the Respondents herein who have already served the Petitioner with the strike notice.

c) That this Honourable Court do issue Conservatory Stay Orders barring the members of the Respondents herein by themselves, their agents and/or servants from continuing with the said strike, Industrial Action, interfering with the smooth learning of Public Schools, and/or in any manner causing demonstrations in the streets, and causing any disturbance to the KCPE and KCSE candidates pending the hearing and determination of this Application inter parties.

d) That the Respondents' members be restrained from interrupting learning in schools by causing a strike, interfering with the smooth learning of schools pending the hearing and determination of the petition herein.

e) That the costs of this application be paid for by the Respondents.

7. When the said application came before me on 11th September 2012, I was of the view that taking into account the issues raised and theinterest of the country, the matter was amenable to the provisions of Article 159(2)(c) of the Constitution under which the Courts and Judicial Tribunals are enjoined to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. Accordingly, I directed that service be effected upon the 1st respondents who were not represented and as it was alleged that personal service on them was not possible I directed for alternative mode of service as well.

8. When the matter came up on 14th September, 2012, although service had been duly effected by way of advertisement in the media, once again the 1st respondent was unrepresented. Accordingly, I directed the parties to address me only in respect of prayer (c) of the amended Notice of Motion. Although the 2nd respondent had filed notice of preliminary objection, I directed that the issues which were intended to be raised by way of the preliminary objection be raised within the application.

The Submissions

9. In his submissions, **Mr. Osoro**, learned counsel for the petitioners stated that they were seeking conservatory orders against the members of the 1st and 2nd respondents whose actions have affected the rights of the petitioners' children. By declaring the strike, an act which is within their Constitutional rights to opt for, the said respondents maliciously calculated to affect the rights of the candidates who are due to sit their Kenya Certificate of Primary Education (KCPE) as well as Kenya Certificate of Secondary Education (KCSE) examinations which are due to start on 24th September 2012. The continuation of the strike, it is submitted, will hinder the rights of the candidates. Articles 20 and 23 of the Constitution bestow powers on the Courts to protect the children whose fundamental right to education has been hindered by the actions and threats of the said respondents. The petitioners, it is submitted, have a right to come to court to stop them from continuing with their said action and threatening the lives of others.

10. Mr. Jaoko, learned counsel for the 2nd respondents, opposed the grant of the orders sought. According to learned counsel, this Court has no jurisdiction to hear and determine the matter under Article 165(5)(d) of the Constitution, which according to counsel, provides that such disputes be filed at the Industrial Court. It is further submitted that under section 12 of the Industrial Courts Act, 2011 the Industrial Court has the exclusive, original and appellate jurisdiction to hear matters referred to it. This being an industrial action, the Court with the jurisdiction, it is submitted, is the Industrial Court. Further section 21 of the Teachers Service Commission Act which took effect on 31st August 2012, the same day these proceedings were instituted provides that proceedings against the Commission are deemed to be proceedings against the Government. Under section 13 of the Government Proceedings Act, the Attorney General must be served and as there is non-compliance with that provision the petition cannot stand. Further the petition is fatally defective by virtue of the fact that the conservatory orders sought are to be sought by virtue of Legal Notice No. 6 of 17th February, 2006, the Constitution of Kenya (Protection of Fundamental Right and Freedoms of the Individual) Practise and Procedure Rules which rules do not provide for the invocation of the Civil Procedure Rules which rules are invoked in the amended Notice of Motion. To that extent, it is submitted, the application is muddled and the petitioners had to elect whether they wanted to come to court by ordinary suit under the Civil Procedure Rules or by way of Constitutional Petition. Similarly, according to learned counsel, Order 19 rule 4 of the Civil Procedure Rules mandate that the deponent must disclose his place of abode. This requirement, it is submitted, is not just a technicality but goes to the substance and the root of the application and renders the same incompetent. On the issue of malice, it is submitted that the respondents have a right to go on strike upon issuance of 7 days' notice which was duly issued. Article 41(2)(d) of the Constitution donates the right to go on strike which right is not inferior to that of the Children and this right coupled with Article 41(2)(a) which gives the second respondent's members the right to remuneration. Since the notice was duly given, it is submitted that the conservatory orders ought not to be granted since the same are intended to suppress the rights of the second respondent\'s members yet there is no competent application before the Court. Accordingly, the application ought to be struck out.

11. Mr. Sitima, learned counsel for the 3rd respondent associated himself with the submissions made on behalf of the petitioners which he adopted. He, however, added that it is not correct that this Court lacks the jurisdiction since the Court is clothed with jurisdiction exercisable in favour of the children. According to learned counsel, under the Labour Relations Act, 2007, in the interpretation clause at section 1 a "Trade Dispute" is defined. According to counsel, what would ordinarily go before the Industrial Court is a Trade Dispute. However, in counsel's view, what is before the Court is not a determination of a Trade Dispute since the matter revolves largely around Children's rights. Section 12(1) of the Industrial Court Act illustrates situations when the Court may exercise jurisdiction none of which abide with this case. This case, in counsel's view, falls clearly outside what the Act says should be placed before the Court. In summary, counsel stated that the matters which the Industrial Court ought to entertain are such matters as salary, recognition etc yet this matter stands apart as it deals with the rights of the Children as amplified in Article 53 of the Constitution. Under Article 53(2) of the Constitution emphasis is laid on the rights of the children which are given paramountcy which is what the petitioners herein are seeking. This clearly demonstrates the Constitutional element in the matter at hand. The right to agitate, it is submitted, is not absolute but must be exercised responsibly since it has limitations. The Court, it is submitted, is being urged to weigh the rights of the child and the rights under Article 53 and decide where the balance lies. All that the 1st and 2nd respondents are agitating for is money which cannot be equated to the case for the children whose lives may be ruined for ever. Counsel therefore urged the Court to speak for the children some of whom were not born at the time of the contentious legal notice. The Court is urged to find that the issues disclosed herein touch on the fundamental rights of the children which are being infringed and which are likely to cause damage to a segment of the country. With respect to section 13 of the Government Proceedings Act it is submitted that the notice of intention to sue is required to be served on the Secretary to the Commission. Even under the Government Proceedings Act, it is submitted the notice contemplated is in normal civil proceedings. Counsel urged the court to grant the orders sought.

The Issues

12. From the foregoing, I form the view that the issues for determination in this application are as follows:

i. Whether this Court has jurisdiction to entertain this matter.

ii. Whether the application is incompetent by virtue of the fact that it is brought under the Civil Procedure Rules.

iii. Whether the affidavit in support of the application is incompetent.

iv. Whether the respondents have violated the rights of the children under the Constitution.

v. Whether the Court should grant the orders sought.

13. Before I proceed to determine the above issues, it important to note that what I am dealing with at this stage is an interlocutory application. Accordingly caution must be taken, that while dealing with the issues raised, the Court must not trespass on the jurisdiction of the Court that will hear and determine the petition.

Jurisdiction

14. The law relating to jurisdiction is now clear. In **The Lilians vs. Caltex Oil (K) Ltd Civil Appeal No. 50 of 1989 [1989] KLR 1; [1986-1989] EA 305, Nyarangi, JA** held:

"It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it

holds the opinion that it is without jurisdiction…It is for this reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the Court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined and there are no grounds why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the Court should hear and dispose of that issue without further ado".

15. Want of jurisdiction in judicial proceedings do occur in two forms. Firstly, it applies to cases where the Court has no powers at all to deal with the matter in issue. Under the Constitution, the Court, for example is barred from entertaining petitions arising from presidential elections which are the preserve of the Supreme Court. The second way in which an issue of jurisdiction arises where the Court, though empowered to hear the suit, has no power to hear specified issues within the suit. In a suit, for example, where there is a claim brought by way of a plaint in which the plaintiff seeks to recover land based on sale and adverse possession, whereas the Court has jurisdiction to determine land matters, it may not have jurisdiction to award the prayer for adverse possession in such proceedings.

16. It is the second respondent's contention that as the matters herein touch on industrial action, the dispute falls within the ambit of Article 165(5)(b) which removes from the jurisdiction of the High Court matters which fall within the jurisdiction of Courts established by Parliament under Article 162(2) to deal with employment and labour relations and environment and the use and occupation of, and title to, land. For the purposes of this ruling the relevant court is the Industrial Court established by the Industrial Court Act, 2011. Section 12 of the said Act provides as follows:

(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

(a) disputes relating to or arising out of employment between an employer and an employee;

(b) disputes between an employer and a trade union (c) disputes between an employers' organisation and a trade unions organisation;

(d) disputes between trade unions;

(e) disputes between employer organizations;

(f) disputes between an employers' organisation and a trade union;

(g) disputes between a trade union and a member thereof;

(h) disputes between an employer's organisation or a federation and a member thereof;

(i) disputes concerning the registration and election of trade union officials; and

(j)disputes relating to the registration and enforcement of collective agreements.

17. Section 12(1) of the Labour Institutions Act, No. 12 of 2007, on the other hand provides that the Industrial Court shall have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of this Act or any other legislation which extends jurisdiction to the Industrial Court, or in respect of any matter which may arise at common law between an employer and employee in the course of employment, between an employee or employer's organisation and a trade union or between a trade union, an employer's organisation, a federation and a member thereof.

18. It is clear that the disputes envisaged under the foregoing provisions are disputes revolving around an employee or employer's organisation and a trade union or between a trade union, an employer's organisation, a federation and a member thereof. Where for instance, in the course of an industrial action damage or injury is thereby occasioned to a third party it would be absurd to turn that type of dispute to be one of the disputes contemplated under the foregoing provisions. Similarly, it is my view that in cases where a party alleges infringement of his Constitutional rights it is incorrect to contend that the High Court has no jurisdiction to entertain such matters. It is therefore my view and I so hold that the petitioners who are parents and whose relationship with the respondents cannot fall under any of the above descriptions cannot be faulted for invoking the High Court's jurisdiction under Article 165(2)(b) of the Constitution.

19. Accordingly, the second respondent's objection is overruled and I hold that this Court has jurisdiction to entertain this petition.

Competency of the application

20. It is the second respondent's contention that in petitions of this nature the Civil Procedure Rules have no place and therefore any application expressed to be brought under the latter is incompetent. First and foremost it must be noted that under Article 22(3), the Chief Justice is enjoined to make rules inter alia providing for the court proceedings which shall satisfy the criteria that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. Although the said Rules are yet to be promulgated, the spirit of the foregoing provision as read together with the provisions of Article 159(2)(d) is clear that technicalities of procedure, more particularly in application brought for the enforcement of the Bill of Rights, should not be entertained. Even prior to the promulgation of the current Constitution the relevance of the Civil Procedure Rules was considered in **Meme Vs. Republic [2004] 1 EA 124; [2004] 1 KLR 637**, in which **Rawal, J** (as she then was), **Njagi, J** & **Ojwang' AJ** (as he then was) held that at a very basic level the Court is empowered to draw from the Civil Procedure Rules in its exercise of powers under the Constitution of Kenya (Protection of Fundamental Right and Freedoms of the Individual) Practise and Procedure Rules and by virtue of Order 1 Rule 10(2). This decision should put the second respondent's position on the applicability of Civil Procedure Rules to Constitutional Petitions to rest.

Competency of the affidavit

21. The same argument applies to the objection taken with respect to the failure by the deponent to the supporting affidavit to disclose therein the place of abode. The second respondent, however, contends that the requirement of the place of abode goes to the root of the affidavit. With due respect the mere fact that the rule applies the word "shall" does not make the said requirement mandatory. In **Standard Chartered Bank Ltd. vs. Lucton (Kenya) Ltd. Nairobi (Milimani) HCCC No. 462 of 1997 Ringera, J** (as he then was) held that the use of the word "shall" in a statute only signifies that the matter is *prima facie* mandatory and its use is not conclusive or decisive and it may be shown by a consideration of the object of the enactment and other factors that the word is used in a directory sense only. Accordingly, the provisions of Order 19 rule 4 must be read together with rule 7 thereof which empowers the court to receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof ***or on any technicality***. It is important to note that the last part of that rule was introduced in the amendments made to the Civil Procedure Rules in 2010.

22. Accordingly, the objection directed towards the supporting affidavit cannot be sustained.

Violation of the Children's Rights

23. Under Article 53(1)(b) and (d) of the Constitution every child has the right to free and compulsory basic education and to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour. The High Court, it has been held, is especially endowed with the jurisdiction to safeguard the interests of infants, as the court is the

parent of all infants. The welfare of the infants is paramount and it is dear to the heart of the court. There would be no better tribunal to perform the task more wisely as well as affectionately. All infants in Kenya of whatever community, tribe, sect fall within the ambit of Article 53 of the Constitution and the court is charged with the sacred duty of ensuring that their interests remain paramount and are duly preserved. See **Omari vs. Ali [1987] KLR 616; Yasmin vs. Mohamed [1973] EA 370.**

24. The petitioners' case if I understood them correctly, is that by resorting to the industrial action the 1st and 2nd respondents have infringed upon the children's' right to free and compulsory basic education and possibly to be protected from neglect. It is, however, important to note that there are two sets of rights. There are rights and fundamental freedoms which are capable of being limited and those that cannot be limited. Under Article 25 of the Constitution the rights and fundamental freedoms which cannot be limited are (a) freedom from torture and cruel, inhuman or degrading treatment or punishment; (b) freedom from slavery or servitude; (c) the right to a fair trial; and (d) the right to an order of *habeas corpus.*

25. Whereas the other rights and freedoms are capable of being limited under Article 24(1) of the Constitution a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right or fundamental freedom; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose. Under clause (2) of the foregoing Article a provision in legislation limiting a right or fundamental freedom (a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom**,** and the nature and extent of the limitation; (b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and (c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content. Under clause (3) thereof the State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

26. Having considered the foregoing it is clearly my view that the ongoing industrial action is clearly a limitation on the right of the children to free and compulsory basic education as envisaged under Article 53 aforesaid. The second respondents have however sought to justify the said action on the ground that their action is similarly protected and recognised under the Constitution. In other words the limitations or restrictions on the rights of the children to free and compulsory basic education is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others. In other words they contend that the rights of the children to education should not infringe on their own rights to agitate for better terms of employment.

27. This argument then leads us to the next stage and that is whether the legislation that allows for the industrial action specifically expresses the intention to limit that right or fundamental freedom**,** and the nature and extent of the limitation; whether the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and whether that restriction limit the right or fundamental freedom so far as to derogate from its core or essential content. It must be remembered that it will be upon the 1st and 2nd respondents to convince the court that the foregoing requirements have been satisfied. Unfortunately that determination cannot be made in this application as that will be the subject of the application and the petition which are yet to be determined and whose determination will necessarily take into account the well known rule of interpretation of Constitutional provisions which are that the constitutional interpretation principle of harmonization, which is to the effect that all the provisions of the constitution concerning an issue should be considered together, will be applied. In addition the widest construction possible, in their contexts, have to be given to the words used according to their ordinary

meaning and each general word held to extend to all ancillary and subsidiary matters. Moreover, constitutional provisions were to be given a liberal construction unfettered by technicalities because though the language of the constitution does not change, changing circumstances may give rise to new and fuller import to the meaning of the words used. See **Olum & Another vs. Attorney General (1) [2002] 2 EA 508.**

Whether the orders sought should be granted

28. In the present application I am asked to issue conservatory stay orders barring the members of the respondents herein from continuing with the strike, industrial action, interfering with the smooth learning of public schools, and/or in any manner causing demonstrations in the streets, and causing any disturbance to the KCPE and KCSE candidates pending the hearing and determination of the application *inter partes*.

29. As already stated the determination whether the respondents are justified in their action or not must await the determination of the petition. However, under Article 37 of the Constitution every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities. Therefore the right to assemble, demonstrate, picket and present petitions must be exercised peaceably and unarmed. The petitioners submit that the members of the 1st and 2nd respondent have resorted to intimidation and harassment in the course of their agitation. The decision to join or not to join an industrial action should not be forced on the members of a trade union. Non-members of the Union or members who for any reason do not feel sufficiently inspired to join in the industrial action should be free to go about their duties. Picketing does not amount to forceful conscription or enlisting of other people to join in the action. Therefore to intimidate or harass other people in the course of the said agitation is clearly wrong and I did not understand **Mr. Jaoko** to contest this.

Determination/Conclusion

30. Having taken into account the foregoing I hereby restrain the members of the 1st and 2nd respondents from interfering with the smooth learning of public schools, and/or in any manner any disturbance to the KCPE and KCSE candidates pending the hearing and determination of the application inter partes.

31. The costs of this application will be in the cause.

32. However, as a parting shot, this country has, in the recent past witnessed a spate of strikes and alarming rise in insecurity in parts of the country. So far no tangible steps have been taken by the Government with a view to stemming this trend which threatens to engulf the education, health and security sectors in this country, the sectors which are at the heart of the common man and woman, the person on whose behalf and from whom the government derives legitimacy to govern. The government must wake up from its deep slumber and stop playing a bystander role in the unfolding events. Just in case the Government has forgotten the provisions of the new Constitution Article 129 thereof provides:

(1) Executive authority derives from the people of Kenya and shall be exercised in accordance with this Constitution.

(2) Executive authority shall be exercised in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.

Dated at Nairobi this 17th day of September 2012

G V ODUNGA
JUDGE

Delivered in the presence of

Mr. Osoro for Petitioners

Mr. Jaoko for 2nd for Respondents