



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Appli 1280 of 2001& 196 of 2002

IN THE MATTER OF AN APPLICATION FOR ORDERS IN THE NATURE OF CERTIORARI AND MANDAMUS

BETWEEN

REPUBLIC APPLICANT

AND

TEACHERS SERVICE COMMISSION.....RESPONDENT

EX PARTE* *ELIUD NYAKUNDI

CONSOLIDATED WITH

MISC. APPLICATION NO. 196 OF 2002

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN

REPUBLIC APPLICANT

AND

RULING

The applicant, **ELUID NYAKUNDI**, moved the court by Notice of Motion application dated 13th December 2001, filed in HCC Misc. 1280 of 2001 seeking an order of certiorari, **“to issue to remove into this court and quash the proceedings of the respondent leading to and the decision of the respondent contained in the letter of the respondent dated 13th October, 2000 and orders in the nature of mandamus to compel the respondent to pay the applicant the sum of Kshs.195,790/= being the applicant’s cumulative salary retained by the respondent during the applicant’s purposed suspension”**.

The applicant’s lengthy affidavit dated 11th December, 2001, supported the application to court.

The respondent filed grounds of opposition dated 8th February, 2002, and charged that applicant, **“had not shown justifiable grounds upon which the decision taken on 15th October, 2000, should be quashed”**. They also filed Notice of Preliminary Objection dated 6/2/2002.

The application was heard after leave to lodge such an application had been obtained from court.

The court records show that the application was first heard by Mbito J, (as he then was). He delivered a Ruling on 1st day of March, 2002.

The Learned Judge struck out the prayer for certiorari from the motion but amended the motion to include a prayer for mandamus and allowed prayers for **“mandamus and certiorari, to continue”**.

The above proceedings were in respect of HCCC No.1280 of 2001. Whilst the 1st suit was pending, the applicant again filed High Court Misc. application No. 196 of 2002, in which he sought Orders in the nature of **“prohibition to issue against the Teachers Service Commission from proceeding further with their notice of interdiction against him dated 7th February, 2002, and orders to the nature of certiorari to issue to bring into this court and quash the decision of the respondent contained in the letter of 7th February 2002, in which the respondent purported to interdict the applicant”**.

This application was consolidated with the one in HCCC No.1280 of 2001, for hearing, however, given the contents of the Ruling of Mbito J, the prayer for **“certiorari,”** was struck out.

In High Court Misc. Application 196 of 2002, Rimita, J (as he was then) granted leave for this application to proceed and also directed that, **“the leave granted to operate as a stay of the decision made to interdict the applicant and of any proceedings contemplated by the respondent pursuant to the said decision as contained in the respondent’s purported notice of interdiction dated 7th February, 2002.”**

The two suits were subsequently consolidated.

The Respondent filed a replying affidavit at some point during the course of the hearing, at my direction. The same was sworn by Lydia Nzomo, a Senior Deputy Secretary, Teachers Service Commission. The affidavit was sworn and filed in court on 13th January 2004.

Mr. Nyakundi submitted that his client was suspended vide a letter dated 13th October 2000. That as a result of that letter, he stopped earning a salary for a period of 6 months, and hence the claim of Kshs.195,790/=.

The applicant was a head-master. The reasons for his suspension were:- a charge of gross professional, misconduct brought against him and secondly, “**gross insubordination**”.

That the applicant was found guilty of the 2 “**charges**” and suspended for six months, by the letter of 13th October, 2000, which did not give reasons, and further, that the applicant was not given a hearing.

Mr. Nyakundi complained further that though his client appeared before the Teachers Service Commission disciplinary Committee, he was treated badly, as he was not allowed to meet the people who accused him; which people were not present at the hearing.

Mr. Nyakundi referred to the 2 letters which formed the applicant’s case, i.e. the 2 letters of suspension dated 13th October, 2000. They were annexed to the plaintiff’s submissions. Also annexed was the plaintiff’s letter dated May, 29th, 2000, about his transfer. It was written to the Provincial Director of Education in Kisumu. He explained why he could not immediately move to his new school, as the situation there was “**too volatile**”.

The District Education Officer, Nyamira District wrote to the Provincial Director of Education, Kisumu on 6th June, 2000 “**advising the Provincial Director of Education,**” to revoke the transfer of the applicant Mr. E. Nyakundi, to Matutu as the situation there was volatile and not conducive to his moving there.....”.

This letter was copied to the Secretary - Commission. Infact one of the charges i.e the one of insubordination against the applicant was that he failed to hand over the headship of Giachore Secondary School to Kennedy Omote and proceed on transfer to Matutu P.A.G. Secondary School vide our letter of 8/3/2000.....”.

Mr. Nyakundi stated that his client did not proceed on transfer because of the letter of the District Education Officer, Nyamira District, written to the Provincial Director of Education, Nyanza Province.

Mr. Nyakundi referred to the complaint of misconduct against the applicant referring to the charge of assault of a student, which charge was withdrawn, but even though there was a defence to it.

The advocate relied on several decided cases for example **ASSOCIATED PROVINCIAL PICTURES HOUSE V WEDNSBURY CORPORATION [1948]IKB** at 223, and **DAVID ONYANGO OLOO’s** case.

Mr. Nyakundi submitted that the defendant was unreasonable in suspending the applicant as it failed to consider materials. He terms the panel which dismissed his client as “hostile”. He therefore prayed the court to grant prohibition – i.e. to bar the Teachers Service Commission from relying on its letter of suspension written to the applicant. He also urged court to issue “**mandamus**” to compel the Teachers Service Commission to pay salary for the 6 months to the applicant. He also wanted the Teacher Service Commission prohibited from proceeding with the Notice of interdiction dated 7th February, 2002. Costs of the application were also prayed for by the applicant.

Counsel for the applicant sought to cross-examine Lydia Nzomo, the deponent of the replying affidavit. This was finally done on 20th April, 2005, when Lydia confirmed the contents of her replying affidavit particularly as paragraph 6 which states that the applicant’s case was, “**presented before the Disciplinary Committee of the Teachers Service Commission on 13th October, 2000 for determination in the presence of the applicant**”. Lydia conceded that she was not present in that disciplinary hearing. She did not bring to court, the proceedings of the Committee, though they were available in the office and she had seen them as she was preparing the affidavit.

Lydia confirmed that the applicant’s transfer was not revoked, despite the letter of 6/6/2000, from the District Education Officer, Nyamira District, advising the Provincial Director of Education to revoke it.

According to Lydia, the procedure employed by the Teachers Service Commission in handling a matter of this nature, was complied with. That the applicant was given a chance and he made a written statement to the Committee dated 15th August, 2000.

Both advocates made detailed written submissions which now form part of these proceedings herein. Such submissions are in writing and are filed.

The letter of suspension from the Teachers Service Commission which caused the applicant, Eluid Nyakundi to file the 1st case, to wit High Court Misc. Application No. 1280 of 2001, was dated 13th October 2000. The applicant annexed a copy of that letter to his application. It reads “I am directed by the Teachers Service Commission to say that the Commission has carefully considered your case and has determined that it will not on this occasion have your name removed from the Register of Teachers. You have however, been found guilty of the following allegations: **GROSS PROFESSIONAL MISCONDUCT**: It is alleged that you assaulted your student Isaac Orobi Mboo, a form 4 with a knife on 15.5.2000, causing him actual bodily harm contrary to regulation 26(1)(e) of the regulation for the teacher.

GROSS INSUBORDINATION: you have failed to hand over the headship of Gianchore Secondary School to Mr. Kennedy Omote and proceed on transfer to Matutu P.A.C. School, vide our letter of TSC/324870/24 of 8.3.2000. The Commission has therefore decided to suspend you from the service without pay for a period of 6 months from the date of this letter. You are directed to report to the Secretary/TSC about a fortnight before the expiry of this suspension.”

The complaint by the applicant’s counsel was that the letter of 13.10.2000, did not contain any reasons. Mr. Nyakundi referred to another letter of even date (13.10.2000) and asked the court to give it effect too. However, my quick response to this is that this second letter though dates 13/10/2000 did not form part of the applicant’s complaint as it was not annexed or referred to the affidavit which supported his application to court. There was no explanation have it come into the proceedings. The letter had only one charge of “**GROSS-INSUBORDINATION**”. The contents of this letter are in my view “**suspect**” to say the least.

Mr. Nyakundi further complained that his client appeared before the Teachers Service Commission Disciplinary Committee and was treated badly. That he was not allowed to meet those who had accused him.

Mr. Nyakundi submitted further that his client did not go on transfer because he was relying on a letter dated 6th June, 2000 written by the District Education Officer, Nyamira District, to the Provincial Director of Education, Nyanza Province. The letter was copied to the Secretary, Teachers Service Commission Nairobi. It reads, “I am hereby writing to you to revoke the transfer of the current headmaster Gianchore Mr. E. Nyakundi TSC 32487, to Matutu since the condition at Matutu is not conducive and the community is rather hostile. In the meantime let him at Gianchore and Mr. Kennedy Omote who was supposed to come to Gianchore should be re-routed elsewhere. I propose that Omote Kennedy be posted to Kanyoro Secondary School as Head teacher. At the same time, Mr. Marube P.B. to Matutu P.A.G. Secondary I am consulting the at Lietego Secondary (DOK) to identify a suitable replacement.

With the greatest respect to Mr. Nyakundi, this letter was neither written to nor was it copied to his client, the applicant. Secondly, it was not attached to his statement in High Court Misc. Application 1280 of 2001, and thirdly, where is the evidence that the Provincial Director of Education acted on the contents of the letter written to him by his juniors, the District Education Officer, Nyamira, to warrant the applicant to rely on the letter. At what stage did the applicant get the letter to be able to rely on its contents? I find from the letter itself that its contents were not conclusive as the Provincial Director of Education had not confirmed that he accepted to act as requested in the letter. For these reasons, the applicant cannot, in my view rely on the contents of the letter as a reason for his failure to go on transfer as ordered.

Mr. Nyakundi also addressed the matter of the second charge in the letter of 13/10/2000, which related to

assault of the student. He said the matter was reported to the police, and the complaint subsequently withdrawn. That for this reason, the applicant had a defence to this “**charge**” as well.

I noticed that one of the annexures to the applicant’s supporting affidavit is a statement written on police paper, headed “**WITHDRAWAL STATEMENT**” by one Isaac Orobi Mboaga. It reads, “**I the above who had reported an assault case against Eluid Nyakundi who had assaulted me on 15/5/2000 as I had reported the matter to police station do hereby withdrawn the case against him - - - -**”

This is the withdrawal which the applicant said was his defence to the 2nd complaint.

In the defendant’s documents was a letter dated 22nd May 2000, written by the District Education Officer Nyamira, to Mrs. Roselyn Onyuka, the Provincial Director of Education, Kisumu reporting the case of professional misconduct, involving assault by the applicant Eluid Nyakundi, of the student Isaac Orobi Mboaga, on 15.5.2000 in the school compound, “**by stabbing him with a knife on his fore-head.....**”

The letter also contained the 2nd complaint of failure by the applicant to proceed on transfer. It was on the basis of this information that the 2 charges against the applicant were drawn up.

So if the student subsequently withdraw the complaint from the police station, does that mean that the assault did not occur, or does it mean that he did not want charge preferred against the applicant, by the police?

The letter to Mrs Roselyn Onyuka aforesaid states at the second part of para (a): “**The incident was reported in my office on 16.5.2000 by the parent of the boy and I immediately visited the school with 2 plain-clothes policemen and the teacher accepted we hit the boy on the forehead with a stick and not a knife. I asked the Headmaster to accompany us to the police station to record a statement and thereafter I asked the police to take the necessary action required by law. In the meantime the teacher has acted contrary to Sec.261(e) of Teachers Service Commission Code of regulation for teachers”.** (the above underlining is mine).

The Teachers Service Commission was obviously taking at this matter as a breach of their regulations, so that the withdrawal of the assault by the student at the police station did not appear to have “**moved**” them. They were treating it as an issue of discipline, whereas they left the police to deal with the legal aspect. It is for this reason that “**the withdrawal of the complaint**” cannot, in my view, act as a defence for the applicant as far as the 1st charge of “**GROSS PROFESSIONAL MISCONDUCT**” by the Teachers Service Commission, is concerned.

Lydia Nzomo who had sworn the replying affidavit was cross-examined at length on its contents. The 2 letters of 13/10/2000, were put to her, and she was questioned about the contents, since one had 2 charges and the other, only one, yet they were allegedly signed by one person. Lydia was not able to explain this. She also confirmed that she did not take part in the Disciplinary Committee Meeting which heard the complaint of Eluid Nyakundi, the applicant, but she got all the information from his personal file.

It was in the course of cross-examination that 2 letters were put to her to identify and produce these were the letters of 6th June 2000, written by the District Education Officer, Nyamira District, advising the Provincial Director of Education, Kisumu to cancel the applicant’s transfer and the letter of 22.5.2000, forwarding the two complaints against the applicant Eluid Nyakundi, Mrs. Roselyne Onguko, the Provincial Director of Education, Nyanza.

Lydia also produced the applicants “**Defence against Intended Disciplinary Action,**” which was prepared by the applicant Eluid Nyakundi, in defence to the 2 charges against him. It was written to the Secretary, Teachers Service Commission and copied to the Provincial Director of Education Nyanza, and District Education Officer, Nyamira. Lydia confirmed that the “charges” against the applicant were never withdrawn by the Teachers Service Commission and again, that he was accorded an opportunity to appear before the Disciplinary Committee and gave his side of the story. She confirmed further that the Teachers

Service Commission followed procedure in handling Eluid Nyakundi's matter, reading through the records in the file.

As already stated, the 2 Learned Counsel made detailed written submissions and quoted several legal authorities which I have considered, however each case must determine on its merits.

Mr. Nyakundi, advocate urged the court to grant an order of Prohibition, to prohibit the Teachers Service Commission from relying on the decision contained in the letter of 13/10/2000, as the same was made without due process. However, having gone through the oral evidence and submissions of both learned counsel, I am of the considered opinion that the Teachers Service Commission followed the laid down dealing with the applicant's case. For that reason, I am unable to prohibit the Teachers Service Commission from acting on the letter of suspension dated 13.10.2000.

Secondly, I cannot grant an order of Mandamus to compel the Teachers Service Commission to pay the applicant his salary for the 6 months he was "**suspended**" from teaching because the said supervision was never lifted and or revoked, and further, I have already found that the laid down procedure was followed in arriving at the suspension. Further and or finally, I am unable to issue and order of "**certiorari**" to bring into this court and quash the Respondent's letter of 7.12.2002, in which the Respondent "**purported to interdict the applicant,**" because the said interdiction, was as a result of the applicant suing the Teachers Service Commission, "**without getting consent from the Attorney General**" as provided in the Teachers Service Commission Act Cap 212 Section 7(3) and Regulation 69(1) of the Code of Regulations for Teachers".

The Teachers Service Commission took the action when the applicant filed High Court Misc. Application No. 1280 of 2001.

It was the letter of 7/12/2002 which resulted in the applicant filing the 2nd suit, namely High Court Misc. Application No. 196 of 2002 seeking orders of prohibiting to "**prohibit the respondent (TSC) from proceeding further with their notice of interdiction against the applicant dated 7.2.2002, and order of certiorari to bring into court and quash the decision of the respondent aimed in the letter of 7/12/2002 in which the respondent purported to interdict the applicant**".

Leave to institute this suit was granted by Rimita J who also directed that the leave do operate as a stay. I now move to vacate the orders granted above as I am satisfied that the suit has no merit and I proceed to dismiss it with costs to the Respondent, the Teachers Service Commission.

Dated at Nairobi this 19th day of May, 2006.

JOYCE ALUOCH

JUDGE