



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL MISC. APPL. NO.194 OF 2002

BONDO GODFREY J. OBIERO APPLICANT.

VERSUS

TEACHERS SERVICE COMMISSION RESPONDENT.

RULING

The applicant BONDO GODFREY J. OBIERO filed this Notice of Motion seeking the following orders.

1. THAT the honourable court be pleased to issue an order of Certiorari to remove into this Hon. Court and quash a decision of The Teachers Service Commissioner made on or about 22nd April 2002.
2. THAT the Hon. Court be pleased to issue an Order of Prohibition to permanently prohibit the Respondent from implementing, executing or carrying out the aforesaid decision or taking any action whatsoever against the applicant relating to this suit.
3. Costs be in the cause.

The applicant was employed by the Respondent on 30/1/97 as an untrained Graduate Teacher in job Group J and posted to teach commerce and accounts at Kisumu Polytechnic. He was later promoted to the post of Assistant Lecturer in Job Group K. On 2/1/2001 the respondent promoted him to the post of lecturer in job Group 'L'. This was in accordance to TSC Circular No.5 of 1997 which directed teachers in technical Services be promoted. He started receiving salary for job group L and continued doing so until by a letter dated 22/4/02 he was informed that his salary was being reduced to that of asst. lecturer in job group K and that the salary he had received for job group L was to be recovered.

It was submitted that he was not first given a hearing before this action was taken and this was contrary to the rules of natural justice. He was demoted before he was heard and his salary reduced. The respondent which is a body created by a statute had a duty to act judiciously. Its decision had a negative impact on the applicant's status and affected his livelihood. He was not called to defend his position.

The Respondent opposed the application. First it was submitted that application for leave was made 6 days out of time as the law is that application for Certiorari must be made within 6 months. Decision complained of was made on 22/4/02. Application for leave was made on 28/10/02 – 6 days after the expiry of the 6 months.

Further it was submitted that the applicant was promoted by mistake and the respondent in demoting him was only correcting the mistake. Circular No.5 of 1997 had provided that only professionally

qualified graduate teacher were to be promoted. Those were graduate teacher who had trained in Pedagogy – the science of teaching. The applicant had not trained in Pedagogy and as such he was not a professionally qualified graduate teacher. Through a mistake or an oversight he was promoted when other qualified graduate teachers were promoted but when the mistake was noticed he was taken back to his grade. It was submitted that to date the applicant had not taken any training in Pedagogy. He therefore remains unqualified and cannot be promoted to job

The first issue to deal with is that of time. Was the application filed out of time? It is not denied application seeking leave to make this application was made on 28/10/02. The decision of the T.S.C was communicated vide the letter dated 22/4/02. It is not clear if the decision was taken on the same day but since there was no evidence as to when it was made we will take that date as the effective date. Order 53 Rule 2 CPR clearly provides that an application for certiorari must be brought within 6 months. Mr. Marete submitted that six months ended on 22/10/02 and thus when the application for leave was filed on 28/10/02 it was already six days late. Mr. Ochillo in reply submitted that order 49 CPR provides that in computing time public holidays should not be considered. With respect I don't think this is so. Order 49 rule 1. CPR is very clear. It provides:

“Whereby these Rules or by any judgment or order given or made, time for doing any, act or taking any proceedings is limited by months and the word “month” occurs in any document which is part of any legal procedure under these Rules, such time shall be computed by Calendar months unless otherwise stated.”

That provision is different from provisions of rule 2 of the same order which provides for time limited in days. Time in this case has to be computed in months. Order 53 rule 2 CPR clearly provides for 6 months. Six calendar months from 22nd April 2002 ended on 22nd October 2002. By 28/10/02 6 days had elapsed after the expiry of the six months. The provisions of order 53 rules 2 are mandatory it provides that leave shall not issue if the application is not within 6 months. In this case leave was not applied for within six months. True the respondent should have raised a Preliminary Objection on that point and perhaps we would not have come this far but he was not estopped to raise it during the hearing. This is a point of law and it could be raised at any time.

What the above observation means therefore is that leave should never have been granted. The court did not have even discretion to grant leave for any reason. It therefore means that this application was null abinitio. It does not lie in law and on that point alone even without going into the merits or lack of it of the application I dismiss the same with costs. It is so ordered.

Dated this 28th October 2004

KABURU BAUNI

JUDGE.

28/10/04

28/10/04

Mr. Ochillo for applicant

Mr. Marete for Respondent

Mr. Ochillo: I apply for copies of proceedings and ruling.

Court:- Copies be provided on payment.

KABURU BAUNI

JUDGE