



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 179 OF 2019

**IN THE MATTER OF ALLEGED INFRINGEMENT OF THE PROVISIONS OF ARTICLES 1(3), 2(1),
(2) & (4), 3(1), 10, 41, 47(1) & (2), 50, 73(1) & (2), 232 & 236 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF THE CODE OF REGULATIONS FOR TEACHERS

AND

IN THE MATTER OF THE EMPLOYMENT ACT NO. 20 OF 2011

AND

IN THE MATTER OF THE BASIC EDUCATION ACT, NO. 14 OF 2013

BETWEEN

AGGREY MURUMBA.....1st PETITIONER
MAURICE MMBWANGA CHALLENGA.....2nd PETITIONER
JAMES KIZITO WEKESA.....3rd PETITIONER
TOM BEN INGOLO.....4th PETITIONER
JOSPHAT LIDWAYA LUBANGA.....5th PETITIONER
TUNGANI ALBERT SHIKULE.....6th PETITIONER
ELIUD OMBORI.....7th PETITIONER
ELLY KORINKO.....8th PETITIONER
PATRICK CHUNGANI.....9th PETITIONER
ROBERT FUKWO MANDILA.....10th PETITIONER
BASHIR M. KILALO.....11th PETITIONER
GABRIEL KISILU.....12th PETITIONER
ARCHEDIOUS LIYAYI.....13th PETITIONER

MARTIN TONGOLO.....14th PETITIONER

VERSUS

TEACHERS SERVICE COMMISSION.....1st RESPONDENT

CABINET SECRETARY, MINISTRY OF EDUCATION...2nd RESPONDENT

AND

KENYA NATIONAL UNION OF TEACHERS

WILSON SOSSION, KNUT EXECUTIVE

SECRETARY GENERAL.....INTERESTED PARTIES

JUDGMENT

1. At all material times, the Petitioners served as Executive Secretaries for different branches of the Kenya National Union of Teachers (save for Robert Mandilla and Martin Tongolo who served as Branch Executive Committee member and Head Teacher and Vice Treasurer, Bungoma branch respectively).
2. On 24 April 2019, Robert Mandillah and Aggrey Murumba Namisi were charged before the Magistrates Court with (an) offences of creating a disturbance in a manner likely to cause a breach of the peace but the charges were withdrawn on 26 July 2019.
3. On 25 April 2019, the Teachers Service Commission (TSC) issued *show cause notices* to the James Kizito Wekesa and Robert Mandillah asking them to show cause within prescribed timelines why disciplinary action should not be taken against them (similar notice was issued to Martin Tongolo on 26 April 2019).
4. On or around 3 May 2019, TSC notified James Kizito Wekesa, Robert Mandillah and Martin Tongolo of their interdiction(s) pending disciplinary proceedings.
5. They made written responses on 3 May 2019, 6 May 2019, 13 May 2019 and on 22 May 2019.
6. On or around 5 July 2019, TSC invited James Kizito Wekesa, Robert Mandillah and Martin Tongolo for (a) disciplinary hearing(s) and on 23 August 2019, they were informed of a decision to dismiss them from service.
7. James Kizito Wekesa appealed on 17 September 2019 while Robert Mandillah appealed on 11 September 2019.
8. Show cause notice against Maurice Mmbwanga Challenga was issued on 26 April 2019 and he responded on 15 May 2019 and 7 May 2019.
9. Some of the other Petitioners were also issued with separate *show cause notices* from around 26 April 2019 to 8 May 2019.
10. The Kenya National Union of Teachers, of which the Petitioners are ranking members was aggrieved with the mass disciplinary proceedings, and it moved the Court to challenge the disciplinary process.
11. On 16 May 2019, Ongaya J granted the Union leave to institute judicial review proceedings to quash the decision of TSC to interdict some of the Petitioners (total of 221 teachers were named in the order). The leave was to operate as stay (it appears the proceedings were terminated).
12. Soon thereafter, the TSC then sent invitation letters to some of the Petitioners to attend disciplinary hearings scheduled from 7 October 2019 to 9 October 2019.
13. The broad allegation(s) against these Petitioners were incitement, and disruption of *competency based curriculum* (CBC) teacher training in various centres.
14. On 1 October 2019, the Petitioners moved the Court under certificate of urgency seeking mainly conservatory orders restraining the TSC from proceeding with the disciplinary hearings scheduled from 7 October 2019 to 9 October 2019, and an order directing the TSC to pay James Kizito Wekesa, Robert Fukwo Mandillah, Martin Tongolo and the estate of Isaac Kilwake Kongani remuneration from the dates of their interdictions.
15. The Court declined to grant any *ex-parte* orders, and directed that the application be served upon TSC for directions and/or hearing on 2 October 2019.
16. After hearing oral submissions from the parties, the Court directed that both the application and Petition would be heard together and

ordered the exchange of pleadings and submissions.

17. At the same time, the Court allowed the pending disciplinary proceedings to continue, but interdicted TSC from releasing any verdicts pending the hearing and determination of the Petition.

18. TSC filed its replying affidavit on 8 October 2019 and submissions on 29 October 2019. Supplementary submissions were filed on 22 November 2019.

19. The Interested Parties filed their submissions on 19 November 2019 while the Petitioners filed their submissions on 20 November 2019.

20. The Petitioners identified one primary Issue in their submissions and that was, *whether the Court had jurisdiction to determine the constitutionality of the competency based curriculum.*

21. The TSC identified the Issues arising for determination as, *whether the Court had jurisdiction over the competency based curriculum limb of the dispute, whether the Petition was sub judice, competency of the Petition and whether the Petitioners had made out a case for grant of conservatory orders.*

22. The Interested Parties identified 3 Issues to wit, *whether TSC had disciplinary control over the Petitioners, whether there were valid reasons to subject the Petitioners to disciplinary action and, whether CBC met the constitutional validity threshold.*

Jurisdiction over competency based curriculum/sub judice

23. TSC took a preliminary objection that this Court lacked the requisite jurisdiction to adjudicate on the constitutional validity of *competency based curriculum* on four fronts.

24. Firstly, it was urged that the dispute relating to *competency based curriculum* was not an employment dispute within the contemplation of Article 162(2) of the Constitution, section 12 of the Employment and Labour Relations Court Act.

25. In this respect it was contended that TSC did not have the mandate to develop the *competency based curriculum*, a task reserved to the *Kenya Institute of Curriculum Development* under section 4 of the *Kenya Institute of Curriculum Development Act*.

26. The TSC asserted that *Kenya Institute of Curriculum Development* has no employer/employee relationship with the Petitioners, and/or labour relationship with the Union in which the Petitioners are members and serve as officials.

27. The TSC further noted that the *Kenya Institute of Curriculum Development* was not a party to these proceedings.

28. Secondly, TSC objected to jurisdiction on account that the validity of the *competency based curriculum* is also under challenge in Nairobi High Court Petition No. 471 of 2018, *Okiya Omtatah Okiiti v Ministry of Education* and therefore section 6 of the Civil Procedure Act applied.

29. Thirdly, TSC contended that the Petition was premature because the Petitioners had not exhausted the dispute resolution mechanisms agreed between it and the Petitioners' Union in the *recognition agreement* and the Labour Relations Act.

30. Lastly, the TSC urged that the Petition did not meet the threshold outlined in *Anarita Karimi Njeru v R* (1979) eKLR as it had not set out with precision the exact rights alleged to have been violated and manner of violation.

31. Under the *Kenya Institute of Curriculum Development Act*, it is the *Kenya Institute of Curriculum Development* which has been clothed with the mandate to lead the development of curriculum. TSC and Kenya National Union of Teachers are just some of the primary stakeholders in the process.

32. The Court would therefore agree with TSC that a legal challenge to the *competency based curriculum* without the direct participation the *Kenya Institute of Curriculum Development* would be a legal non-starter.

33. The Petitioners did not deny that there are current legal proceedings before the High Court Nairobi Petition No. 471 of 2018, *Okiya Omtatah Okiiti v Ministry of Education* where the *competency based curriculum* is under challenge.

34. The prudent thing the Petitioners should have done was to seek to join those proceedings so that a certain and final legal conclusion is made on the validity of the *competency based curriculum*.

35. On the objection on *subject jurisdiction* (no employer/employee relationship), the Court observes that aspects of the *competency based curriculum* would implicate the terms and conditions of service of teachers, who have organised under the aegis of several Unions and on that ground, the Court would not easily decline jurisdiction.

36. The Court will nevertheless decline jurisdiction over the challenge to the constitutional validity of the *competency based curriculum* because of the proceedings pending before the High Court.

Competency of claims by 3rd, 10th and 14th Petitioners

37. These 3 Petitioners were taken through a disciplinary process by TSC culminating in their dismissal from the teaching service through letters dated 23 August 2019.

38. It was therefore legally misguided for them and/or their advocate to sneak into this Petition there causes of action wherein the main dispute relates to pending disciplinary action against the other Petitioners, and the constitutional validity of the *competency based curriculum*.

39. The Court also notes that the 10th Petitioner was part of the grievants whose disciplinary cases were challenged by the Union, the Kenya National Union of Teachers in Nairobi Judicial Review No. 9 of 2019 wherein certain orders had been issued.

40. Similarly, the 3rd and 10th Petitioners had commenced Kisumu Cause No. 44 of 2019, *Robert Fukwo Mandillah & James K. Wekesa v Teachers Service Commission* challenging the disciplinary process against them. An application seeking interim interdicts was dismissed for want of prosecution on 15 May 2019.

41. The Petitioners did not disclose the status of the judicial review proceedings and the Cause in Kisumu to this Court.

42. In addressing material non-disclosure it was stated in ***Brinks-MAT Ltd Vs Elcombe (1988) 3 All ER 188***

In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following. (i) The duty of the applicant is to make a full and fair disclosure of the material facts. (ii) The material facts are those which it is material for the judge to know in dealing with the application made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers. (iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries. (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) The nature of the case which the applicant is making when he makes the application. (b) The order for which application is made and the probable effect of the order on the defendant, and (c) The degree of legitimate urgency and the time available for the making of inquiries. (v) If material non-disclosure is established the court will be astute to ensure that a Plaintiff who obtains an ex parte injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty.... see Bank Mellat v Nikpour at (91) per Donaldson LJ, citing Warrington LJ in the Kensington Income Tax Comrs case (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented. (vii) Finally, it is not for every omission that the injunction will be automatically discharged.

43. The disclosure of the pending or any past proceedings, in the view of the Court was relevant and material and without such disclosure, the Court finds the participation of these Petitioners in these proceedings amounts to abuse of the court process.

44. Their respective causes of action are struck out with costs to TSC.

Material non-disclosure and sub judice

45. Section 6 of the Civil Procedure Act outlaws the institution of a suit where another suit raising the same questions is pending before another competent Court.

46. The Kenya National Union of Teachers, of which the Petitioners are all members instituted judicial review proceedings before this Court Nairobi Judicial Review No. 19 of 2019, *Kenya National Union of Teachers v Teachers Service Commission* where the disciplinary action against certain of its officials/members was central.

47. Amongst the persons for whose benefit the proceedings were commenced were 1st, 4th, 6th, 10th, 12th and 13th Petitioners.

48. Apart from stating that the orders granted were no longer in force, the Petitioners did not disclose the status of the proceedings.

49. Such a disclosure, in the view of the Court was both material and relevant to enable the Court address appropriately the question of *sub judice* in relation to the judicial review proceedings.

Whether Petitioners are subject to disciplinary control by TSC/Whether Court should interdict the pending disciplinary proceedings

50. The Interested Parties contended that the Petitioners were not susceptible to disciplinary control by TSC because they were full time elected employees of the Kenya National Union of Teachers serving as Branch Executive Secretaries and members of the branch executive committees on secondment.

51. It was therefore asserted that the Petitioners while exercising their roles as union officials could validly raise concerns on the implementation of the *competency based curriculum* without running afoul of provision on *professional misconduct* as defined in the Code of Regulation for Teachers.

52. According to the Interested Parties, the Petitioners were and/or are only subject to the Union Constitution and that any alleged misconduct on their part should be addressed within the confines of the Union constitution.

53. The TSC however urged that the Petitioners though on leave of absence were still teachers subject to its disciplinary control as they remained in an employer/employee relationship with it (TSC).

54. The TSC therefore asked the Court to adopt the finding in *Wilson Sossion v Teachers Service Commission* (2019) eKLR that union officials are subject to disciplinary control by the employer despite serving as such union officials.

55. Comparative jurisprudence shows that there has been a shift on the susceptibility of union officials to an employer's disciplinary control.

56. The jurisprudence shows that employers now have a fundamental right to discipline union officials for *just and reasonable cause* (see *Richmond Lions Long Term Care Society v Hospital Employees Union* BCLRB No. B375/94) where the Tribunal held that

the boundaries of steward immunity must be drawn in a manner that balances the need to preserve the viability of the employment relationship with the legitimate right of the union to carry out its responsibilities without undue interference from the employer.

57. In *National Union of Mineworkers and Others v Black Mountain Mining (Pty) Ltd* (2010) 3 BLLR 281 (LC) the court held that

When shop stewards are dismissed for alleged misconduct committed while performing their duties as shop stewards, the first issue that must be established is whether or not they were, in fact, committing misconduct as employees or whether the alleged misconduct was merely an action ancillary to the duties of a shop steward. Furthermore, where it is established that the shop steward was indeed committing misconduct in relation to his duties as a shop steward, the limits of the immunity from disciplinary action that should be extended to shop stewards must be determined.

58. In *Mondi Paper Co Ltd v PPWAWU & Another* (1994) 15 ILJ 778 (LAC), the shop steward was dismissed for deliberately disrupting a meeting with management. The Court held as follows

No doubt a shop steward should fearlessly pursue the interests of the members he represents, and he ought to be protected against being victimized for doing so. However, this is no license to resort to defiance and needless confrontation. I do not agree with the view of the court a quo that the fact that he is acting in his capacity as a shop steward serves to 'mitigate' conduct which objectively is unacceptable. Notwithstanding the position to which he has been elected, a shop steward remains an employee, from whom his employer is entitled to expect conduct that is appropriate to that relationship.

59. The jurisprudence as alluded herein above show that Union officials, in their conduct must not go beyond the limits of what is lawful.

60. The Petitioners are registered teachers and were granted leave of absence by TSC upon election to various union positions. Once their tenures end, they would revert to their duties and responsibilities as teachers.

61. They could also revert to their teaching responsibilities in the uneventful circumstance that TSC were to withdraw the leave of absence.

62. The TSC had commenced disciplinary proceedings against the Petitioners.

63. Previously, union officials enjoyed blanket protection from disciplinary control by employers, but that is not the norm or practice now. Such is not the case presently.

64. The majority of the Petitioners were on the verge of appearing for oral hearings before the TSC. The Petitioners contend that they were acting in their roles as union officials. TSC maintains they were employees susceptible to disciplinary control.

65. An employee who is a union official has a difficult balancing act to carry. He must robustly play his role as a union official for the betterment of the terms and conditions of service as agreed with the employer while alive to the fact that as an employee he must not be insubordinate to the employer.

66. But an employer must tread carefully when subjecting a union official who is an employee to disciplinary action because the range of activities in which a trade union official can participate on behalf of the union is much wider than for an ordinary member/employee.

67. However, in the Court's view, it is not its business to interrogate at this stage any type of defences the Petitioners have to the allegations presented against them. They must at the first instance lay those defences before TSC.

Conclusion and Orders

68. From the foregoing, the Court finds no merit in the Petition herein and the same is dismissed in its entirety with costs to the 1st Respondent. Costs to be paid by each Petitioner in equal proportions.

Delivered, dated and signed in Nairobi on this 11th day of December 2019.

Radido Stephen

Judge

Appearances

For Petitioners Mr. Wasilwa H.M. instructed by H.M. Wasilwa Advocate

For 1st Respondent Mr. Anyuor, Advocate, Teachers Service Commission

For 2nd Respondent Mr. Kioko, Senior Litigation Counsel, Office of the Attorney General

For Interested Parties Mr. Rono instructed by SMS Advocates LLP

Court Assistant Judy Maina