



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.127 OF 2014

BETWEEN

KENYA NATIONAL UNION OF TEACHERS.....PETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE CABINET SECRETARY FOR EDUCATION.....2ND RESPONDENT

THE TEACHERS SERVICE COMMISSION.....3RD RESPONDENT

AND

MOMBASA COUNTY GOVERNMENT & 46 OTHERS.....INTERESTED PARTIES

THE COUNCIL OF GOVERNORS.....48TH INTERESTED PARTY

KENYA UNION OF PRE-PRIMARY EDUCATION TEACHERS...49TH INTERESTED PARTY

JUDGMENT

Introduction

1. This Petition seeks an interpretation as to whether the recruitment and employment of ECE teachers by County Governments is a violation of **Articles 237 and 252** of the **Constitution** and **Section 9 of Part II** of the **Fourth Schedule** to the **Constitution**.

Parties

2. The Petitioner is the Kenya National Union of Teachers (KNUT), a trade union registered under the **Labour Relations Act, 2007**.

3. The 1st Respondent is the Attorney General of the Republic of Kenya, an office established under **Article 156** of the **Constitution** and the principal legal adviser to the Government. The 2nd Respondent is the Cabinet Secretary for Education, an office established under **Article 152** of the **Constitution** of the Republic of Kenya while the 3rd Respondent is the Teachers Service Commission (TSC), a body

established under **Article 237** of the **Constitution**.

4. The 1st to 47th Interested Parties are County Governments established under **Article 6(1)** of the **Constitution** and the **First Schedule** to the **Constitution**. The 48th Interested Party is the Council of Governors, a body established under **Section 19** of the **Intergovernmental Relations Act** comprising of the 47 elected governors of all the Counties in Kenya. The 49th Interested Party is the Kenya Union of Pre-Primary Education Teachers (KUPPET), a union of ECE teachers.

Factual background

5. It is alleged that sometime in January 2014, the Petitioner started receiving credible information that a number of County Governments were recruiting and employing ECE teachers directly. That shortly thereafter, the said County Governments began placing advertisements in the print media inviting members of the public to apply for the positions of ECE teachers and ECE teachers were subsequently appointed by the County Governments and posted to ECE Centres.

6. The Petitioner is concerned by that action and in its view, the decision by the County Governments to recruit and employ ECE teachers is in conflict with the role and function conferred upon TSC, pursuant to the provisions of **Articles 237** and **252** of the **Constitution** as well as the provisions of the **TSC Act No. 20 of 2012**.

7. It is in light of these facts that this Petition was brought to resolve the controversy surrounding the County Governments' actions and an interpretation is thus sought as to whether the recruitment of ECE teachers by County Governments is in violation of **Article 237** of the **Constitution**.

The Petitioner's case

8. The Petitioner submits that the decision aforesaid by some or all of the County Governments (the 1st to 47th Interested Parties) is in conflict with the role and function conferred upon the Teacher's Service Commission (TSC) under **Articles 237** and **252** of the **Constitution** as well as the **TSC Act** and it states that by employing ECE teachers, the said Interested Parties are usurping the constitutional mandate of TSC.

9. It is its further case that whereas **Section 9** of **Part II** of the **Fourth schedule** to the **Constitution** provides that pre-primary education is a function of County Governments, it is the TSC that is authorized under **Article 237 (1)** of the **Constitution** to recruit and employ registered teachers. It thus claims that nothing in the **Fourth Schedule** has delimited the clear mandate conferred upon the TSC under **Article 237**.

10. It is also its submission that the role of a County Government in pre-primary education is provided for under **Section 26** of the **Basic Education Act No.14 of 2013** and that role is limited to the provision of funds required for infrastructural development of basic education facilities but not the recruitment and employment of teachers. That in that regard, TSC is the key agency in the recruitment of teachers and County Governments must at all times act in collaboration with TSC in all matters involving education (including the recruitment aforesaid).

11. It further asserts that **Section 23** of the **TSC Act** makes provision for the registration of teachers pursuant to **Article 237** of the **Constitution** and bars any person from engaging in the practice of teaching unless they are registered by the TSC under the Act. The Petitioner therefore claims that teaching by ECE teachers employed by the County Government who are not registered under the **TSC Act** amounts to an illegal action.

12. In addition, it is the Petitioner's contention that under **Sections 26** and **27** of the **TSC Act**, TSC is the only body in Kenya with the technical ability, expertise and capacity to assess and vet applicants to fill up teaching positions including those of ECE teachers. Further, it submits that TSC is the only body in

Kenya with the legal mandate to undertake disciplinary action against teachers and to ensure compliance with teaching standards as prescribed under **Sections 34 and 35** of the **TSC Act** and that County Governments have no such expertise.

13. The Petitioner therefore seeks the following orders in its Petition dated 20th March 2014;

a. A declaration under Article 165(d) of the Constitution that the recruitment and employment of early childhood education teachers by county governments is unconstitutional, null and void.

b. A declaration that it is only the Teachers Service Commission that has the constitutional and legal mandate to recruit, appoint and employ all teachers including early childhood education teachers.

c. An order of prohibition to issue prohibiting all county governments either by themselves or through their servants, agents, officers or employees, from in any way recruiting, appointing or employing teachers, including early childhood education teachers.

d. Such other and/or further relief as this Honourable Court may deem fit and just to grant.

e. The costs of and occasioned by this Petition be provided for.

The 1st and 2nd Respondents' case

14. The 1st and 2nd Respondents did not file any response to the Petition but filed submissions dated 16th February 2016.

15. It is their submission in response to the Petition that the same is based on a wrong interpretation of the **Constitution** on three fronts. Firstly, it purports a disjointed interpretation of the **Constitution**. Second, it pursues a conflicting and partisan construction of **Articles 237** of the **Constitution** read with **Sections 15 and 16** of **Part 1** of the **Fourth Schedule** on the one hand and **Section 9** of **Part II** of the **Fourth Schedule** on the other hand. Lastly, that it has blatantly disregarded the existing inter-governmental dispute resolution mechanisms under the **Intergovernmental Relations Act**.

16. They submit in addition that the act of employing ECE teachers is a function of both TSC and the County Governments and the two levels of Government have distinct roles to play in pursuing the greater public interest (education) under the **Fourth Schedule** to the **Constitution**. Further, that the two levels of government should work on the basis of cooperation and consultation between themselves because they both have important roles to play in regard to education of the Kenyan populace at different levels.

17. Furthermore, the Attorney General submits that **Article 189** of the **Constitution** contemplates that intergovernmental disputes shall be solved by alternative dispute resolution mechanisms including negotiation, mediation and arbitration. In his view therefore, the present dispute should be settled amicably between the two levels of Government through consultation and cooperation and without resorting to Court process since the dispute falls within the ambit of the **Intergovernmental Relations Act**.

18. The Attorney General also claims that **Article 187(2)** of the **Constitution** espouses the principle that resources must follow functions and that the resources necessary for the performance of a function must be transferred to the relevant level of Government performing the function in question. In this case, if the function of employing ECE teachers is transferred to Counties, then constitutionally, resources for that function must also stream to the Counties.

19. He further submits that **Article 235** of the **Constitution** gives County Governments power to act within the framework of uniform norms and standards prescribed by Acts of Parliament and that they have in that context, power to appoint persons to hold or act in the offices established within their individual public service realms.

20. The Attorney General has therefore urged this Court to give a harmonious interpretation of **Articles 237, 252, Sections 15 and 16 of Part I and Section 9 of Part II of the Fourth Schedule**, to enable the two levels of Government mutually execute their separate constitutional mandates for the greater public good and interest.

The 3rd Respondent's case

21. TSC did not file also any response to the Petition but filed submissions dated 1st December 2015. It associates itself with the Petitioner's position, and adds as hereunder.

22. That TSC's primary functions include registration of trained teachers, recruitment, employment and assignment of teachers for service in public schools, their promotion to higher grades and administrative positions, their transfer and enhancement of discipline. Further, that under the law, the general functions of the TSC are two-fold in character and that is to regulate the teaching sector and employ teachers in public service for the institutions contemplated under the **Basic Education Act**.

23. In addition, that in executing its functions, the TSC serves both National and County Governments and considers ECE teachers as basic education providers who must be qualified to teach pre-school children aged 4 and 5 years and also lower primary children aged between 6 and 8 years. It also claims that it considers ECE teachers as basic education providers who must be qualified to teach pre-school students aged between 4 and 5 years and lower primary pupils between 6 and 8 years. Consequently, it states that their engagement must conform to the framework established under the **TSC Act** and the **Constitution** and it is its position that **Section 9 Part II of the Fourth Schedule** cannot diminish the substantive authority given to the 3rd Respondent under **Article 237 of the Constitution**. Further, that the mandate of County Governments in pre-primary school matters is limited to recruitment of support staff and development of the ECE infrastructure and that all issues relating to management of teachers at all level remains the preserve of the TSC.

24. TSC submits further that it has developed a Code of Regulations for Teachers and other policy instruments which sets out basic requirements to be met by every teacher and it has also endeavored to professionalize the teaching service by spelling out the administrative processes for a teacher's development as well as the reviewing and maintenance of teaching standards and training. To this end, it claims that it has developed a 'scheme of service' for ECE teachers and that ECE is inevitably hinged on **Article 53 of the Constitution** which anticipates that the best interests of the child ought to be observed at all times.

25. It is therefore the submission of the TSC that it has the exclusive mandate of teacher management and it would be against public policy and interests for County Governments to register and recruit ECE teachers and has urged the Court to grant the orders sought in the Petition as it is merited.

Interested Parties' case

26. In response to the Petition, only some of the Interested Parties filed affidavits thereto. In that regard, the 17th Interested Party, Makueni County, filed an affidavit sworn by Mr. Wambua Kawive, its County Executive Member for Education and Civic Education sworn on 28th April 2014. The 46th Interested Party, Nyamira County, filed an affidavit sworn by Ms. Gladys Momanyi Bogonko on 29th April 2014. The 36th Interested Party filed an affidavit sworn on 8th May 2014 by Mr. Jonathan Kiprof Soi, the County Secretary. The 45th Interested Party, Kisii County, filed an affidavit sworn on 9th May 2014, by Mr. Kodek Omwancha, its County Executive Member in-charge of ECE. Kiambu County, the 22nd Interested Party filed an affidavit sworn on 9th May 2014 by Mr. Wilson Mwita Maroa, its Executive Member in-charge of Public Service and administration and also the Acting County Secretary. The 3rd Interested Party, Kilifi County, filed an affidavit sworn on 9th May 2014 by Ms. Salma Muhiddin Ahmed, its County Executive Committee Member for Education, Culture, Youth, Sports and Social Services. The 43rd Interested Party, Homa Bay County, filed an affidavit sworn by Mr. Cyprian Otieno Awiti, the

County Governor on 17th May 2014. The 25th Interested Party, Samburu County, filed an affidavit sworn on 22nd May 2014 by Mr. Peter Jerina Lolmodooni its Executive Committee Member in-charge of Education, Sports and Youth. The 47th Interested Party, Nairobi County, filed an affidavit sworn on 12th September 2014 by Ms. Lilian Ndegwa, its County Secretary.

27. I have meticulously read all the affidavits filed by the different Interested Parties and they are the same in tenor and content. The Interested Parties' position can therefore be summarized as hereunder.

28. That the two levels of Government are distinct and inter-dependent and ought to conduct their mutual relations on the basis of consultations and cooperation. They are also dependent on each other and there is need for them to work together in serving the people of Kenya. Their position in that context is that cooperate governance at the two levels of Government aims at ensuring that the Governments do not work at cross-purposes or in a mutually destructive way that is also duplicative and wasteful of resources.

29. They contend that the two levels of Government are specifically required to cooperate in the provision of educational services across the County and that in fulfilling the function of managing pre-primary education, County Governments must apply national standards and best practices contained in the national education policy and relevant documents.

30. They state further that it cannot be true that County Governments, by recruiting ECE teachers, will compromise the quality of pre-primary teaching in Kenya and indeed claim that for over 50 years, the Respondents and the Petitioner have not developed or implemented a scheme of service for ECE teachers nor have they employed them. That instead it is County Governments that are currently streamlining operations in the pre-primary education sector for purposes of promoting the educational welfare of children in that sector.

31. They further claim that County Governments inherited very few teachers from the defunct local authorities and are currently in the process of hiring more ECE teachers to cure the acute shortage. In addition, that they have directly employed ECE teachers which action has tremendously improved teaching services in pre-primary education and child care facilities. The said employed and recruited teachers are however registered with TSC in the spirit of inter-dependence and co-operation.

32. It is therefore the position of the County Governments that the prayers sought by the Petitioner are against public policy and should not be granted and have urged the Court to dismiss the Petition.

33. The 47th Interested Parties, Nairobi County, in addition to its affidavit filed written submissions dated 12th October 2014 and submits that the alternative dispute resolution mechanisms prescribed by the **Intergovernmental Relations Act** should be pursued first so as not to strain the relationship between the national and county governments. It is its contention in that regard that the Petition is not ripe for determination and on that submission, it relies on the decision in **Okiya Omtatah Okoiti and Another v Attorney General and 6 Others (2014) eKLR** and **Dickson Mukweluine v Attorney General and 4 Others (2013) e KLR** where it was held that alternative dispute resolution mechanisms are complementary to the judicial process by virtue of **Article 159(2)** of the **Constitution**. That therefore, this Court is obligated to promote these modes of alternative dispute resolution.

34. The 47th Interested Party also contends that the provisions of **Article 189 (3)** and **(4)** of the **Constitution** as read together with **Sections 30** and **31** of the **Intergovernmental Relations Act**, do not oust the jurisdiction of this Court granted under **Article 165** of the **Constitution** but the proper approach would be to postpone the matter until the dispute resolution mechanisms had been explored. That this Court should therefore decline the exercise of its jurisdiction to enable the parties exhaust the procedures set therein.

35. Further to the above submission, relying on the case of **County Government of Nyeri v Cabinet Secretary Ministry of Education Science and Technology Petition No. 3 of 2014**, it submits that for a dispute to fall within the ambit of the **Intergovernmental Relations Act**, it must firstly be a dispute

involving a specific disagreement concerning a matter of fact or law. Second, it must be a dispute capable of being the subject of judicial proceedings. Third, it must be an intergovernmental one in that it involves various organs of the State and arises from the exercise of powers of functions assigned by the **Constitution**. It has also referred this Court to the South African Constitutional Court case of **National Gambling Board v Premier of Kwazulu Natal and others 2002 (2) SA 715**, where the Court held that disputes should, where possible, be solved at a political and diplomatic level rather than through adversarial litigation. The 47th Interested Party therefore submits that in view of the provisions of **Article 189** of the **Constitution**, **Section 30** of the **Intergovernmental Relations Act** and **Section 19** of the **National Government Coordination Act**, the dispute herein is not ripe for determination.

36. On the merits of the Petition, the 47th Interested Party submits that **Section 26 (1)** of the **Basic Education Act** bestows upon County Governments the responsibility of ensuring provision of funds required for the development of the necessary infrastructure for basic education and training used for conducting pre-primary education. It thus claims that **Section 9** of **Part II** of the **Fourth Schedule** as well as the said Act assigns the management, planning and development of pre-primary education to County Governments.

37. It therefore concludes that County Governments are constitutionally mandated to perform the constitutional and statutory function of recruiting, appointing and employing ECE teachers and for the above reasons, urges this Court to dismiss the Petition with costs.

The 48th Interested Party's case

38. The 48th Interested Party, the Council of Governors, in response to the Petition filed on undated affidavit sworn by Isaac Ruto, its Chairman at the material time. Its contents are the same as the affidavits deponed to on behalf of the County Governments and whose contents I have reproduced elsewhere above. I see no reason to reproduce the same contents again

The 49th Interested Party

39. The 49th Interested Party, KUPPET, in response to the Petition filed an affidavit sworn on 27th May 2014 by Mr. Samuel Opiyo, Secretary General. It also filed undated written submissions.

40. Its case is that ECE teachers are not members of KNUT nor employees of TSC and in any event, it claims that TSC ought to have been the right party to have instituted the Petition because in its view, the role of registering teachers is reserved exclusively for TSC and cannot be duplicated by any other employer.

41. Further, it claims that TSC has never shown any interest in employing ECE teachers and the resolve by County Governments to employ ECE teachers is remedial. As regards registration of ECE teachers by TSC, it claims that TSC only started doing so after KUPPET made demands to it to do so in May 2014.

42. It is its submissions therefore that ECE teachers will suffer irreparably if the orders sought by the Petitioner are granted since they will remain unemployed. That the Petition for the above reasons lacks merit and should be dismissed with costs.

Determination

43. As stated earlier, this Petition concerns an interpretation of the question whether the recruitment of ECE teachers by County Governments is in conflict with the functions and powers conferred upon the TSC pursuant to **Articles 237** and **252** of the **Constitution**.

44. However, before I determine that question, the Attorney General and the Interested Parties contended that the dispute, subject matter of this Petition, is not ripe for determination as the dispute resolution mechanism established under the **Constitution** has not been exhausted. In that regard, Jurisdiction is

everything and without it the Court has no power to pronounce itself on an issue - See *Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd (1989) KLR 1*.

45. Having so stated, **Article 189(3)** of the **Constitution** provides that;

“(3) In any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation.

(4) National legislation shall provide procedures for settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.”

46. The legislation contemplated in **Article 189(4)** has already been enacted i.e. the **Intergovernmental Relations Act**, which has established institutions and mechanisms for resolving intergovernmental disputes. Indeed, the Preamble thereto provides that it is an Act that establishes mechanisms for the resolution of intergovernmental disputes pursuant to the provisions of **Articles 6** and **189** of the **Constitution** and states that it is;

“An Act of Parliament to establish a framework for consultation and cooperation between the national and county governments and amongst county governments; to establish mechanisms for the resolution of intergovernmental disputes pursuant to Articles 6 and 189 of the Constitution, and for connected purposes.”

47. The contentious issue at this point is whether there is an intergovernmental ‘dispute’ and in that regard the Parties have agreed that the Respondents and the 1st to 47 Interested Parties are indeed ‘state organs’ and rightly so within the meaning of **Article 1(3)** of the **Constitution**. They all exercise public power or perform a public function and in this case, the 1st to 47th Interested Parties exercise public power at the county level while the Respondents are organs of the state exercising power at the national level. It is also not contested that the Petitioner is not an organ of the State but is a trade union and the obvious question therefore is whether the dispute resolution mechanisms established under the **Intergovernmental Relations Act** can properly apply in this case where the complaining Party is not a State organ.

48. To answer that question, I shall refer to the provisions of **Section 30** of **Intergovernmental Relations Act** which stipulates as to when a dispute can be said to have arisen between the two levels of Government. It provides thus;

“30 (1) In this Part, unless the context otherwise requires,

"dispute" means an intergovernmental dispute.

(2) This Part shall apply to the resolution of disputes arising—

(a) between the national government and a county government; or

(b) amongst county governments.”

49. The dispute in this Petition is whether County Governments have the power to recruit ECE teachers and whether they have that power or not would depend in the first place on an interpretation accorded to **Section 9** of **Part II** of the **Fourth Schedule** as read together with the provisions of **Article 237** of the **Constitution**. This means that the present dispute concerns an interpretation of the Constitution and is not *per se* a dispute as contemplated under **Section 30(1)** of the **Intergovernmental Relations Act**.

50. In any event, no dispute can be said to exist between the two levels of government or amongst counties, so that the dispute resolution mechanisms that have been set out under **Sections 30-35** of **Intergovernmental Relations Act** can hardly be invoked. In that regard, in **Okiya Omtatah Okioti v Attorney General (supra)**, this Court held that the intention of the Legislature was that the dispute

resolution mechanisms under the said Act are strictly to be utilized by the two levels of Government and any other party cannot benefit from its processes.

51. Having said so, the subject matter of the Petition is one that falls squarely within the jurisdiction of this Court under **Articles 165(3)(d) and 258(1) of the Constitution**. For clarity, that is the jurisdiction to interpret the **Constitution** and determine whether it has been violated in any manner.

52. Before I dispose of the issue of jurisdiction, I also recall that the 47th Interested Party contended that the dispute herein should have been subjected to the collaboration and dispute resolution mechanism between National and County Governments on issues of apparent concurrent mandate as is stipulated under the **National Government Co-ordination Act of 2012**. In that regard **Section 19(1)** aforesaid provides as follows;

“19(1) Where a dispute arises as to the mandate or powers of any of the officers or roles of county governments and those of the national government, a mediation team shall be constituted to deal with the dispute.”

To my mind, this provision would not also be applicable in the instant case because there is no dispute involving any of the officers or roles of the National and County Governments, and that is all there is to say on that issue.

53. With that clarification in mind, I now turn to determine the crux of the Petition.

Whether the recruitment of ECE teachers by County Government violates the constitutional powers of TSC

54. The constitutional functions of National and County Governments are spelt out under **Part I and II** of the **Fourth Schedule** as read with **Articles 185(2), 186(1) and 187(2) of the Constitution**. In respect of matters of education, on one hand **Sections 15 and 16 of Part 1** of the **Fourth Schedule** state that the National Government shall have the following functions;

“15. Education policy, standards, curricula, examinations and the granting of university charters.

16. Universities, tertiary educational institutions and other institutions of research and higher learning and primary schools, special education, secondary education and special education institutions;”

55. On the other hand, **Section 9 of Part II** of the **Fourth Schedule** states that;

“The functions of county governments are;

...

“(9) pre-primary education, village polytechnics, home craft centers and child care facilities”.

Without saying more, the demarcation of powers is clear and primary school education and all close including research institutions fall within the purview of the National Government.

56. Having so noted, the contest herein manifests itself in terms of **Article 237** of the **Constitution** which provides;

237. (1) There is established the Teachers Service Commission.

(2) The functions of the Commission are—

- (a) *to register trained teachers*;
 - (b) *to recruit and employ registered teachers*;
 - (c) *to assign teachers employed by the Commission for service in any public school or institution*;
 - (d) *to promote and transfer teachers*;
 - (e) *to exercise disciplinary control over teachers*;
- and*
- (f) *to terminate the employment of teachers.*
- (3) *The Commission shall—*
- (a) *review the standards of education and training of persons entering the teaching service*;
 - (b) *review the demand for and the supply of teachers; and*
 - (c) *advise the national government on matters relating to the teaching profession.*

(Emphasis added)

57. **Article 237(1) (b)** of the **Constitution** is therefore plain and requires no more than a literal interpretation which is that the TSC is the body responsible for recruiting and employing registered teachers and the next question is whether County Governments would not by law have any mandate to recruit and employ ECE teachers.

58. In that regard, the Constitution has created two levels of Government and assigned functions to each level of Government and at **Article 6 (2)** of the **Constitution** it is stipulated that;

“The governments at the national and county levels are distinct and interdependent and shall conduct their mutual relations on the basis of consultation and cooperation”.

59. The importance and the need for cooperation between the National and the County Governments has further been provided for under **Article 189** of the **Constitution** which provides that;

189(1) Government at either level shall-

- a. Perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level;*
- b. assist, support and consult and, as appropriate, implement the legislation of the other level government; and*
- c. liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity.*
- d. Government at each level, and different governments at the county level, shall cooperate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities.*

Principally therefore, the **Constitution** has introduced a multi-level system of government that shares resources and responsibilities. These two levels of Government are however on one hand are independent and on the other, inter-dependent. The distinctiveness refers to the autonomy of the two levels of Government which connotes that each of them ought to perform its powers and functions without interference from the other. This autonomy is made clear in the sense that **Article 1 (4)** of the **Constitution** recognizes that each of these levels exercises sovereign power on behalf of the people. None of them is therefore an agent of the other but each is an equal partner in the governance structure in Kenya.

Despite this distinct character, the **Constitution** also recognizes that the two levels of Government are interdependent, which connotes connectivity and the need to work together in discharging their respective functions. It essentially means that none of the two levels of Government can operate in isolation of the other. Interdependence can be seen in different contexts. For instance, independent commissions and state organs such as the TSC, the National Land Commission, the Independent, Electoral and Boundaries Commission, the Commission on Revenue Allocation and the Auditor General serve both levels of Government.

61. With that understanding in mind, the Petitioner now claims that any unregistered ECE teacher purportedly hired by a County Government would be undertaking his/her duties illegally. In that regard, it is true that the TSC is the body responsible for registering trained teachers and recruiting them. But can it recruit ECE teachers for a County Government? I do not think so. I say so because elsewhere above, I have found that issues relating to pre-primary pre-primary education is a function of County Governments.

62. However, I have also found that the two – levels of Government are inter-dependent and must rely on organs at both levels to achieve their respective mandates in matters relating to education generally.

63. In that regard firstly, the **Basic Education Act** was enacted to give effect to the provisions of **Article 53** of the **Constitution** and for the promotion and regulation of free and compulsory basic education and to provide for accreditation, registration, governance and management of institutions of basic education at the national level, through the establishment of the National Education Board and at the county level through the County Education Board.

64. Under **Section 18** of the **Act**, a County Education Board is empowered to oversee, in consultation with the County Government, the operation and management of youth polytechnics, pre-primary education including early childhood care and education programmes in the County. It is also supposed to coordinate and monitor education and training in the county on behalf of both the National Government and the County Government.

65. Secondly, **Section 26(1)** of the **Basic Education Act** bestows upon County Governments the responsibility of ensuring the provision of funds required for the development of necessary infrastructure for institutions of basic education and for conducting pre-primary education. It is therefore clear that pre-primary education management, planning and development was assigned both by the **Constitution** and the said **Act** to be a function of County Governments. The law has however not specifically granted County Governments any responsibility over registration of teachers. Its mandate in that regard is limited to registration and maintenance of a data bank of all education and training institutions within the County as stipulated under **Section 18(1)(g)** of the **Basic Education Act** and as regards teachers, the County Education Board is expected, under **Section 18(1) (g)** of the **Act**, to collaborate with TSC on teacher management within the County.

66. Thirdly, I have seen the ‘Policy Framework for Education’ draft of 11th May 2012, by the Ministry of Education. In Chapter 10, it states at paragraph 10.11 that;

The national government shall retain responsibilities for policy, standards and curriculum development, even where implementation is undertaken by the county governments.

The intention therefore, supported by law as stated above, is that the National Government has responsibility for policy, standard and curriculum development and a County Government shall then undertake the implementation thereof at its level of Government. To what extent should TSC therefore get involved in pre-primary education?

67. In answer thereto, to that above, I am aware of the provisions of **Article 252(1) (d)** which prescribe the functions and the exercise of power by a constitutional commission through prescribed legislation as follows;

252(1) Each Commission, and each holder of an independent office-

(a)...

(b)....

(c)...

(d) May perform any function and exercise any powers prescribed by legislation, in addition to the function and powers conferred by this Constitution.”

68. Accordingly, the **TSC Act** was enacted in pursuance of the foregoing provision in order to make further provisions for the functions of the TSC. Under **Section 11** of that Act, TSC shall;

a. formulate policies to achieve its mandate

b. provide strategic directions, leadership and oversight to the secretariat

c. ensure that teachers comply with the teaching standards prescribed by the Commission under the Act

d. manage the payroll of teachers in its employment

e. facilitate career progressions and professional development for teachers in the teaching service including the appointment of head teachers and principals”.

69. It must be remembered in the above context that among the functions of the TSC, relevant to this Petition, is the registration of trained teachers and recruitment of registered teachers. **Section 23** of the **TSC Act** has then made provision for registration of teachers and in essence, it bars any person from undertaking the teaching practice unless that person is registered as a teacher by the TSC.

70. Further, under **Section 11** of the **TSC Act**, TSC is mandated to formulate relevant policies to enable it achieve its mandate including the registration of trained teachers. None of the relevant statutes has given the County Government or the County Education Board the power to register trained teachers and it therefore follows that this is the exclusive mandate of TSC.

71. It is also within the power of TSC under **Article 237(2)(b)** to recruit registered teachers and in my view, the principles of distinctiveness and inter-dependence must be applied so as to ensure cooperation and mutual existence of the two levels of Government. TSC is therefore the only body that can employ teachers with regard to institutions contemplated to be within the mandate of the National Government under **Sections 15 and 16 of Part I of the Fourth Schedule**.

72. However, the same cannot be said in regard to the County Government level. I say so because, pre-primary education is a function of the County Governments and being such a function, the County Government is responsible for developing and maintaining the infrastructure and providing learning materials.

73. As regards the human resource, that is, teachers, the County Governments would also be responsible for recruiting them within its functions as set out above. Indeed Mr. Opiyo, the Secretary General of the 49th Interested Party deponed that recently, TSC started registering trained ECE teachers and I therefore do not find any difficulties if the County Governments were to recruit ECE teachers from the pool of those registered as such by the TSC. This would ensure that the teaching standards as set by TSC to maintain quality education are adhered to. The County Government through the County Education Boards should then liaise with TSC, in the spirit of cooperative governance discussed elsewhere above and recruit ECE teachers from those pre-qualified and registered by TSC.

Conclusion

74. Having found as I have done above, it follows that County Governments have the power to recruit ECE teachers but must do so only from the register of trained registered teachers held by the TSC within its constitutional mandate. However, despite that clear finding, one last issue requires resolution; what happens to the ECE teachers recruited by County Governments prior to this decision? Parties did not address me on the issue but my view is that this is a matter that can be resolved, under the leadership of the TSC but within the confines of my findings above.

75. Turning back to the prayers in the Petition therefore, Prayer (a) and (b) seek orders essentially that recruitment of ECE teachers by County Governments is unconstitutional. I have held that County Governments have the specific mandate in all aspect of pre-primary education save registration of teachers which is a function solely repositied in TSC. The prayer as worded must therefore fail but I shall make necessary orders in regard to the latter issue.

76. Prayer (c) seeks an order of prohibition to stop the recruitment of ECE teachers by County Governments and it is obvious that the said Prayer cannot be granted in view of my findings above.

77. On any other relief to be granted, I have stated that ECE teachers recruited by County Governments prior to this decision would require that TSC, working with County Governments, should regularize their appointment within the law.

78. Regarding costs, this is a fit case, by its nature, that would require an order that each party should bear its own costs.

Disposition

79. For the above reasons and save for the following orders, the Petition herein is dismissed:

- i. The TSC working with County Governments should regularize the appointment of ECE teachers made by County Governments prior to this Judgment.**
- ii. Each Party shall bear is own costs.**

80. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 1ST DAY OF NOVEMBER, 2016

ISAAC LENAOLA

JUDGE

DELIVERED AND SIGNED AT NAIROBI THIS 4TH DAY OF NOVEMBER, 2016

EDWARD MURIITHI

JUDGE

In the presence of:

Victor – Court clerk

Mr. Mbaluto for Petitioner

Mr. Ogono for the Respondent

Mr. Moimbo for 48th and 49th Interested Party

Court

Judgment delivered.

EDWARD MURIITHI

JUDGE