



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

MISC. CIVIL APPLICATION NO.154 OF 2011

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
CERTIORARI BY BWOME N. RENISON**

AND

IN THE MATTER OF CHAPTER 13 PART 3 OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF THE DECISION OF THE OFFICER MOUNT ELGON DISTRICT
WESTERN PROVINCE MADE ON 3RD NOVEMBER 2011**

BETWEEN

REPUBLIC.....APPLICANT

-VRS-

DEO MOUNT ELGON DISTRICT.....1ST RESPONDENT

THE SECRETARY

TEACHERS SERVICE COMMISSION2ND RESPONDENT

AND

BWOME N. RENISON.....EXPARTE APPLICANT

RULING

1. On or about 7th October, 1987, Bwome N. Renison (hereinafter “*the Applicant*”) was employed by the Teachers Service commission (hereinafter “*TSC*”) as an untrained teacher and allocated TSC NO.263766 and posted to Kipsikrok CPK Primary School. On 3rd August, 2009, the Applicant was promoted to the position of Graduate Teacher II, Job Group K and was deployed and seconded to Moi Kaptama Secondary School.

2. According to a P3 Form dated 19th October, 2011, the Applicant was involved in a Road Traffic Accident on 09th September, 2011 along Kitale-Webuye Road at Kamukuywa Market. He did not report to his place of work but caused to be delivered to the Headteacher of Moi Kaptama Secondary School on subsequent days, Medical Certificates (Sick Sheets) from Kimilili District Hospital showing that he was

unwell and giving him off duty. On 3rd November, 2011, the Headteacher Moi Secondary School, Kaptama wrote to the District Education Officer (“*the 1st Respondent*”) informing him that the Applicant had sought permission to be away from his place of work on 26/9/11 and was to return on 27/9/11. That he had thereafter gone underground and locked his phone. That although the Applicant had left while healthy, someone by the name Solomon M. Barasa was delivering to the Headteacher sick sheets in respect of the Applicant. The Headteacher requested the 1st Respondent to take disciplinary action against the Applicant.

3. On the same day, the 1st Respondent wrote to the Applicant advising him of his interdiction and conveyed the TSC's intention to remove his name from the Register of Teachers. The 1st Respondent specified in the interdiction letter the allegations against the Applicant as being desertion of duty with effect from 27th September, 2011 to the date of that letter. The letter further informed the Applicant that he had 21 days from the date of that letter to file his defence with the TSC. He was also assured that he will be given an opportunity to be heard in person by the TSC. That letter which was sent to the Applicant through the Headteacher of Moi Secondary School Kaptama was received by the Applicant at the offices of the Headteacher on 14th December, 2011.

4. Aggrieved by that decision, the Applicant took out summons in chambers on 20th December, 2011 and sought leave to commence Judicial Review proceedings. That leave was granted on 29th December 2011. Together with the leave, the Court granted a stay of execution of further proceedings of interdiction. Subsequently, on 19th January, 2012, the Applicant took out a Motion on Notice under Order 53 Rules 1, 2 and 3 of the Civil Procedure Rules seeking to remove to this court, for quashing the proceedings and decision of interdiction which aimed to remove his name from the register of Teachers made on 3rd November, 2011. That is the motion that is the subject of this Ruling.

5. The Motion was supported by the Applicant's Affidavit sworn on 11th January, 2012. The Applicant contended that the 1st Respondent did not ascertain the truth of the matter before taking action; that at the time of the alleged desertion the Applicant was nursing injuries and had been adjudged unfit to work; that the interdiction was a witch-hunt as the letter was handed over to him after 40 days; that the Applicant was not afforded a hearing before being interdicted; that the action breached the Applicants' fundamental rights and that the same was illegal and unlawful.

6. In his written submissions, Mr. Nyamu, Learned Counsel for the Applicant submitted that the terms of service of the Applicant are governed by Article 247 of the Teachers Service Commission (sic), the Teachers Service Commission Act and the Code of Regulations for Teachers (“*the CORT*”); that the actions of the Respondents was in breach of Article 47 of the Constitution; that in so far as the act of interdiction was based on the allegation of desertion, it breached the Code of Regulations for Teachers; that it was not in dispute that the Applicant's Headteacher and the 1st Respondent did receive the Applicant's sick sheets; that under Regulation 54 (1) (a) (ii) of the CORT, the Headteacher was supposed to inform the Respondents of the Applicants illness instead of straight away recommending disciplinary action against him; that there was no investigations that were conducted by the 1st Respondent as required under Regulation 66 (3) of the CORT, Counsel relied on the Case of **Bungoma H. C. Misc. Appl. No.99 of 2002 R -VRS- TSC Exparte Patrick Wanyonyi Khaemba (UR)** in support of the submissions and urged the Court to allow the application.

7. The Respondents opposed the application vide the Replying Affidavits of Fredrick Mula Sewe and Simon Musyimi Kavisi sworn on 27th February, 2012 and 28th February, 2012, respectively. The Respondents contended that the 1st Respondent is an agent of the 2nd Respondent properly so appointed under the law; that upon receipt of the report from the Applicants' Headteacher to the effect that the Applicant had deserted duty from 27/09/11, he properly issued an interdiction letter in accordance with the provisions of the Education Act Cap 211, Laws of Kenya, the Teachers Service Commission Act Cap 212 Laws of Kenya and the CORT. That since the first letter dated 3rd September, 2011 had a typographical error, he issued another one dated 16th November, 2011.

8. The Respondents further contended that the applicant had failed to inform them of his medical condition until 10th January, 2012 when he lodged his statement of defence with the 2nd Respondent; that the Applicant's disappearance between 26/09/11 and 12/01/12 amounted to desertion Regulation 2 of the CORT; having been for more than 14 days; that the Applicant had failed to inform the Respondents of his medical condition and apply for sick leave and that the interdiction letter gave him sufficient time to prepare his defence which he has since lodged and that the Applicant's Disciplinary Case for desertion is pending before the 2nd Respondent's Disciplinary Panel and the 2nd Respondent should be allowed to dispense with it.

9. In her written submissions, Ms Busienei appearing for Mr. Sitima, Learned Counsel for the Respondents submitted that; the Applicant had sought and was granted permission to be away on 26/09/2011 to report back on 27/09/11 but to date had not reported; that it is upon evaluating the surrounding circumstances and the provisions of the CORT and the report of the Headteacher that the 1st Respondent interdicted the Applicant. It was further submitted that the 2nd Respondent has Constitutional mandate under Article 237 (2) of the Constitution to exercise disciplinary control over teachers; that interdiction is not a punishment in itself but a step initiating a process, that the Applicant will be given an opportunity to defend himself under section 2 of the TSC Act. Counsel relied on the case of **Evan Rees and Others -vs- Richard Alfred Crane [1994] 2 WLR as cited in Nancy Baraza -vs- JC & 9 Others [2012] eKLR 39** in support of the proposition that in an initial step that commences such a process such as in the present circumstances, there is no requirement for a hearing.

10. It was further submitted that the TSC was entitled to act as it did under Regulations 65 and 66 (3) of the CORT; Counsel cited the Case of **Nyongesa & 4 Others -vs- Egerton University College [1990] 692** for the proposition that courts should be slow to interfere with decisions of domestic bodies and tribunals. Counsel concluded that since the interdiction was not made in excess of any jurisdiction but within the law, Certiorari cannot issue. She therefore urged that the application should be dismissed.

11. I have carefully considered the Affidavits on record, the written submissions of counsel and all the authorities relied on. As stated in the Case cited by Counsel for the Respondents of **the Kenya National Examinations Council -vs- Republic Ex- parte Gathienji & Others CA NO.266 of 1996 (UR)**;

“An order of Certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons.”

The question that therefore arises is whether the decision taken by the Respondents to interdict the Applicant was with or without jurisdiction and whether the Applicant was entitled to be heard before such interdiction.

12. It is not in dispute that the Applicant's employment with the 2nd Respondent is governed by the TSC Act, the Education Act and the CORT. The Applicant was interdicted for alleged desertion. Desertion has been defined under Regulation 2 of the CORT as:-

“..... being absent from duty continuously for a period of 14 days or more without written explanation or acceptable explanation.” (Underlining mine)

It is not in dispute that the Applicant was away from his place of work for a period exceeding three months. According to the Applicant, he was away from 9th September, 2011 until 14th December, 2011 when he was served with the interdiction letter. However, according to the Respondents, the Applicant was absent from his place of work from 27/9/11 until 12/01/12 when he lodged his statement of defence with TSC. Whichever way one looks at it, the Applicant was absent from his work continuously for a period exceeding 14 days. It is also not in dispute that he did not have any written permission to be away as such. Did this amount to desertion in terms of Regulation 2 of the CORT? I will come to this later on in this Ruling.

13. There is no doubt in my mind that the 1st Respondent is an agent of the 2nd Respondent in

accordance with the law. The contention by the Applicant that it is only the 2nd Respondent who could interdict him and that the 1st Respondent was not a proper agent has no basis in the face of exhibit “FMO1”; letter dated 11/05/10 by the TSC to the 1st Respondent. The evidence on record is that on 3rd November, 2011, Jacob M. Psero, the Headteacher of Moi Secondary School, Kaptama wrote to the 1st Respondent reporting that the Applicant had deserted duty since 27/9/11. He urged the 1st Respondent to take disciplinary action against the Applicant. Consequently, on the same day, the 1st Respondent made a decision and interdicted the Applicant forthwith by a letter of the same date, later on amended on 16/11/2011 and commenced the process of the removal of the Applicant from the Register of Teachers.

14. The process of interdiction is clearly provided for in Regulation 66 (3) of the CORT which provides:-

“The Agent shall:-

a) on receiving allegations against a teacher conduct investigations and assemble evidence to establish whether the teacher has a case to answer.

b) Where there is a Board of Governors, the Board will invite and interview the teacher except for desertion cases.”

It is clear from the foregoing that, it is only after an Agent has conducted investigations and assembled evidence that satisfies him that the teacher has a case to answer that the Agent is required to serve the teacher with a notice of interdiction.

15. In the instant case, there is no evidence to show that after the alleged desertion was reported to the 1st Respondent, he undertook any investigations before issuing the interdiction letter. In his letter dated 24th February, 2012 addressed to the Secretary, TSC and produced in his Affidavit as “Exh.FMO6”, the 1st Respondent confirmed that among the documents that he had received was a P3 Form indicating that the Applicant had been involved in a road traffic accident on 09/09/11. I have seen that P3 Form. It is produced as “Exh.BNR-1” to the Applicants Supporting Affidavit. In the P3 Form, the Reference given is OB No.55/9/9/2011. It is shown to have been issued from the Kimilili Highway Traffic Police to the Medical Officer of Health (“MOH”), Kimilili District Hospital and was in the name of the Applicant. It was duly filled by the MOH, Kimilili District Hospital on 19/10/2011. Instead of seeking to verify the authenticity or otherwise of the said document from the police or the subject Hospital as contained in the said P3 Form, the 1st Respondent sought to confirm from the very Headteacher of Moi Secondary School, Kaptama who had asked him to discipline the Applicant, whether the information contained in the P3 Form was correct. Of course, he got the obvious answer, that the information was not correct! It is then that he issued the interdiction letter.

16. I have on my part seen exhibit “BNR – 3 (b)” produced in the Applicant's affidavit in support of the summons for leave. That exhibit is a Police Abstract Form No.A605648 issued by the Kimilili Highway Traffic Police. It is dated 18/12/11. It confirms that under OB No.55/9/9/11,(the same as in the P3 Form),an accident involving one Benson Bwome and MV Reg. No.KAQ 249C was reported at the station.To my mind, had the 1st Respondent investigated the information in the P3 Form in his possession, he would have concluded that actually an accident in which the Applicant was involved had been reported to the Police and he would not have dismissed the sick sheets and medical certificates delivered to his office.

13. In this regard, I am of the firm view and so hold that, had the 1st Respondent carried out investigations as required by Regulation 66 (3) of the CORT, he would have concluded that there may have been an **“acceptable explanation”** under Regulation 2 of the CORT, for the Applicant's absence from duty whereby, there would be no desertion under that Regulation.Accordingly, I hold that firstly, there was no desertion and secondly, the 1st Respondent breached the provisions of Regulation 66 (3) of

the CORT.

14. The other issue is whether in the circumstances of this case the Respondents acted properly. Both the Headteacher of the Applicant and the 1st Respondent admit having received the medical records by way of Sick Sheets (Medical Certificates) by the Medical Officer of Health, Kimilili District Hospital indicating that the Applicant was unwell and could not attend duty. The Respondents contend that even if the Applicant was unwell, he did not apply for sick leave in writing. Regulation 54 (1) (a) provides:-

“54. Sick leave

(1) (a) (I) A teacher who on account of illness must be absent from duty, shall be required to produce to the headteacher a medical certificate as prescribed in Schedule XXXIII signed by a Government doctor or a registered medical practitioner not later than forty eight hours. If he/she attended hospital as an outpatient and not later than seven days if admitted to hospital.

ii) A head of an institution shall be required to forward a teacher's medical certificate to the PDE/DCE/DEO/MEO.

iii) In the event that a teacher is too ill to apply for sick leave, the Headteacher should inform the Agent and the Teachers Service commission, within twenty one (21) days from the date of absence.*”*Emphasis supplied.

Sub regulation (2) of Regulation 54 provides on how a teacher should apply for leave and how default shall be deemed to be desertion.

15. The evidence on record to wit, exhibits “BNR 1 and BNR 2 (a) and (b)”, discloses that the Applicant had injuries to his head and both the upper and lower limbs. He suffered temporary loss of consciousness at the time of the accident and lost functions for right shoulder and right lower limbs. With such injuries, it would be safe to conclude that the Applicant may have been unable to apply for sick leave and that is why he kept on delivering to his Headteacher as required by Reg.54 (1) (a) (i), medical certificates on his sickness. Instead of the Headteacher forwarding to the 1st Respondent and the 1st Respondent forwarding to the 2nd Respondent those Medical Reports, both acted illegally. One by requesting disciplinary action against the Applicant and the other by interdicting him. Clearly that was in breach of Regulation 54 of the CORT.

16. The Applicant argued that he was not given a hearing. On the other hand the Respondents contended that there was no reason to give the Applicant a hearing as the interdiction was not the punishment in itself as it was only an initial step to a process whereby the Applicant will be given a hearing at a later date. The Respondents relied on the Case of **Rees -vs- Crane as cited in Nancy M. Baraza -vs- JSC & 9 Others (Supra).**

17. With due respect, I do not agree with the Respondents submission as they seem to have quoted the case selectively. In that Case it was held; inter alia that:-

“In most types of investigation there is in early stages a point at which action of some sort must be taken and must be taken firmly in order to set the wheels of investigation in motion. Natural justice will seldom if ever at that stage demand that the investigator should act judicially in the sense of having to hear both sides. No one's livelihood or reputation at that stage is in danger. But the further the proceedings go and the nearer they get to the imposition of penal sanction or to damaging someone's reputation or to inflicting financial loss on someone, the more necessary it becomes to act judicially and the greater the importance of observing the maxim audi alteram partem.....”.

Further, in the **Nancy Baraza Case**, the court found that the Applicant in that case had been given

a hearing to controvert the allegations against her. What she had not been granted is the right to cross-examine the witnesses.

18. In the instant case, it is common knowledge that interdiction comes with its own consequences. There is the issue of half pay, being rendered idle for an indefinite period leave alone the reputation on one being under a disciplinary process. There is definitely likelihood of financial loss, loss of reputation and anxiety which is a prejudice in its own way. To my mind, before one is subjected to all these, he should be given a hearing. Probably, if the Applicant was heard and he gave an explanation on all his documents that he has supplied to the Headteacher and the 1st Respondent, the interdiction letter would have been unnecessary. Accordingly, I hold that the Applicant's right to be heard was breached.

19. From the foregoing, I believe that it is clear that the Applicant's Constitutional right to fair administrative action under Article 47 of the Constitution was breached by the Respondents. Accordingly, I hold that the process and decision of interdiction was made both in breach of the Constitution, in excess of jurisdiction and contrary to the rules of natural justice and it cannot stand.

20. Since the Respondents have agreed that the letter of 3rd November, 2011 was amended with that of 16th November, 2011 (which does not seem to have reached the Applicant), I allow the Application and remove to this Court and quash the proceedings and decision of interdiction made by the 1st Respondent and contained in the letters dated 3rd November, 2011 and 16th November, 2011. I also award the costs to the Applicant.

It is so ordered.

Dated and delivered at Bungoma this 12th day of May, 2014.

A. MABEYA

JUDGE