



REPUBLIC OF KENYA  
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

PETITION NUMBER 22 OF 2013

IN THE MATTER OF THE LABOUR RELATIONS ACT, 2007  
AND  
IN THE MATTER OF THE TEACHERS SERVICE COMMISSION ACT, 2012  
AND THE STRIKE CALLED BY KENYA UNION OF POST PRIMARY EDUCATION TEACHERS  
(KUPPET)

TEACHERS SERVICE COMMISSION.....PETITIONER/  
APPLICANT

VS

KENYA UNION OF POST PRIMARY EDUCATION TEACHERS (KUPPET)  
.....RESPONDENT

SALARIES AND REMUNERATION  
COMMISSION.....INTERESTED PARTY

RULING

Introduction

1. On 12th June 2013, the Respondent wrote to the Cabinet Secretary, Ministry of Labour, reporting a labour dispute between itself and the Teachers Service Commission, the Respondent in this petition. The dispute as framed was the Respondent's failure to honour an agreement signed on 1st October 2012. In the said letter, the Respondent gave a seven (7) days strike notice pursuant to Section 76 of the Labour Relations Act, 2007. The letter was copied to the Cabinet Secretaries for Education and Finance, the Secretary of the Teachers Service Commission and the Chairperson of the Salaries and Remuneration Commission. The Respondent then called a nationwide strike of its members which commenced on 19th June 2013 and persists to date.

2. In response to the strike, the Petitioner filed a petition together with a Notice of Motion on 26th June 2013 under Certificate of Urgency seeking orders to restrain the Respondent and its members from continuing with the strike.

3. When the matter came before me on 26th June 2013, I certified it urgent and directed the Petitioner to serve the Respondent and the Interested Party and set an inter partes hearing for 28th June 2013. The

Petitioner was represented by Muthoni Kimani, Allan Sitima and Francis Njoroge while the Respondent was represented by Judith Guserwa.  
The Petitioner's Submissions

4. Muthoni Kimani for the Petitioner submitted that the Respondent had partially complied with the law by issuing a strike notice. She stated that the grievances by the Respondent and its members emanated from harmonisation of commuter, leave and responsibility allowances. Counsel further told the Court that following a previous strike in 2012, the Petitioner and the Respondent had agreed on a return to work formula where the parties agreed to harmonise the salaries of the Respondent's members and then constitute a committee to consider the pending issue of allowances.

5. The Committee which was constituted in November 2012 had done some preliminary work. The Respondent had made its demands and the Petitioner was reported to be in consultation with the Salaries and Remuneration Commission, the Interested Party in this Petition. In explaining the delay in concluding this matter, Counsel for the Petitioner asked the Court to take judicial notice that the term of the commissioners of the Teachers Service Commission had expired and that the process of appointing new commissioners was underway. She asked the Court to compel the Respondent to call off the strike to pave way for negotiation of a Collective Bargaining Agreement.  
The Respondent's Reply

6. In opposing the Petitioner's application, Miss Guserwa for the Respondent submitted that the Respondent secured recognition by the Petitioner on 10th June 2010, twelve years after registration and that the parties had not negotiated any Collective Bargaining Agreement due to bureaucracy within the operations of Government.

7. With regard to the committee charged with the responsibility of dealing with the pending issue of commuter, leave and responsibility allowances for the Respondent's members, Counsel told the Court that apart from naming the members of the committee, no further action had been taken. Attempts at intervention of the Salaries and Remuneration Commission had borne no fruit.

8. The Respondent therefore put the Cabinet Secretary for Labour on notice on 12th June 2013 that within seven days the Respondent would call a country-wide strike of its members. Miss Guserwa submitted that the Respondent ought to have moved the Court for prohibitory orders within the seven day notice period, which it failed to do.

9. On the question of the legality of the strike, Counsel cited Article 41(2)(d) of the Constitution which confers the right on workers to go on strike. According to the Respondent, its members were being discriminated against vis a vis other civil servants contrary to Article 27 of the Constitution. The Respondent's Counsel told the Court that the Respondent called the strike as a last resort as all forms of dialogue had collapsed. The Respondent was still ready and willing to negotiate but within reasonable time.

The Petitioner's Final Reply

10. In her final reply, Ms. Kimani for the Petitioner admitted that there was indeed bureaucracy within Government of Kenya, just like in other governments. She added that engagement between the parties had been haphazard and that there was now an opportunity to do things right. She maintained that the Government and the Petitioner had demonstrated good faith.

11. In reply to the question why the Petitioner did not come to Court within the strike notice period, Counsel told the Court that there were meetings taking place between the parties. She took the view that there was still a window of opportunity to negotiate in good faith without resorting to extra judicial means. She asked the Court to take into account the right to education conferred on the child by Article 53 of the Constitution.  
Recognisable Dispute

12. The first issue for determination in this application is whether there exists a legally recognisable dispute between the Petitioner and the Respondent. In the supporting affidavit sworn by Gabriel Lengoiboni, the Chief Executive Officer of the Petitioner, he depones that the Respondent does not have an existing Collective Bargaining Agreement. There is therefore no recognisable dispute between the parties.

13. This argument does not sell. First, it is not in contest that there is a valid Recognition agreement between the Respondent and the Petitioner. Second, the Petitioner has relied on a Memorandum of Understanding between itself and the Respondent to demonstrate that there has indeed been positive engagement between the parties in the past.

14. Third, unlike in the private sector industrial relations in the public sector have not been governed by Collective Bargaining Agreements. In the case of the Teachers Service Commission, the terms and conditions of service are contained in the Code of Regulations for Teachers. The only issue left for negotiation by the Teachers Union has to do with remuneration. This practice has been in place for a long time and the Petitioner cannot be allowed to turn around and disown a system that is has employed over the years. The Court therefore finds that there is indeed a recognisable dispute between the parties to wit; harmonisation of commuter, leave and responsibility allowances.  
Balancing of Rights

15. The Petitioner told the Court that as a result of the teachers' strike, the right of the child to free and compulsory basic education as provided for in Article 53 of the Constitution has been violated and that the Court should arrest the violation. On the other hand, the Respondent maintained that the rights of the teachers to fair remuneration and non discrimination as provided by Article 41 and 27 of the same Constitution have been violated.

16. It is true that every time the teachers down their tools the children under their watch and tutelage suffer immeasurably. However, this fact cannot be used as a justification to push the rights of the teachers underfoot. The employer of the teachers and by extension the Government must secure and protect the rights of the teachers in order to safeguard the rights of the children.  
Legality of the Strike

17. I will now address the question whether the on going strike by the Respondent's members was called within the law. The law on strikes and lock-outs is found in Part X of the Labour Relations Act.

18. Section 76 of the Act provides that:  
(a) A person may participate in a strike or lock-out if the trade dispute that forms the subject of the strike or lock-out concerns terms and conditions of employment or the recognition of a trade union;  
(b) the trade dispute is unresolved after conciliation  
(i) under this Act or

(ii) as specified in a registered collective agreement that provides for the private conciliation of disputes; and  
(b) seven days written notice of the strike or lock-out has been given to the other parties and to the Minister by the authorised representative of  
(i) the trade union in the case of a strike ;  
(ii) the employer, group of employers or employers' organisation in the case of a lock-out

19. Section 78 sets out what constitutes a prohibited strike or lock-out. One of the instances in which a strike or lock-out is prohibited is where the employer and employee are engaged in an essential service.

20. The Petitioner advanced the argument that teaching is an essential service. I will therefore proceed to rule on this point. While the Trade Disputes Act (now repealed) expressly categorised teaching services as essential, the Labour Relations Act does not do so.

21. Section 81(1) of the Labour Relations Act defines 'essential services' as far as strikes and lock-outs are concerned as :  
“service the interruption of which would probably endanger the life of a person or health of the population or any part of the population.”

22. Moreover the Fourth Schedule to the Act categorises only six services as essential and they do not include teaching services. I therefore find no legal basis for the argument by the Petitioner that teachers may not go on strike because they are engaged in an essential service.

23. From my analysis of the circumstances surrounding the strike which is the subject matter of the case before me, the only fault line has to do with whether the conciliation process had been concluded before the strike was called.

24. Counsel for the Respondent told the Court that a conciliator appointed in 2012 had not discharged their mandate and then there is the committee that was put in place in November 2012 but had not made much progress. It seems to me therefore that the conciliation process never begun in earnest. For this reason I make the following orders:

a) The Petitioner and the Respondent are directed to decamp from their hard line positions and proceed to the negotiating table in good faith. For the avoidance of doubt, these negotiations shall be limited to harmonization of commuter, leave and responsibility allowances for the Respondent's members. The negotiation meetings shall be convened by the Cabinet Secretary for Labour.

b) The parties are directed to report the outcome of these negotiations to this Court at 9.00 a.m. on Monday, 15th July 2013.

c) The teachers are directed to report back to work by 8.00 am on Tuesday, 2nd July 2013. Any strike beyond this time shall be unprotected and illegal.

d) In order to preserve industrial peace, the parties and/or their members and/or agents and/or servants and/or sympathisers are restrained from commenting on this matter outside the confines of the negotiations hereby ordered.

Orders accordingly.

DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 1ST DAY OF JULY 2013

LINNET  
JUDGE

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In the Presence of:

.....Petitioner/Applicant

.....Respondent