REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. E055 OF 2025

(Before Hon. Justice Dr. Jacob Gakeri)

SIMON ODHIAMBO OWUOR……. ……CLAIMANT

VERSUS

MR. PAUL J. OUMA, PRINCIPAL ST. STEPHENS MENARA SECONDARY SCHOOL……1ST RESPONDENT

THE BOM ST. STEPHENS MENARA SECONDARY SCHOOL……2ND RESPONDENT

TEACHERS SERVICE COMMISSION……3RD RESPONDENT

RULING

Before the court for determination is the Applicant's Notice of Motion dated 25th June, 2025 filed under Certificate of Urgency seeking Orders that:

1. *Spent*
2. *Spent.*

3. *Pending the hearing and determination of the substantive suit, the 3rd respondent be restrained either by or her agents, servants and or employees threatening with consequences, dismissing from employment or in any other way taking adverse measures against the claimant on account of his failure to report to his new posting station, being Nyakoko Secondary School on 3rd July, 2025.*
4. *Costs of this application be provided for.*

The Notion of Motion is expressed under Section 3A of the Civil Procedure Act, Article 50, 159(2) of the Constitution of Kenya and Section 12(3) of the Employment and Labour Relations Court Act and is based on the grounds set forth on its face and the Supporting Affidavit of the applicant sworn on 25the June, 2025.

The applicant's case is that the transfer from St. Stephen's Menara Secondary School, where he teaches Biology and Agriculture to Ombeyi Secondary School vide letter dated 24th April, 2024 was occasioned by his refusal to participate in KCSE 2023 examination malpractices at Menara Secondary School and the schools mean score had dropped from 6.6. in 2022 to 5.8 in 2023.

According to the applicant, parents of form 4 candidates were required to pay Kshs.800 allegedly to facilitate the teachers who would take the KCSE examination for them.

The applicant further alleged that the Principal of Menara Secondary School, the 1st respondent, was intentionally frustrating him and even delayed his transfer letter dated 24th April, 2024, which the applicant received late.

The applicant further deposed that his appeal against the transfer was based on the fact that he had an anaemic child whose records were at a hospital within Muhoroni Township and had already paid fees for his children and a transfer would be disruptive. He pleaded to be retained in a school within Menara Zone.

The affiant alleged that one of the panellists of the 3rd respondents County Appeals Committee was the 1st respondent, whom he accuses of having orchestrated his transfer and the appeal was unsuccessful.

That his clearance was impeded by closure of the gate the security and left for his house and his locker and desk were vandalized.

The applicant deposed that he appealed against the County Appeals Committee's decision vide letter dated 21st May, 2024 after an earlier one dated 14th May, 2024, protesting over the transfer and another dated 13th June, 2024 as a follow up.

That at the 3rd respondent's regional offices, he received a letter dated 15th May, 2024 directing him to proceed to Ombeyi Secondary School as directed earlier.

The applicant further deposed that in October, 2024, one Mr. Gideon Nandi informed him to pick a notice to show cause from the County's Human Resource Office and responded on the same day and subsequently received an interdiction letter dated 17th October, 2024 and responded, was invited for a hearing scheduled for 22nd May, 2025 and whose venue was changed from the Regional County Director's Office to Kisumu Girls High School.

That the applicant and his witnesses were intimidated and not accorded ample time and prevented from tabling evidence.

That the outcome was a warning and transfer to another school Nyakoko Secondary School with immediate effect and received the letter on 19th June, 2025.

1st and 2nd Respondents case

By an affidavit sown on 22nd July, 2025, Mr. Paul Ouma, the 1st respondent deponed that the 3rd respondent was solely responsible for recruitment, posting and transfer of teachers and denies having instructed the applicant to pay Kshs.800 to facilitate teachers who would supervise the K.C.S.E examination.

That parents had agreed to contribute the same to provide meals to students during the examination period and the applicant had not attended the meeting at which the decision was made as he was not in school.

That the applicant collected monies from form 4 parents but did not surrender the same and he was not blamed for the drop in the KCSC performance for 2023.

The affiant deponed that he attended the meeting on 25th May, 2024 as Principal of the school where the applicant was teaching and attended to confirm that the applicant had not cleared with the school after the transfer to

Ombeyi Secondary School and did not prevent the applicant from going to the school to clear despite being invited to do so.

The affiant further deponed that after the applicant was promoted as the Boarding Master and subject head, he was not a team player and the affiant wrote to the 3rd respondent on 5th June, 2024 on the applicant's absence from school without permission, forwarded the notice to show cause to him on 9th October, 2024, and informed the 3rd respondent and also notified it of the filing of the instant suit vide letter dated 7th July, 2025.

The affiant denied having withheld the applicant's letters or instructed anyone to vandalize the applicant's locker.

3rd Respondent's case

Vide a Replying Affidavit sworn on 22nd July, 2025, Mr. Joseph Atwolo Ombufu, the 3rd respondent's County Director in charge of Kisumu deposed that the 3rd respondent was empowered to review the supply and demand of teachers nationally, transfer and or deploy teachers assign teachers to any public school and the applicant was its employee since 2017 and was

responsible for the applicant's transfer in the foregoing context.

That the applicant's appeal against the transfer to Ombeyi Secondary School was heard and a decision communicated to him but the applicant failed to report to Menara Secondary School for clearance and release to Ombeyi Secondary School as directed and after a disciplinary hearing he was warned and transfer to Nyakoko Mixed Secondary School in Muhoroni Sub-County and accorded 14 days to do so and did not appeal against the new transfer but did not report to the school in breach of the terms of employment.

That the instant application related to the original transfer to Ombeyo Secondary School and the 3rd respondent had the prerogative to assign teachers to public education institutions depending on need and demand and the grant of the Orders sought would amount usurpation of powers of the 3rd respondent.

The applicant's Further Affidavit sworn on 8th August, 2025 raised no new issues.

Applicant's submissions

Concerning the threshold for injunctive Orders, reliance was placed on the sentiments of G. V. Odunga J (as he then was), **JM V SMK & 4 Others [2022] eKLR** where the learned Judge restated the principles in **East African Industries V Trufoods [1972] EA 120 and Giella V Cassman Brown & 2 others [1973] EA 358** and **Nguruman Ltd V Jan Bonde Nielsen & 2 others [2014] eKLR,** to urge that the applicant was entitled to the Orders sought.

On *prima facie* case, counsel faulted the hearing on 22nd May, 2025 on irregularities, malice, pre-determined outcome and no reason for the decision was given and the applicant was posted to a new school and the 1st and 2nd respondents had not opposed interim Orders.

Counsel submitted that the 3rd respondent had not provided statistics of teachers at Nyakoko Secondary School and Menara School to justify the transfer and the 3rd respondent was expected to consider family needs, such as illness, and the applicant had a sick child.

Reliance was placed on the decision in **Mrao Ltd V First American Bank of Kenya Ltd & 2 others [2003] eKLR**.

As to whether damages were an adequate remedy, counsel cited the sentiments of the court in **Pius Kipchirchir Kogo V Frank Kimeli Tenai [2018] eKLR** on the meaning of irreparable injury to urge that Nyakoko Secondary School was located far away from a medical facility and poor road network.

That if the Orders were not granted, the applicant would suffer irreparable loss as was the case in **Joseph Siro Mosioma V Housing Finance Co. of Kenya & 3 others [2008] eKLR** and the sentiments in **Sharok Kher Mohammed Ali & another V Credit Banking Corporation Ltd [2008] eKLR**.

On the balance of convenience, counsel submitted that the applicant stood to suffer more with his sick child as he would have to look for proper housing.
Reliance was placed on **Paul Gitonga Wanjau V Gathuthi Tea Factory Co. Ltd & 2 others [2016] eKLR**, where Mativo J. (as then was) unpackaged the principle of balance of convenience as were those in **Jan Bonde Nielsen V Herman Phillipus Steya** also known as **Hermanous Philipus Steyn & 2 others [2012] eKLR**.

1st and 2nd Respondent's submissions

As regards prima facie case, counsel for the 1st and 2nd respondents contended that their duty was to ensure that the applicant carried out his professional duties in the school and did so and the applicant had contractually agreed to work in any part of Kenya and abide by the terms and conditions of engagement and the 3rd respondent as admitted by the applicant, had the sole responsibility to transfer, employ and transfer teachers in the Republic of Kenya.

That both Ombeyi Secondary School and Nyakoko Secondary School were in Muhoroni Sub-County. Counsel submitted that the applicant's refusal to proceed on transfer was not grounded on availability or otherwise of medical facilities but his personal decision in breach of the 3rd respondent's regulations and teachers had no jurisdiction to determine where they ought to be transferred to. Counsel submitted that grant of the Orders would set a bad precedent.

Counsel further submitted that the applicant had not indicated why he was blaming the 1st and 2nd respondents for the transfers. That the Kshs.800 payable by students was intended to enhance their diet.

Counsel submitted that examination malpractices alleged by the applicant was a criminal activity and he ought to have reported the same but never did and was thus seeking sympathy from the court and had not established a *prima facie* case with probability of success.

That the applicant had not demonstrated how the disciplinary process was unreasonable or malicious and no law required the 3rd respondent to set out the reason(s) for the transfer of a teacher.

Finally, counsel submitted that the appeal against the transfer to Nyakoko Secondary School was pending but the applicant filed the instant suit and ought not to benefit from the court's discretion and the application ought to be dismissed with costs.

Analysis

The singular issue for determination is whether the application meets the threshold for the grant of a temporary injunction to restrain the 3rd respondent from forcing, compelling, intimidating, threatening with consequences, dismissing the applicant or taking any

adverse measures against him for failure to report at Nyakoko Secondary School.

When the matter came up on 27th June, 2025, the court was not persuaded that a case for *ex parte* orders had been made and directed service though compliance by the respondents took inordinately long coupled with the court's vacation effective 1st August, 2025.

It is not in dispute that the applicant is an employee of the 3rd respondent serving as a teacher at Menara Secondary School and having previously been transferred to Ombeyi Secondary School and later to Nyakoko Mixed Secondary School.

The outcome of the appeal against the 2nd transfer is pending.

The applicant's case is simply that the transfer to Ombeyi Secondary School was orchestrated by the 1st respondent ostensibly because the applicant did not countenance to being involved in K.C.S.E examination malpractices at the school in 2023 and was blamed for the drop in mean score from 6.6 to 5.8. The 1st respondent vehemently denied the accusations.

Although the applicant availed printouts of sms communication or WhatsApp messages on the contentious Kshs.800 payable by form 4 candidates, it emerges from the communication that the applicant had not participated in the parents meeting that passed the resolution and could not without documentary evidence prove what the amount of Kshs.800 was being paid for.

Relatedly, evidence availed by the 1st and 2nd respondents reveals that the purpose of the payment was noble and had been discussed and agreed upon.

Secondly, the applicant tendered no verifiable or unverifiable evidence as to by whom and how he was blamed for the drop in the schools mean score in the 2023 KCSE examination series.

Most worrisome to the court, the applicant casually mentioned that the sum of Kshs.800 was intended to facilitate examination malpractices at the school during the examination, an egregious and criminal conduct which if true, the claimant ought to have reported not only to the employer but to the Kenya Police and record a statement on it for further investigation, but intriguingly,

and as submitted by the 1st and 2nd respondents, he did not report the same to anyone either before or after the examination or at any other time thereafter and thus remains an allegation yet to be demonstrated by the one who alleges it as by law required.

Relatedly, the applicant pleaded and counsel submitted that the reason why he was not eager to proceed on transfer to Ombeyi Secondary School was that he had an anaemic child who required care and regular medical attention and who was being attended to at an unnamed hospital at Muhoroni township.

While sickness, illness or indisposition of a child or spouse is a grave issue and is often cited in court for one reason or another, the party relying on the same is obligated to adduce sufficient evidence to show that indeed a person is indisposed or has been attended to at a particular clinic, hospital or health centre. A letter from the hospital would have established the fact effortlessly.

Strangely, other than the applicant's averments, there is no shred of evidence to demonstrate the averment was availed.

Equally, the court is not persuaded that the 1st respondent purposefully or deliberately withheld the applicant's, promotion or transfer letters as no evidence was adduced as to when the letters were dispatched to or collected by the school.

I will now proceed to the transfers by the 3rd respondent.

In his appeal against the transfer to Ombeyi Secondary School which is about 59km from Menara Secondary School the applicant's case was that he had a sick child and he had already paid fees for his children at the school and he sought to be retained within Menara Zone. He was heard by the County Appeals Committee of the 3rd respondent on 20th May, 2024 but faulted the Committees composition on the premise that the 1st respondent, the Principal of his school was present, a fact he did not raise at the meeting, if he considered it necessary and in any case the 1st respondent was neither the chairperson nor the only member of the committee and in the absence of any objection, his presence was to update the committee on the status of the school in relation to the transfer.

The appeal was declined.

Strangely, the applicant did not report back to Menara Secondary School to clear or report to Ombeyi Secondary School but appealed the committee's decision.

Documents availed by the 1st and 2nd respondents show that the applicant did not clear with Menara Secondary School or report on duty on 13th May, 2024, when schools re-opened for the 2nd term and was vide letter dated 27th May, 2024 requested to report to school for clearance and release but did not and was vide letter dated 5th June, 2024 reported to the TSC County Director, which precipitated a notice to show cause dated 9th October, 2024. A response was required within 7 days and the applicant responded denying having deserted duty.

The letter was received on 15th October, 2024, and a letter of interdiction followed on 17th October, 2024.

In his response, the applicant introduced the issue of K.C.S.E malpractices at St. Gregory Koru Girl's Secondary School and St. Stephen Menara Secondary School to show that he was marked or under siege.

The applicant was subsequently invited for a disciplinary hearing held on 22nd May, 2025 and was found culpable and a warning letter dated 19th June, 2025 was issued.

The 3rd respondent posted the applicant to Nyakoko Mixed Secondary School effective 20th June, 2025 and was at liberty to appeal the decision within 14 days.

The applicant moved to court.
The foregoing factual analysis was necessary to contextualize the determination whether the threshold in **Giella V Cassman Brown & Co. Ltd (supra)** has been met.

It is trite law that whether or not to grant injunctive Orders involves the exercise of judicial discretion as captured in **Abel Salim & Others V Okong'o & others [1976] KLR 42 at 48**.

Needless to overemphasize, the principles that govern the grant of a temporary injunction as submitted by counsel were enunciated in **Giella V Cassman Brown Co. Ltd (supra)** as follows:

> *"First, an applicant must show a prima facie case with a high probability of success. Secondly, an*

*interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience (**E.A Industries Ltd V Trufoods (1972) EA 420**)."*

As regards *prima facie* case the sentiments of the Court of Appeal in **Mrao Ltd V First American Bank of Kenya & 2 others (supra)** are worth recapitulating as follows:

"A prima facie case in a civil application includes but was not confined to a "genuine and arguable case". It is a case which on the material presented to the court, a tribunal properly directing itself would conclude that there existed a right which had apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter"

In **Ngurumau Ltd V Jan Bonde Nielsen & 2 others (supra)** the Court of Appeal observed:

"...The party in whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by

an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation".

The pith and substance of the applicant's case is that he is objecting to the transfer to Nyakoko Mixed Secondary School because he had a sick child and already paid fees for his children at Menara Secondary School and faulted the disciplinary hearing.

Notably, the disciplinary hearing was precipitated by the applicant's failure or refusal to report for duty at Menara Secondary School or clear and report to Ombeyi Secondary School.

Significantly, Nyakoko Secondary School is about 41 kilometers from Menara Secondary School and the

Masogo Sub-County Hospital is 2Km from Nyakoko Mixed Secondary School and 37 kilometers from Muhoroni town.

Probability of success was explained on **Habib Bank AG Zurich V Eugene Marion Yakob** CA No. 43 of 1982 weighing the applicant's evidence against the respondent's and considering that the applicant is not rendering services, the court is persuaded that the applicant has demonstrated a *prima facie* case.

As to whether the applicant would suffer irreparable injury or harm, the court is guided by the sentiments of the Court of Appeal in **Nguruman Ltd V Jan Bonde Nielsen & 2 others (supra)** that:

> *"On the second factor, that the applicant must establish that he "might otherwise suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold required and the burden is on the applicant to demonstrate prima facie the nature and extent of the injury".*

Bearing in mind that the applicant is an employee of the 3rd respondent, a contract of service under which each party owes the other certain obligations and the 3rd

respondent has transferred the applicant to two schools without any success owing to the applicant's non-compliance and has refused, failed or neglected to clear with Menara Secondary School and his Supporting Affidavit sworn on 25th June, 2025 was silent on the injury or harm he stood to suffer, whether financial or otherwise, the court is persuaded that the injury or harm likely to arise or suffered is compensated by monies counted.

The applicant's case is hinged on restraining the 3rd respondent from compelling forcing, intimidating, threatening with consequences, dismissing the applicant or taking adverse measures against him. All these are quantifiable in monetary terms and are compensable by an award in damages in an employment context.

Thus, the second requirement is not met and because all the requirements are necessary, the applicant's case is unlikely to succeed.

As regards balance of convenience, the sentiments of the court in **Byran Chebii Kipkoech V Barnabas Tuitoek Bargoria & another [2019] eKLR** are instructive:

"The meaning of balance of convenience in favour of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiff, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendant, if an injunction is granted but the suit ultimately dismissed.

...In other words the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it".

In the instant case, the applicant has not demonstrated the comparative inconvenience to the parties to the suit if the injunction was either granted or withheld.

Having failed to demonstrate that he stood to suffer irreparable injury if the injunction sought was not granted, the court is not persuaded that the balance of convenience would be in his favour.

It is also instructive to note that the applicant did not approach this court with clean hands. He is not free from blame.

His blatant refusal to continue teaching at Menara Secondary School as he appealed the 3rd respondent's decision or reports for clearance, unnecessarily escalated the dispute leading to an interdiction and warning.

For the foregoing reasons, it is the finding of the court that the applicant has failed to demonstrate a sustainable case for the grant of a temporary injunction.

Consequently, the Notice of Motion dated 25th June, 2025 is devoid of merit and it is dismissed with no Orders as to costs.

The 3rd respondent is however directed to hear and determine the applicant's pending appeal, within 30 days, in readiness for hearing and determination of the main suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 22ND DAY OF OCTOBER 2025.

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE