



REPUBLIC OF KENYA

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI**

(ON Makau J on 24th March, 2026)

CAUSE NO. 232 OF 2017

KAARA

JOSEPH

GITHINJI.....CLAIMANT

-VERSUS-

TEACHERS

SERVICE

COMMISSION.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant instituted this suit by a Statement of Claim dated 8th February 2017, alleging unlawful deduction of his salary and unlawful withholding of Special School Allowance

by the Respondent. The Claimant prayed for the following reliefs: -

- a) A declaration that the recovery of the Special School Allowance paid to the Claimant by the Respondent is illegal and unlawful.***
 - b) A permanent injunction restraining the Respondent from recovering Special School Allowance paid to the Claimant.***
 - c) The Respondent to refund to the Claimant all the money deducted as Special School Allowances since December, 2016.***
 - d) The Respondent to pay the Claimant Special School Allowances withheld since the month of September, 2016 when the Respondent stopped paying.***
 - e) An order that the costs of this suit be awarded to the Claimant with interest thereon at court rates from the date of filing of the claim.***
 - f) Any other relief the court deems fit to grant.***
2. Contemporaneously with the filing of the Statement of Claim, the Claimant filed a Notice of Motion Application dated 8th February 2017 seeking interim orders to restrain the Respondent from further withholding his allowances and

deducting his salary to recover of the Special School Allowance paid to him.

3. The Respondent filed a Memorandum of Response dated 27th June 2017 admitting some of the averments in the Statement of Claim but contending that the payment of Special School Allowance to the Claimant was an inadvertent error on its part, and that the stoppage of the said allowance and the subsequent recovery of the overpayment were lawful, regular and in line with the contract of service existing between the parties.
4. The Respondent further averred that the TSC Code of Regulations for Teachers 2015 empowers the Commission to make recoveries from the Claimant's monthly salary to satisfy the government liability which arose from the erroneous payment.
5. When the interlocutory motion was presented to Abuodha J under certificate of urgency, on 9th February 2017, he granted interlocutory injunction restraining the respondent from further withholding allowances and deducting the

claimants salary to recover Special School Allowance pending hearing and determination of the suit. However, by a ruling delivered on 30th June 2017, Ndolo J dismissed the motion and vacated the interim orders.

Claimant's case

6. The Claimant testified as CW1 and adopted his written statement dated 25th July 2017 as his evidence in chief. He also produced the four (4) documents listed in his List of Documents dated 25th July 2017 as exhibits in support of his case. The documents were marked as Claimant's Exhibits 1 to 4 respectively.
7. In his witness statement, the Claimant stated that he is a teacher at Joy Town Special Secondary School, an institution for children with special needs, where he has been teaching since 30th May 2012. Upon deployment to the said special school, his salary was revised upwards by the Respondent to reflect an allowance known as Special School Allowance due to working with children with special needs. In the year 2013, his Special School Allowance was increased to Kshs.

10,000/- as a result of further negotiations between the Respondent and the Teachers Trade Union.

8. The Claimant further stated that in September 2016, the Special School Allowance he was receiving was stopped leading to his salary reduction of Kshs. 15,293.35. In December 2016, the Respondent commenced recovery of Special School Allowance he had been paid since 2012 being Kshs. 282,108.05 through deduction from his salary. He produced his December 2016 and January 2017 payslip, as proof that the said deduction left him with no disposable income for that month.
9. He contended that he has worked both diligently and professionally as a teacher at Joy Town Secondary School and the denial and consequent deduction of Special School Allowance from his salary is extremely inequitable, prejudiced, unjust and in breach of his constitutional right to fair administrative action.
10. He prayed for the reliefs set out in his Claim including release of money deducted from his salary for December

2016 and January 2017 by the employer before the recovery was stopped through a court order.

11. On cross examination by Mr. Ochieng, the Claimant testified that he was deployed to Joytown school on 30th May 2012 and reported in June 2012. He teaches Mathematics and Physics. He confirmed that he was trained at Kenya Science Training College but he has no training in special education. He reiterated that he started receiving special allowance immediately he reported to Joytown school.
12. On being shown the Code of Regulations for Teachers (CORT) 2005, he confirmed that Clause 39(b) provides for a special allowance being 10% of basic salary to teachers trained in special education. He further confirmed that under Circular No. 21 of 2006 at page 8 of the Respondent's bundle, the qualification to receive the allowance is training in special education. He contended that he only became aware of the said qualification in 2006 when he received a letter of stoppage and recovery.

13. He maintained that he was entitled to receive the allowance by dint of the Return to Work Formula and CBA dated 11th July 2013 which provided for payment of the allowance to all teachers posted to Special needs Schools. He confirmed that he has not yet trained in special education but he is still receiving the allowance after it was reinstated by the court. He denied being aware of the CORT 2015 which amended CORT 2005. He was also unaware of Regulation 94 at page 14 of the Respondent's documents and maintained that as at the time of the stoppage he was qualified to receive the allowance because he was posted to a special school where he has remained upto now.

14. The Respondent called its Acting Deputy Director HR Management Maureen Mollet Sango as RW1. She adopted her written statement dated 8th November 2017 as her evidence in chief. She also produced 11 documents in the list dated 8th November 2017 as exhibits.

15. In brief she stated that the Respondent is established under Article 237(1) of the Constitution of Kenya, 2010 with its

primary functions being to register trained teachers, recruit and employ trained teachers, assign teachers in its service to teach in various public schools, promote and transfer teachers, exercise disciplinary control over teachers and terminate the employment of teachers.

16. She further stated that the Claimant's contract was governed by among others the Teachers Service Commission Act (No. 20 of 2012), the Code of Regulations for Teachers (CORT), the Teachers Service Code of Conduct and Ethics, 2015 (COCE) and various circulars issued from time to time.

17. She confirmed that the Claimant is a teacher of Mathematics/Physics having duly trained at Kenya Science Teachers' College and graduated with a Diploma in Science Education on 8th November 2000. She further confirmed that on or about 29th May 2012, the Commission posted the Claimant to Joy Town Special School to teach Mathematics/Physics where he officially reported for duty on 5th June 2012. She contended that on or about 4th July 2012, the Commission erroneously commenced payment of Special

School Allowance to the Claimant, despite him not being qualified to be paid the same.

18. She stated that vide a letter dated 11th May 2016, the Principal Joytown Secondary School informed the Commission that the Claimant together with his colleague, Kimani J. F Kabugi TSC NO. 183931, were erroneously drawing Special School Allowance since they had no training in special education. She stated that the situation was causing some unease among others in the same school who had no training in Special Needs Education and were not receiving the Special Needs Allowance.

19. She stated that upon receipt of the above information, the Respondent conducted a payroll audit which confirmed that the Claimant was indeed receiving special allowances erroneously without meeting the requirements. The total allowance paid was Kshs. 297,401.40, which constituted an overpayment and therefore a government liability. The Commission duly notified the Claimant of the anomaly and

commenced recoveries with effect from December 2016 from both the Claimant and his colleague Kimani J. F Kabugi.

20. She stated that the Claimant's colleague, Kimani J. F Kabugi, filed **ELRC Cause No. 132 of 2017 - Kimani J. F Kabugi - v- Teachers Service Commission** which was heard, determined and a judgment delivered on 20th July 2022.

21. She acknowledged Return to Work formula signed between KUPPET and TSC following a strike at page 8 of the Claimant's documents but contended that it is no longer in force because there was subsequent review of the document and the CORT. She confirmed that there are teachers who are deployed to special schools and units and they do not receive special allowance because they are without special skills. She confirmed that the Claimant is still receiving the allowance due to the court order issued in 2017.

22. On cross examination, she confirmed that the Claimant is an employee of the Teachers Service Commission at Joytown Secondary School and was posted to the school which is a special needs school since June 2012. She confirmed that the

Respondent issued a circular in 2006 which communicated variation of payment of special allowance in schools and special subjects, and that the subjects in issue included mathematics and physics.

23. On being referred to page 8 of the Respondent's bundle (Circular dated 27th July 2006), she confirmed that bullet 2 of the last paragraph stated that all teachers without special education training were to be withdrawn and deployed and replaced. She was unable explain why the Claimant was deployed to the special school despite the express circular of 2006. She admitted that there was no evidence of demand for payment of special allowance before it commenced in 2012.

24. She admitted that on 11th July 2013, the respondent and union, signed a collective agreement on page 15 of the claimant's documents, which provided on page 16 paragraph 3 that teachers deployed to designated special schools shall be paid special allowance of Kshs. 10,000 effective 1st July 2013.

25. She confirmed that after the CORT 2015, the Claimant was never deployed to another school but continued serving in the special school and receiving the allowance for 3 years before it was stopped. She admitted that there is no evidence of the claimant's inability to teach students in the special school. She confirmed that she was the one responsible to deploy the Claimant to a normal school but contended that the delay was due to the court order issued on 9th February 2017.

26. In re-examination, she restated that the qualification for payment of special allowance is possession of special education training and deployment in a special needs school or unit. She stated that the subjects listed in circular No. 21 were for areas where there was scarcity of trained teachers, and as a motivation, teachers of those subjects were given two annual salary increments. She reiterated that the Return to Work agreements of 2013 have since been overtaken by the reviewed of CORT and subsequent CBAs. She stated that the Claimant received special allowance erroneously

because he did not have the skill in Special Needs Education, and it was stopped in September 2016.

Issues for determination and analysis

27. After the close of the hearing, both parties filed written submissions and the court scheduled the suit for judgment. Having considered the pleadings, evidence, and submissions, the following issues fell for determination: -

- a) Whether the Claimant was/is eligible for payment of Special School Allowance.
- b) Whether the Respondent had the legal and contractual duty to stop the Claimant's Special School Allowance and to recover overpayment.
- c) Whether the Claimant is entitled to the reliefs sought.

Eligibility for payment of Special School Allowance

28. The Claimant contended that he was eligible for payment of Special School Allowance by virtue of being deployed to teach Mathematics/Physics at Joy Town Special Secondary School, a school for students with special needs. There is no doubt that when the Claimant was posted to the said school

in May 2012, the applicable CORT was 2005 Edition. Regulation 39(b) of the said CORT provided as follows: -

"Special School Allowance is payable at 10% of the minimum basic salary to teachers with training in special education and deployed in special schools/units/integrated programmers."

29. By TSC Circular No. 21 dated 27th July 2006 Respondent's Secretary/Chief Executive notified several officers including Heads of Public Secondary Schools, thus:-

" VARIATION OF PAYMENT OF SPECIAL SCHOOLS AND SPECIAL SUBJECT ALLOWANCES

Reference is made to circular No. 13/97 of 24th November 1997 which introduced special schools allowance with effect from 1st July 1997 to teachers who acquired a certificate, diploma or degree in Special Education and are deployed to special schools or special units and circular No. 5/97 of 3rd February 1997 which introduced special subject increment to teachers who teach:-

- | | |
|-----------------------------|--------------------------|
| <i>- Mathematics</i> | <i>- German</i> |
| <i>- Physics</i> | <i>- French</i> |
| <i>- Chemist</i> | <i>- Arabic</i> |
| <i>- Biology</i> | <i>- Fine Art</i> |

- **Agriculture and Office Practice**
- **English**
- **Kiswahili Education**
- **Secretarial**
- **Accounting**
- **Special**

When introducing the special subject increments, the aim was to encourage teachers to specialize in these areas, which were understaffed.

- **The areas of high need have had enough teachers**
- **Change in school curriculum has phased out certain subjects such as Accounting while others have been made optional**
- **Many teachers in primary schools have obtained degrees in the high needs areas and they are still retained in primary schools where they teach all subjects.**

Special school Allowance

The Commission introduced the special school allowance as from 1st July 1997 when very few teachers had skills in special education. The situation hence since changed because:-

- **Many teachers have obtained special Education skills**

- ***The available special schools and integrated programmes cannot absorb the current number of teachers with Special Education background and so some of them have remained in institutions other than special schools/units.***

Due to this scenario the Commission has made the following changes as regards the payment of the allowance:-

- ***Only the teachers trained in Special Education and teaching in Special Schools or Special Units will be paid special school allowance which is 10% of the minimum basic salary.***
- ***All teachers who are teaching in Special schools or Special units but are not trained in Special Education should be withdrawn immediately and be deployed and replaced appropriately.***
- ***Special school allowance paid to teachers who have no special education skills will be stopped.***
- ***All the PDE's, DEO's MEO's and the Director of City Education Nairobi will establish and maintain data bases for all graduate teachers teaching in primary schools and their areas of specialization.***

The changes take effect from 1st July 2006.

SIGNED

GABRIEL K. LENGIOBONI

SECRETARY/CHIEF EXECUTIVE.”

30. Despite the above clear provision of CORT and the Circular the Respondent posted the Claimant to the said special school in May 2012 and started paying him special school allowance without him demanding for the same. During the hearing the claimant admitted that he did not possess any training in special education. It follows that, based on the CORT 2005 and the Circular, he was not qualified to payment of the special school allowance, from the beginning.
31. The Claimant, however, contended that in June 2013, his trade union issued a strike notice which culminated into a settlement Agreement signed on 11th July 2013 between the union and the Respondent. A letter dated 4th July 2013 by the Labour Cabinet Secretary had urged the Respondent and the union to engage in a bi-partisan negotiation to resolve the several issues including Special Needs Schools Allowances.

32. Clause 3 of the Agreement stated as follows:

“ 3) Special School Allowance.

The parties agree that teachers deployed to and teaching in designated special schools and units shall with effect from 1st July 2013 be paid a Special Schools Allowance of flat rate of Kenya Shillings Ten Thousand (Kshs. 10000) per month. As particularized in Appendix VI.”

33. I agree with the Claimant that, based on the above agreement he was entitled to payment of a flat special school allowance of Kshs. 10,000 per month from 1st July 2013. The said Clause 3 of the collective agreement became part of the claimant's terms and conditions of service and overrode the previous Circulars and Regulations on the special school allowance. Consequently, I find and hold that the claimant was eligible for payment of the allowance from 1st July 2013 a right mutually negotiated between his trade union and his employer.

34. The Respondent contended the above agreement was subsequently reviewed and set aside by negotiated CBAs and the CORT 2015, which came into effect on 1st July 2016

vide Legal Gazette notice No. 4956. Regulation 94 of the Code provides that:

"(1)The Commission shall from time to time determine -

(a) Pay special school allowance to a teacher who possesses skill in special education and who is assigned to a special school or special unit; and

(b) Determine the rate of payment of special school allowance under this regulation.

(2) A teacher entitled to special school allowance shall claim the payment of the allowance in writing through the head of the institution.

(3)The Commission shall stop payment of special school allowance to a teacher who ceases to perform duties in a special school."

35. The Claimant submitted that Regulation 94(1)(a) was silent on the fate of the teachers who hitherto, were receiving the agreed Special School Allowance of Kshs. 10,000; and the fate of the teachers in the working in special schools without the training in special education but who were receiving the agreed Special School Allowance of Kshs. 10,000. I agree

with the claimant on the interpretation of Regulation 94 above. Unlike the TSC Circular 21 of 2006, Regulation 94 never required that teachers without training in special education be withdrawn, deployed and replaced.

36. Circular N0.13/97 of 24th November 1997 was said to be the genesis of the Special school allowances. The said Circular was not produced as an exhibit but the mischief in the said circular was explained Circular No. 21 of 2006. The aim was to encourage teachers to specialize in area of special education and 13 other subjects because few teachers had skills in those areas as at 1st July 1997 when the allowance was implemented.

37. The Claimant admitted that he did not possess skills in special education as at the time the special school allowance was stopped and he did not pursue the same thereafter. Therefore, I find that he lost his eligibility to payment of special school allowance from 1st July 2016 when the CORT 2015 became effective as he did not possess the mandatory

skill in special education required under Regulation 94 of the CORT.

Stoppage of claimant's Special School Allowance and recovery overpayment.

38. The Respondent submitted that it had a duty to stop the Claimant's Special School Allowance and to recover what it had already paid him. The Respondent relied on Section 19(1) of the Employment Act, Cap 226 of the laws of Kenya which provides that:

***"(1) Notwithstanding section 17(1), an employer may deduct from the wages of his employee -
(e) any amount paid to the employee in error as wages in excess of the amount of wages due to him;"***

39. It also relied on Regulation 30(4) of the Teachers Service Commission Code of Regulations for Teachers 2005 which provided that: -

"(4) If a teacher were to receive any erroneous payment of any salary, gratuity or allowance, or the grant of any benefit in respect of which the

Commission or the teacher incurs a loss, the Commission or the teacher shall be liable to refund the amount of such payment. It is immaterial whether an erroneous payment was made under a mistake of fact or law."

40. The Respondent further relied on Regulation 82 (6) and (7) of the Teachers Service Commission Code of Regulations for Teachers 2015 which provide that: -

"(6) Where the Commission erroneously pays salary or allowance or grants an undeserved benefit to the teacher, the teacher shall reimburse the Commission to the extent of the erroneous payment."

"(7) Any over payment or erroneous payment made to a teacher constitutes government liability and the Commission shall recover the amount to the extent of the liability."

41. The Respondent submitted that pursuant to section 37 of the Teachers Service Commission Act No. 20 of 2012 of the Laws of Kenya, the funds of the Commission largely consist of monies allocated by parliament for purposes of the Commission. Pursuant to section 38 (2) of the Teachers

Service Commission Act, the annual estimates of the Commission make provision for all the estimated expenditure of the Commission for the financial year concerned. The funds of the Commission are subject to audit and must be reported upon in accordance with the provisions of Articles 226 and 229 of the Constitution of Kenya 2010 and section 81 of the Public Finance Management Act No. 18 of 2012.

42. The Respondent submitted that prudent, efficient, transparent and responsible use of public funds requires that a State agency accounts for the public funds so appropriated to it, and that where anomalies in payments and receipts are discovered, urgent corrective measures are taken to remedy the same.

43. It further submitted that despite the Claimant having been aware that he was unjustly drawing payment for special school allowance, at no point did he notify the Commission of the anomaly. It Respondent contended that all that it has done in this matter is to protect the use of public funds as

required under the Constitution, the Employment Act and Public Finance Management Act 2012.

44. The court has considered the evidence and the submissions by the two sides. I am clear in my mind that the claimant was only eligible for payment of special school allowance from 1st July 2013 to 30th June 2016 under the collective agreement dated 11th July 2013. He was not eligible for the said benefit from June 2012 to 30th June 2013, and from 1st July 2016 to date. It follows that under section 19 (1)(e) of the Employment Act, Regulation 30(4) of CORT 2005 and Regulation 82(6) & (7) of CORT 2015, the respondent had both legal and contractual right to stop further payment of the special school allowance to the Claimant and to recover any erroneous overpayment.

45. I am persuaded by the reasoning in the case of **Herman Musabi v Teachers Service Commission [TSC] & Attorney-General (Third Party) [2018] eKLR** where the Court authorized deductions of amounts paid to the employee in error, holding that the Employment Act

sanctions deduction from an Employee's salary, of any amount paid to the Employee in error, and that TSC, as a public agency, acted as a defender of public interest.

46. I gather support from the **Kimani J.F Kabugi v Teachers Service Commission [2022] KEELRC 1274 (KLR)** Onyango J dismissed the Claimant's suit and allowed the Respondent's counterclaim. The Claimant in that case was teaching with the Claimant herein in the same school in similar circumstances. The court held that:

“Having found that the claimant was not entitled to Special School Allowance, I find that the Respondent was in fact entitled to deduct such monies erroneously paid out to the claimant under that head...

The court finds merit in the counter claim and allows it in terms of the reliefs sought.”

Whether the Claimant is entitled to the reliefs sought

47. The Claimant sought a declaration that the recovery of the Special School Allowance paid to him is illegal and unlawful

but I have already made a finding of fact that the respondent was legally and contractually right in stopping and commencing recovery of the overpaid funds to the claimant from June 2012 to June 2013 and from July 2016 to date. Therefore the only recovery which I hereby declare to be unlawful is in respect of the special school allowance paid from 1st July 2013 to 30th June 2016 because it was sanctioned through mutual agreement dated 11th July 2013.

48. I further find that the Claimant is entitled to an order of permanent injunction restraining the Respondent from recovering the Special School Allowances paid to him from 1st July 2013 to 30th June 2016.

49. As for the allowance paid before and after that period, I will not say much because there is no counterclaim like in the case of **Kimani J.F Kabugi v Teachers Service Commission [2022] KEELRC 1274 (KLR)**, *supra*. Even if a counterclaim had been filed, the right to recover would be subjected to the law on limitation of actions and the two-thirds rule under Section 19 of the Employment Act, which

prohibit deduction of an employees salary in excess of two - thirds.

50. For reasons stated above the Claimant's prayer for refund of money deducted from his salary in December 2016 and January 2017 fails.

Conclusion

51. I have found that save for the period between July 2013 and June 2016, the claimant was not entitled to payment of special school allowance. I have found that the Respondent had the right to stop further payment of the said allowance to him and to recover any overpayment done outside the period between July 2013 and June 2016. Consequently, I enter judgment for him as follows: -

a) Declaration that the recovery of the Special School Allowance paid to him between July 2013 and June 2016 is unlawful.

b) Permanent injunction restraining the respondent from recovering the special school allowance paid to the Claimant from July 2013 to June 2016.

c) The rest of the prayers which have not been expressly granted are declined.

d) The Claimant is awarded costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN OPEN COURT AT NAIROBI THIS 24TH DAY OF MARCH, 2026.

ONESMUS MAKAU

JUDGE

Appearance:

Githinji for the Claimant

No appearance for the Respondent