



**Teachers Service Commission v Kenya National Union of Teachers (KNUT) & 2 others  
(Civil Appeal 257 of 2015) [2021] KECA 85 (KLR) (22 October 2021) (Judgment)**

Neutral citation: [2021] KECA 85 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 257 OF 2015  
MSA MAKHANDIA, F SICHALE & HM OKWENGU, JJA  
OCTOBER 22, 2021**

**BETWEEN**

**TEACHERS SERVICE COMMISSION ..... APPELLANT**

**AND**

**KENYA NATIONAL UNION OF TEACHERS (KNUT) ..... 1<sup>ST</sup> RESPONDENT**

**KENYA UNION OF POST PRIMARY EDUCATION TEACHERS .... 2<sup>ND</sup>  
RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the judgment and decree of the Employment and Labour Relations Court at Nairobi (Abuodha, J.) dated 25th September 2015 in Petition No. 72 of 2015)*

**JUDGMENT**

1. The background to this appeal is a dispute between the appellant and the 1<sup>st</sup> and 2<sup>nd</sup> respondents which led to the calling for a national strike by the two respondents on account of non-payment and or delayed payment of salary increment ordered by the Employment and Labour Relations Court (ELRC) with effect from the 1<sup>st</sup> August 2015 in Petition No. 3 of 2015.
2. The appellant filed a petition leading to this appeal contemporaneously with an application for a conservatory order. The conservatory order was to prohibit the 1<sup>st</sup> and 2<sup>nd</sup> respondents, their agents or servants from participating in any strike. It was the appellant's case that the court in its judgment in Petition No. 3 of 2015, dated 30<sup>th</sup> June 2015 had awarded the 1<sup>st</sup> and 2<sup>nd</sup> respondents' members a salary increment of 50% to 60% to be spread over four years. The payment of these sums was however to abide by the set mandatory constitutional and legislative procedures depended wholly on the funds allocated to it by the National Assembly through the National Treasury pursuant to Article 249(3) of the Constitution. These funds have to be budgeted for and the National treasury was informed



but no funds had been allocated. Despite this challenges and being in their knowledge the 1<sup>st</sup> and 2<sup>nd</sup> respondents called out their members on strike with effect from the 1<sup>st</sup> September 2015 without any formal notice having been served on it.

3. The petition was supported by an affidavit sworn by Nancy Macharia who largely reiterated and expounded the facts of the petition above. The following orders were then sought:
  - a. A declaration be and is hereby issued declaring the strike of the teachers called by the respondents to be in violation of the petitioners fundamental rights and freedoms contrary to Articles 30, 48 and 50.
  - b. A declaration be and is hereby issued declaring the strike of the teachers called by the respondents to be in violation of the petitioners fundamental rights and freedoms of the children contrary to Article 53.
  - c. A declaration be and is hereby issued declaring the strike of the teachers called by the respondents to be unjustified in an open and democratic society based on human dignity equality and freedom.
  - d. A declaration be and is hereby issued declaring the strike of the teachers called by the respondents commencing on 1<sup>st</sup> September 2015 or any day thereafter over the implementation of the judgment of the court dated 30<sup>th</sup> June 2015 be and is hereby declared illegal.
  - e. A declaration that the teachers strike called by the respondents commencing on 1<sup>st</sup> September 2015 or any day thereafter over the implementation of the judgment of the court dated 30<sup>th</sup> June 2015 be and is hereby declared an unprotected strike under the *Labour Relations Act* No. 14 of 2007.
  - f. A prohibitory injunction be and is hereby issued against the General secretaries of the respondents, their officials, servants, agents and members restraining all of them and singularly from inciting, calling on the respondent's members to participate in a strike over the implementation of the judgment of the court dated 30<sup>th</sup> June 2015.
  - g. An order directing the respondent's members to report to their respective work places and participate in their teaching duties with immediate effect
  - h. Any other or further orders as the honorable court may deem fit.
4. The petition was opposed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents who filed a notice of preliminary objection dated 4<sup>th</sup> and 7<sup>th</sup> September 2015 respectively stating in the main that; the issues raised in the petition were res judicata and an abuse of the court process; that the appellant was seeking to review the judgment in Petition No. 3 of 2015 and that the appellants were turning their contractual obligation disagreement into constitutional issues. In an affidavit sworn by the 1<sup>st</sup> respondent through its then Secretary General Wilson Sossion dated 14<sup>th</sup> September 2015, it was deposed that: the petition was disguised as raising constitutional issues yet it was purely a labour relations dispute; the appellant lacked the locus standi to agitate on behalf of the children over an alleged infringement of their right to education; that the strike was a result of having consultative meetings on the terms and conditions of service of the registered teachers but no collective bargaining agreement between the union and the appellant had been reached. That in fact the appellant had gone ahead and suspended any further meeting thereby infringing on their right under Article 41(5) of the Constitution which provides inter



alia that every trade union, employers' organization and employer has the right to engage in collective bargaining.

5. The 2<sup>nd</sup> respondent through its Secretary General Akelo M. T. Misori swore an affidavit and stated in summary that; he is a member of the Consultative Committee established under Section 13(5) of the [Teachers Service Commission Act](#) which has representation from the treasury, Ministry of Education, the appellant, Ministry of Devolution and the 1<sup>st</sup> and 2<sup>nd</sup> respondents and therefore the appellant could not feign ignorance of the progress and any logical consequence of the ongoing negotiations; that a meeting was held on the 9<sup>th</sup> September 2014 where the appellant came up with a document called 'working condition' where the appellant factored in the salary adjustments; a consultative meeting was scheduled for 3<sup>rd</sup> December 2014 to review the progress on the negotiations but the same was cancelled by the appellant; he was subsequently authorized to issue a notice of a strike on 31<sup>st</sup> December 2014 for the same to commence on the 7<sup>th</sup> January 2015; that the appellant could not file the petition on behalf of the children yet it had failed to protect them and that the appellant had filed the instant petition seeking to review the judgment in Petition No. 3 of 2015. Finally, he deposed that the petition be struck out.
6. The petition was canvassed by way of written submissions with limited oral highlighting. The trial court thereafter delivered its judgment on the 25<sup>th</sup> September 2015 and held as follows:
  - a. In the interest of the children in the public schools and the rights under article 53(1)(c) of the Constitution, the respondents are hereby ordered to suspend for 90 days, the strike commenced on 1<sup>st</sup> September 2015 with the consequence that the respondents' members do resume duties immediately.
  - b. The petitioner and the respondents within 30 days of this judgment with the help of the cabinet secretary for the time being in charge of labour, appoint a neutral and mutually agreeable conciliator or conciliation committee and engage in conciliation in good faith limited to exploring viable modalities of implementing the award in petition no. 3 of 2015 bearing in mind Government's fiscal policies and budgetary cycle.
  - c. The petitioner will not victimize or in any way take any adverse step against the respondents' members for participating in the strike called on 1<sup>st</sup> September 2015 by the respondents and this includes payment of full salaries and allowances without any deductions whatsoever on account of the period the respondents' members participated in the strike called by the respondents'.
  - d. Either party shall upon the expiry of the 90 days period in A and failure to conciliate the dispute as stated in B above, be at liberty to declare a trade dispute and exercise any of their rights as provided under article 41 of the Constitution as read together with section 76 of the *labour Relations Act*.
7. Aggrieved by the judgment and decree the appellant preferred an appeal to this court. The appellant in its memorandum of appeal raised the following grounds in summary, that the learned judge erred: in not appreciating that the strike called by the 1<sup>st</sup> and 2<sup>nd</sup> respondents' had already been found to be unprotected by a court of the concurrent jurisdiction; in directing it to pay the 1<sup>st</sup> and 2<sup>nd</sup> respondents' members full salaries for the period they participated in the strike regardless of its lack of jurisdiction pursuant to Section 79(6) of the Labour and Relations Act and Section 19(1)(c) of the [Employment Act](#); in considering irrelevant matters not adduced in evidence; in directing the parties to go for



conciliation as regards implementation of the award in Petition No. 3 of 2015 and by holding that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were not in any breach of the *Labour Relations Act*.

8. The 1<sup>st</sup> respondent thereafter moved this court on a motion on notice dated 14<sup>th</sup> November 2018 seeking to strike out the appeal with costs. The grounds in support of the motion were mainly that the teachers were given a salary increment award of 50%-60% in Petition No. 3 of 2015. That parties had negotiated and concluded all disputes with the intervention and assistance of the President of the country. Following that stakeholders meeting it was further agreed that the parties will withdraw all pending suits in court. The respondents duly withdrew the appeal they had lodged in the Supreme Court. However, the appellant failed to equally withdraw this appeal and that it is in the interest of justice that the motion be allowed on account of estoppel.
9. The motion was again supported by an affidavit sworn by Wilson Sossion the former Secretary General of the 1<sup>st</sup> respondent dated 14<sup>th</sup> November 2018 in which he largely reiterated and expounded on the above grounds.
10. In opposing the motion, the appellant's Chief Executive Officer Nancy Njeri Macharia filed its replying affidavit dated 25<sup>th</sup> January 2019. She deposed that; it had filed the petition before the ELRC seeking as already stated that the court declares the strike called by the 1<sup>st</sup> and 2<sup>nd</sup> respondents unprotected and illegal for failure to give it notice as required by Section 76 of the *Labour Relations Act*; its petition was nonetheless dismissed but was ordered not to victimize any member of the 1<sup>st</sup> and 2<sup>nd</sup> respondents for participating in the strike and it was required to pay full salaries and allowances which decision is the subject of this appeal. That the appeal raises fundamental issues which require the interpretation of Section 79(6) of the *Labour Relations Act* and Section 19(1)(c) of the *Employment Act*; that the stakeholders meeting called by the President on 15<sup>th</sup> November 2015 at state house reached an agreement that the appellant would not punish any teacher, there was no agreement that parties will withdraw all pending suits in courts; that she had been informed by her counsel that the instant motion ought to have been filed within 30 days of service of the notice or the record of appeal which had not been done thus it was incurably defective and bad in law and therefore should be struck out with costs.
11. Both the appeal and the notice of motion were canvassed by way of written submissions with limited oral highlights. Learned counsel Mr. Kiragu, Mr. Mbaluto, Mr. Ndubi and Mr. Mbita appeared for the appellant, 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents respectively.
12. Mr. Kiragu teaming up with Issa Mansur maintained that the appeal raised fundamental issues with regard to interpretation of Section 79(6), 80(1) (b) of the *Labour Relations Act* as well as Section 19(1) of the *Employment Act*. Failure by the trial court in not declaring the strike illegal was contrary to Section 76(c) of the *Labour Relations Act* which required the 1<sup>st</sup> and 2<sup>nd</sup> respondents to serve a notice on the appellant before initiating a strike. Further that calling of a strike was not a way of enforcement of a judgment. That, if the judgment and decree is not set aside, it will set bad precedent where employers shall be disadvantaged if awards were enforced by the calling of strikes. In addition, we were further urged to find that the issues raised in the appeal as regards the enforcement of the judgment and decree shall have adverse effects on the law regarding enforcement of court orders and decrees and the relationship between trade union and employers. We were referred to the case of *Corocraft Ltd v. Pan-American Airways [1968] 2 ALL ER 1059 at 1071, HL* on the duty of the courts in interpretation of the law. The ELRC according to counsel had adopted an interpretation, which put the principles of the rule of law and separation of powers under threat.
13. In addition, no evidence had been tendered that there had been agreement between the parties to withdraw the appeals in a stakeholders meeting called by the President at state house. The only agreement reached by parties was that no teacher would be victimized for participating in the strike.



That a seven (7) days notice had to be issued before calling a strike which was not complied with in this case. That the strike called was not a resumption of an earlier strike. With regard to the motion by the 1<sup>st</sup> respondent it was submitted that it ought to have been filed pursuant to Rule 84 of the Court of Appeal Rules and not under Section 3 and 3A of the *Civil Procedure Act*. It was further submitted that the motion to strike out the appeal was filed out of time. The record of appeal was served on 21<sup>st</sup> October 2015 while the motion was lodged on the 15<sup>th</sup> November 2018, a delay of 3 years contrary to Rule 84 of this court's rules. Further the 1<sup>st</sup> respondent had not sought to extend the time within which to file the motion. In any event the 1<sup>st</sup> respondent had failed to meet the conditions set out in Rule 84 of the Court of Appeal Rules for striking out a notice of appeal or indeed the appeal itself. In support of this argument we were referred to the decision in *Olive Mwibaki Mugenda & Another v. Okiya Omtata Okiiti & 4 Others [2016]eKLR*.

14. We were urged to find that Abuodha, J. had erred in reversing the ruling by Mbaru, J. a judge of concurrent jurisdiction who had earlier in the same petition ruled that the strike called by the 1<sup>st</sup> and 2<sup>nd</sup> respondent was unprotected. Neither did he have power to exercise an appellate jurisdiction over Mbaru, J's decision by finding that the strike was protected and therefore legal. Further the finding by the court was an attempt to amend Section 76(c) of the *Labour Relations Act* which requires the giving of a 7 day written notice which was couched in mandatory terms.
15. On whether the court erred in finding that there was a trade dispute within the meaning of Section 76 as read with Section 2 of the *Labour Relations Act*, we have been urged to find that the 1<sup>st</sup> and 2<sup>nd</sup> respondents' had called for a strike in-order to compel the appellant to satisfy the judgment of the court. The court therefore erred in finding that enforcement proceedings constitute a trade dispute as provided for under Section 13 of the *Employment and Labour Relations Court Act*. The 1<sup>st</sup> and 2<sup>nd</sup> respondents were required to follow the procedure provided for in Part 3 of the *Civil Procedure Act* and Order 22 of the Civil Procedure Rules on enforcement of orders and decrees.
16. The appellant further submitted that the court had no jurisdiction to order it to pay the teachers their full salaries contrary to Section 80(1)(b) of the *Labour Relations Act* and Section 19(1)(C) of the *Employment Act*. And that the law gives the employer discretion to deduct from the wages an employee who participates in an unprotected strike.
17. Mr. Mbaluto for 1<sup>st</sup> and 2<sup>nd</sup> respondents opposing the appeal, urged us to uphold the finding that the strike was not illegal. That the holding by Mbaru, J. that the strike was unprotected was not binding on Abuodha, J. The 1<sup>st</sup> and 2<sup>nd</sup> respondents did not have to issue a fresh notice to strike as the strike was a continuation of the earlier one. On the motion we were urged to allow it on the basis of estoppel by conduct. That following a meeting at state house brokered by the President an agreement was reached resolving the dispute and parties were prevailed upon to withdraw all the suits pending in court. The respondents as a consequence withdrew its appeal from the Supreme Court on that basis. However, the appellant refused to do the same. The rules of equity hold that once a party has made representation to another and the latter places reliance and acts on it, that person cannot be allowed to turn against that representation, in other words he is estopped from resiling from the agreement. In support of this argument we were referred to the case of *Kenindia Assurance Company Limited v. New Nyanza Wholesalers Ltd [2017] eKLR*.
18. Mr. Bitta in opposing the appeal submitted that the appeal was moot since the appellant had admitted to have entered into an agreement and this court does not have to determine issues which had already been agreed on by parties.
19. Before us for determination is the motion to strike out the appeal and the appeal itself. We shall first deal with the motion. The motion was filed pursuant to Section 3,3A and 3B of the *Appellate Jurisdiction*



Act and Rule 84 of this court's rules. The judgment against which the appellant is appealing was delivered on the 25<sup>th</sup> September 2015. The appellant was bound by Rule 84 of this court's rules which provides inter alia:

“A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time. Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be.” (emphasis of this court)

20. It is not in dispute that the motion was filed out of the stipulated time. If the 1<sup>st</sup> respondent intended to have this appeal struck out after being served with the notice of appeal or the appeal itself, it should have filed this motion within 30 days of such service. The proviso is couched in mandatory terms and therefore the same having been filed on 14<sup>th</sup> November 2018 was way out of time after service. There is no evidence that the 1<sup>st</sup> respondent sought and obtained leave of court to file the application out of time. It was submitted that we should disregard this rule while embracing Section 3 and 3A of the Appellate Jurisdiction Act whose overarching objective is to administer justice. Can this be so when the rules of this court are clear on when to make an application to strike out an appeal and the grounds upon which such an application ought to be made? We do not think so! Failure to comply with the strict requirements of the rule makes the motion defective. In Joyce Bochere Nyamweya v. Jemima Nyaboke & another [2016] eKLR this court held as follows:

“The above proviso is couched in mandatory terms and we have no discretion to second guess what was intended by the framers of the Rules when they gave a time frame...”

21. See also Total Kenya Ltd. v. Reuben Mulwa Kioko [2018] eKLR.
22. We do not think that the 1<sup>st</sup> respondent can rightly invoke overriding objective to defeat the above specific provisions of the law more so when the rule gives the grounds upon which such an application can be made, yet the grounds advanced in support of the motion are not among those contemplated under the rule. The 1<sup>st</sup> respondent was represented in the trial court by an advocate who had a duty to comply with the rules of this court once served with the notice of appeal and the record. The advocate had a duty to advise the 1<sup>st</sup> respondent on the filing of the motion to strike out the appeal. This court has a duty to facilitate the just, expeditious, proportionate and affordable resolution of disputes but can not aid an indolent party who has slept on it's right for three plus years.

Accordingly, the motion has not met the threshold required and is therefore for dismissal.

23. With regard to the appeal, this a first appeal we have the duty to reconsider the evidence, evaluate it and draw our own conclusion. In Gitobu Imanyara & 2 others v. Attorney General [2016] eKLR, this court observed that;

“[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”



24.. Further the court in *Peters v Sunday Post Ltd [1958] EA 424*, held that;

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.”

25. To our mind however, the determination of this appeal will turn on only one issue, whether Abuodha, J. reversed, reviewed and set aside the previous holding by Mbaru, J. in the same petition that the national strike called by the 1<sup>st</sup> and 2<sup>nd</sup> respondents was unprotected. Should we agree with the position taken by the appellant that they did then whatever has been undertaken subsequent to the judgment will fall by the wayside.

26. It is not in dispute that the parties herein have engaged in many battles in court. The appellant filed Petition No. 3 of 2015 and this Petition No. 72 of 2015 against the respondents. The appellant in Petition No. 72 of 2015 from which this appeal arises at the interim stage filed a motion dated 1<sup>st</sup> September 2015 seeking a conservatory order prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> respondents from calling or participating in any strike on account of non-payment of salary increments. Mbaru, J. heard the motion inter-parties and on 4<sup>th</sup> September 2015 held that the industrial action by the 1<sup>st</sup> and 2<sup>nd</sup> respondents’ members was unprotected. However, Abuodha, J. in his judgment in the same petition held that the strike was protected hence the appellant’s agitation that Abuodha, J. overturned the decision of Mbaru, J. on the issue of the validity of the strike called by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. It should be appreciated that both judges sit in ELRC and therefore have concurrent jurisdiction. Accordingly, none can be superintendent over the other’s decision. For instance none can sit on appeal, review or set aside decision of the other. We note that the holding by Mbaru, J. was neither reviewed nor set aside on appeal and therefore by Abuodha, J. declaring the strike protected was literally sitting on appeal, reviewing, or setting aside the decision of Mbaru, J. which he had no jurisdiction to do. In *Bellevue Development Company Ltd v. Francis Gikonyo & 7 Other [2018] eKLR*, this court held as follows:

“I have no difficulty upholding the learned Judges holding that as a judge of the High Court he had no jurisdiction to enquire into or review the propriety of the decisions of the Judges, who were of concurrent jurisdiction as himself. In our system of courts, which is hierarchical in nature, judges of concurrent jurisdiction do not possess supervisory jurisdiction over each other. No judge of the High Court can superintend over fellow judges of that court or of the superior courts of equal status. That much is plain common sense. It has, moreover, been expressly stated in Article 165(6) of the Constitution in these terms;

“The High Court has supervisory jurisdiction over the subordinate courts and over any other person, body or authority exercising a judicial or quasi judicial function, but not over a superior court.”

27. From the foregoing it is clear to us beyond peradventure that in overturning, or reviewing and or setting aside Mbaru, J.’s decision Abuodha, J. assumed a jurisdiction he did not have. The argument by the 1<sup>st</sup> and 2<sup>nd</sup> respondents that Abuodha, J. was not bound by the decision of Mbaru, J. in the light of the foregoing seems to us a long shot.

28. Accordingly, we allow the appeal and set aside the judgment and decree of the ELRC dated 25<sup>th</sup> September 2015. We make no order as to costs.



DATED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF OCTOBER, 2021.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

