



REPUBLIC OF KENYA



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Board of Management Nyeri Primary School v Maina & 33 others (Civil Appeal 81 of 2017) [2021] KECA 63 (KLR) (8 October 2021) (Judgment)

Neutral citation: [2021] KECA 63 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 81 OF 2017
MSA MAKHANDIA, KI LAIBUTA & J MOHAMMED, JJA
OCTOBER 8, 2021**

BETWEEN

BOARD OF MANAGEMENT NYERI PRIMARY SCHOOL APPELLANT

AND

DADSON MAINA & 33 OTHERS RESPONDENT

(Appeal from the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Nyeri (Byram Ongaya, J) dated 5th May, 2017 in E.L.R.C Cause No 168 of 2016)

JUDGMENT

Background

1. This appeal arises from the judgment of Hon. Justice B. Ongaya delivered on 5th May 2017 in the Employment and Labour Relations Court “ELRC” Case No. 168 of 2016 in which the Respondents, Dadson Maina and 33 others, had sued the Appellant, the Board of Management of Nyeri Primary School seeking –
 - (a) a declaration that the Appellant’s failure to implement two Circulars issued by the then Office of the Prime Minister, Ministry of State for Public Service (erroneously referred to in the pleadings as “Directorate of Personnel Management”) on 1st June 2011 and 25th June 2012 in their favour was unconscionable and in breach of their employment agreement;
 - (b) an order of specific performance to compel the Appellant to specifically perform their obligations under the two circulars and pay the Respondents the sums claimed to be due and payable to them;
 - (c) an order directing the Appellant to pay overtime dues and arrears;
 - (d) an award of special damages in the sum of KShs. 9,634,098 together with interest thereon from the respective dates of the circulars in issue;



- (e) general damages for breach of contract; and
 - (f) costs of the suit.
2. The Appellant, who did not file a defence, raised a preliminary objection to the Respondents' claim on the ground that the two circulars did not apply to them, as they were not civil servants. The suit proceeded to hearing on 28th February 2017 after which the ELRC delivered its judgment and awarded the Respondents a sum of KShs. 9,634,098, the arrears claimed to be due, and costs of the suit. Hence this appeal.

The Parties

3. The Appellant is the Board of Management of Nyeri Primary School, a Board established under Section 55 of the *Basic Education Regulations, 2013*, 2013 and comprises of members specified in Section 56(1) of the Act. According to paragraph 1 of the Fourth Schedule to the Act, the Board of Management is a "body corporate with perpetual succession and a common seal," and with power to –
- (a) sue and to be sued;
 - (b) take, purchase or otherwise acquire, hold, charge, or dispose of movable and immovable property;
 - (c) borrow, lend and grant money;
 - (d) enter into contracts; and
 - (e) do or perform all other acts or things for the proper performance of its functions under the Act which may lawfully be done or performed by a body corporate.
4. Section 59 of the Act sets out the functions of the Board. Paragraph (p) mandates the Board to "recruit, employ and remunerate such number of non-teaching staff as may be required by the institution in accordance with this Act." "Non-teaching staff" are defined in Regulation 2 of the *Basic Education Regulations, 2015* as "... all employees of the Board of [Management] who are not engaged in teaching or research." It is not in dispute that the Respondents were at all material times employees of the Appellant, and served as non-teaching staff in different capacities.

Dispute and Findings of the ELRC

5. A dispute having arisen as to whether the Circulars of 27th June 2011 (which came into effect on 1st July 2011) and 25th June 2012 (which took effect on 1st July 2012) applied to the Respondents, the Respondents sued the Appellants in Nyeri ELRC Case No. 168 of 2016 to recover moneys allegedly due and payable under the two circulars.
6. Upon hearing the parties, the Hon. Justice B. Ongaya dismissed the Appellant's preliminary objection. In his considered view, the Respondents were civil servants and that the circulars issued by the then Ministry of State for Public Service applied to them. He proceeded to give judgment in the Respondents' favour as prayed, save for the claim for general damages on account of the alleged breach of contract.

Appeal and Submissions of Counsel

7. The Board of Management of Nyeri Primary School was aggrieved by the whole decision of the ELRC and raised five grounds of appeal to challenge it. In our considered view, the appeal stands or falls on three issues of law, on which learned counsel submitted, and which may be summarized as follows. The first issue is whether the Respondents were civil servants or public officers within the meaning of the



Public Service Commission Act. Secondly, whether the Respondents were employees of the National Government. Finally, whether the Circulars of 27th June 2011 (which came into effect on 1st July 2011) and 25th June 2012 (which took effect on 1st July 2012) applied to the Respondents.

8. We have considered the findings of the ELRC, the submissions of counsel and the numerous statutory provisions cited before us. This being a first appeal, it is also our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. This approach was adopted by this Court in *Arthi Highway Developers Limited v West End Butchery Limited and 6 others* citing the case of *Selle v Associated Motor Boat Co.* [1968] EA p.123 where the Court held:

“An 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 allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

Were the Respondents Civil Servants or Public Officers within the Meaning of Article 260 of the *Constitution of Kenya* or the *Public Service Commission Act*?

9. We find and hold that they were not. For good reason, Section 55(1) of the *Basic Education Regulations, 2013*, 2013 establishes Boards of Management for every public primary school, secondary school, adult and continuing education centre, multipurpose development training institutes and middle level institutions of basic education. These Boards are comprised of the members specified in Section 56(1) of the Act.
10. According to paragraph 1 of the Fourth Schedule to the Act, a Board of Management established under Section 55(1) is a “body corporate with perpetual succession and a common seal,” with the powers that we have already set out in paragraph 3 of this judgment.
11. The Respondents were employed by the Appellant in exercise of its powers conferred pursuant to paragraph 1 of the Fourth Schedule to the Act read together with Regulation 17 of the *Basic Education Regulations, 2013* 2015 to facilitate the proper performance of its functions. Regulation 17 reads:
- “Every Board of Management shall, pursuant to Section 59(p) of the Act, recruit, employ, remunerate, promote, demote or terminate the services of any of its employees.”
12. We do not consider Sections 55 and 59 of the Act, read together with Regulation 17 and Paragraph 1 of the Fourth Schedule to the Act, as constituting Boards of Management established under the Act as alternative agencies for recruitment into public service. In our considered judgment, that is the preserve of the Public Service Commission as mandated under Article 234(2) (a) of the Constitution, which is given effect by Part VI of the *Public Service Commission Act, 2017*. In exercise of its functions, the Commission is guided by, and acts in accord with, the advice and policy direction of the State Department for Public Service.

Accordingly, the two circulars on which the Respondents’ claim in the ELRC were premised have no place in the contracts of service between such Boards of Management and their employees.

Were the Respondents employees of the National Government?



13. The fact that the Respondents were employed by a statutory body did not constitute them civil servants or public officers as held by the ELRC. They were not employees of the National Government. The Appellant was a body corporate with statutory power to, among other things, “... recruit, employ, remunerate, promote, demote or terminate the services of any of its employees” pursuant to Section 59(p) of the Act, provided always that such powers are exercised in accordance with the relevant statute law relating to terms of service of individuals in the employment of bodies corporate, including public corporations.

Do Circulars Issued by the State Department for Public Service Apply to Employees of Boards of Management of the Institutions Specified in Section 55 of the *Basic Education Regulations, 2013*, 2013, Including the Respondents?

14. No. we find that the Circulars of 27th June 2011 (which came into effect on 1st July 2011) and 25th June 2012 (which took effect on 1st July 2012) do not apply to employees of such Boards. They did not, and do not, apply to the Respondents. The Respondents are not civil servants or public officers, and do not hold public office, within the meaning of Article 260 of the Constitution.
15. To lend clarity to our finding, the *Black’s Law Dictionary* defines “civil service” as “... all functions under the government, except military functions. It is confined to functions in the greater administrative departments of State.” In view of the foregoing, we find that the Respondents were not employed in a State department and, consequently, the circulars in question have no relation to their employment in so far as they set out certain terms of employment in the public service.
16. Paragraph 16(7) of the Fourth Schedule to the *Basic Education Regulations, 2013*, read together with Regulation 18 of the Basic Education Regulations, helps to clarify the matter further. Paragraph 16(7) of the Fourth Schedule reads:
- “ A Board of Management of a public institution of basic education may, with the approval of the County Education Board upon consultation with the Cabinet Secretary pay all expenses connected with the institution, including the salaries of staff; but the personal emoluments of a person seconded to the service of the Board of Management shall, in the first instance, be paid by the seconding authority and may be recovered from the institution.”
17. Regulation 18 draws a distinction between professionals and non-professional staff of a Board, and provides:
- “ Persons belonging to a professional cadre and employed by the Board of Management shall be employed on such terms and conditions of service similar to those recommended for equivalent posts in the Civil Service and as per applicable scheme of service.
18. In our considered view, only professionals employed by Boards of Management enjoy terms similar to those under which their counterparts are employed in Civil Service. We find no evidence on record to suggest that the Respondents were professionals entitled to terms of service similar to those of their counterparts in the Civil Service. On the other hand, non-professionals in the employment of Boards of Management have their terms determined by the Board pursuant to Regulation 19, which provides that “the Board of Management may appoint suitable semi-professional and subordinate staff on such terms and conditions as shall be determined by the Board.” Indeed, it is the Appellant that was mandated to determine the terms of service of the Respondents, and not the Public Service Commission or the State Department for Public Service from whom the two circulars emanated.



19. In conclusion, we find that the decision of the ELRC was made in error and allow the appeal in its entirety. Consequently, the judgment and decree of the ELRC delivered on 5th May 2017 is hereby set aside. In view of the fact that the Appellant was represented in this Court and in the ELRC by a State Counsel, we make no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF OCTOBER, 2021

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

