



**Nyangongo & another v Cabinet Secretary, Ministry of Education & 8 others
(Petition 7 of 2022) [2024] KEELRC 836 (KLR) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 836 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION 7 OF 2022
CN BAARI, J
APRIL 18, 2024**

BETWEEN

EVANS MORARA NYANGONGO 1ST PETITIONER

CHARLES MORARO MOGUNDE 2ND PETITIONER

AND

THE CABINET SECRETARY, MINISTRY OF EDUCATION .. 1ST RESPONDENT

**THE PRINCIPAL SECRETARY, MINISTRY OF EDUCATION,
STATE DEPARTMENT OF VOCATIONAL & TECHNICAL
TRAINING 2ND RESPONDENT**

THE ATTORNEY GENERAL 3RD RESPONDENT

**DIRECTOR, DIRECTORATE OF TECHNICAL EDUCATION MINISTRY OF
EDUCATION 4TH RESPONDENT**

**ELICANAH M. MOSIORI, DIRECTOR, HUMAN RESOURCE MANAGEMENT
IN THE DIRECTORATE OF TECHNICAL EDUCATION, MINISTRY OF
EDUCATION 5TH RESPONDENT**

**CHAIRMAN, KISII NATIONAL POLYTECHNIC GOVERNIN'G
COUNCIL 6TH RESPONDENT**

PRINCIPAL, KISII NATIONAL POLYTECHNIC 7TH RESPONDENT

TEACHERS SERVICE COMMISSION 8TH RESPONDENT

PUBLIC SERVICE COMMISSION 9TH RESPONDENT



JUDGMENT

1. Before court is an amended petition initially dated 1st February, 2022 and amended on 12th February, 2023. Under the amended petition, the Petitioners seek the following reliefs:
 - i. A declaration that they were employees of TSC and not PSC
 - ii. A declaration that the transfer instituted by PSC against the Petitioners was therefore illegal and unconstitutional in light of Articles 41 and 47 of *the Constitution*.
 - iii. A declaration that subjecting the Petitioners to illegal transfers of duties and responsibilities without involving them was in contravention of their rights in Article 41, Section 47, and Section 10(5) of the *Employment Act*, 2007
 - iv. A declaration that subjecting the petitioners to transfer by an unknown body (PSC) and then terminating their salaries based on the same illegal transfer after denying them access to their place of employment amounts to unfair constructive dismissal.
 - v. Special damages equivalent to 12 months' salary for unfair constructive dismissal
 - vi. Exemplary and aggravated damages for breach of Constitutional rights, harassment, unfair labour practices, unfair administrative action and discrimination.
 - vii. Certificate of service
2. The petition is premised on the grounds THAT:
 - i. The conduct and actions of the Respondents were in breach of Articles 2 and 10 of *the Constitution*.
 - ii. Article 41 of *the constitution* provides for the right of employees to include, remuneration, reasonable working conditions, form or join a trade union.
 - iii. That the conduct of being cherry picked for transfer by the Respondents discriminated against them as compared to other TSC teachers with active contracts in various secondary schools and training institutions.
 - iv. The Respondents discriminated against them on appointments and promotions of which their fellow teachers were beneficiaries; without advertisement, recruitment, or competition, and that their colleagues who did not protest transfer received preferential promotion to principals/chief principals. That this was meant to dissuade them from proceeding with this matter and to persuade others not to protest the transfer.
 - v. That the conduct of varying the substance of their contract and privileges contravened Section 10(5) of the *Employment Act* 2010.
 - vi. That the act of transferring them without considering their membership in the trade union of their choice was in breach of Article 41 of *the Constitution*.
 - vii. That the act of stopping their salary without notice or involvement after subjecting them to unfair administrative action, and further denying them access to work places contravenes Article 41 of *the Constitution*.



- viii. That the general conduct of the Respondents contravened their own laws, procedures, and policies, and by that alone, contravened Article 47 of *the Constitution*.
- ix. That the act of transferring TSC employees by a strange body (PSC) not only interfered with the independence of TSC but also jeopardized their constitutional right to be subject to external orders other than the rule of law and *the Constitution*.
- x. That it was illegal to transfer the Petitioners' pay roll to the Public Service Commission without engaging them.

The Petitioners' Case

3. The Petitioners state that they were employees of the Teachers Service Commission which bound them to TSC, having been appointed as such on various dates between 1998 and 2009.
4. That the first Petitioner taught biology and agriculture at Eronge, St. Mathias, Kipchim Chim. Kenyoro, Kebabe, Nyamauro, Keng'uso Secondary Schools, among others, where he served in the ranks of assistant teacher, head of various departments, and deputy principal, and that transfers to all these institutions were made legally.
5. That the 2nd Petitioner taught at Naigera Secondary School as a teacher of Chemistry and Physics before being transferred by TSC to Mawe Technical Training Institute.
6. That the Petitioners subscribed to being members in good standing at the Kenya Union of Post-Primary Teachers Union (KUPPET).
7. That on July 27, 2018, through Circular Number 17/2018, the Teachers Service Commission gave a directive that lecturers, teachers, instructors, trainers, and institutional administrators who were on the TSC payroll as of June 30, 2018, have their services transferred to the Ministry of Education under the Public Service Commission with effect from 1st August, 2018.
8. They state that the said circular was successfully rendered unconstitutional through Petition Number 97 of 2018, and that an application for stay filed by the Respondent was not prosecuted, hence no stay of the decision was granted.
9. That in violation of the rule of law, and despite the circular being declared unconstitutional, the Respondents proceeded to illegally transfer the Petitioners' services from TSC to an independent body (PSC) without consulting them or providing any notice as required by Articles 41 and 47 of *the Constitution*.
10. That the transfers changed the Petitioners' job descriptions and specifications to mere trainers. It is their case that the change denied them all the benefits, entitlements and privileges of TSC employed teachers.
11. It is their case that the transfers were effected by a strange party with whom the Petitioners had no contract with, and that it was done arbitrarily and without the due process established under Section 43(2)(1)-(iii) of the *Public Service Commission Act*
12. That the Petitioners were later denied access to their workplaces and their attempt to report to the institutions where they were transferred to, to file a complaint was also thwarted by arrogant gate soldiers who could not let them in.
13. The Petitioners state that their monthly salary was Kshs 105,650 and kshs 87,120 respectively.



14. It is their case that the Respondents decision and actions imposed inconceivable mental torture, anguish and distress that undermined the inherent dignity.
15. The 1st – 7th Respondents opposed the petition vide a replying affidavit sworn on 6th November, 2023 by Joyce Mwanika Mwale, where she details the 1st -7th Respondents’ case as follows:
- i. That the Technical Training function, where the Petitioners belong, was transferred from the Teachers Service Commission to the Ministry of Education, State Department for Vocational and Technical Training following the enactment of the Technical and Vocational Education and Training (TVET) Act of No. 29 of 2013.
 - ii. She depones further that as a consequence of the enactment, all trainers serving in National Polytechnics, Technical Institutes and Vocational Training Institutes were transferred with effect from 1st July, 2018 vide Public Service Commission's (PSC) letter Ref. No. PSC/ HRM/ 41/XXXIV/(38) dated 7th June, 2018 and TSC/ ADM/ 192 A/ Vol. IX/47 dated 27th July 2018, and which circulars were in force during the relevant period of the facts informing this case.
 - iii. That by virtue of a Judgment rendered by Justice Abuodha in Nairobi ELRC Petition No. 17 of 2018, Rose Nva.mbura Chege& 4 Others vs. Teachers Service Commission & 3 Others, declaring the circulars unconstitutional and which decision was stayed, this court and Courts of similar jurisdiction are functus officio on this matter and cannot exercise and/or assume jurisdiction over the same.
 - iv. That as a consequence of the transfer of the Technical Training function from the Teachers Service Commission to the Ministry of Education, State Department for Vocational and Technical Training, and the obtaining Stay Order, the averments and depositions made by the Petitioners that the Public Service Commission, the Cabinet Secretary of Educations and the Principal Secretary - Ministry of Education State Department of Vocational and Technical Training are strangers to them and/or that they do not have a running and recognized employment contract between them are both legally and factually incorrect.
 - v. It is the 1st – 7th Respondents’ assertion that under the *Public Service Commission Act* and the cited circulars, the human resource management functions of the Cabinet Secretary, the Principal Secretary and the Director Human Resources are distinct but coordinated and shared. They aver that the transfers of the Petitioners in issue herein, were done within the law and with the full concurrence of the Authorized officer who is the Principal Secretary.
 - vi. It is their case that according to Article 10 and 232 of *the Constitution* as read together with Section 36 (1) & (2) PSC Regulations, 2020, the authorized officer has a responsibility to deploy public officers within the State Department to ensure efficiency and effectiveness in service delivery, promotion of national integration and cohesion, representation of Kenya's diverse communities, genders, ethnic communities and persons with disabilities.
 - vii. The aver further that the Petitioners were among 78 trainers transferred/deployed to address issues of over establishment, operationalization of new institutions, redistribution of excess skills to other institutions and medical needs of vocational and technical trainings and institutes, and that their transfers/ deployment were not isolated or discriminative.
 - viii. The Respondents confirm that the Petitioners did lodge administrative appeals against their transfer, but which were not heard by the relevant committee owing to the filing of the suit herein.



- ix. That in a meeting held on 27th July, 2023 between the Petitioners and the Human Resource Management Advisory Committee (MHRMAC) of the Respondents, a resolution was reached that the Petitioners be reinstated with effect from the dates they report to their respective stations of deployment; that they be paid transfer allowance; that their salaries for the period they were absent be forfeited and finally that they be issued warnings letters.
 - x. It is their position that since Petitioners received these letters informing them of the Respondents' decision to reinstate them, none of them has reported to their stations as deployed.
 - xi. That by dint of paragraph K.8 of the Human Resource Policies and Procedures Manual for the Public Service, 2016, and paragraph 4.4 of the Discipline Manual for the Public Service of May 2016, the Respondents were by law required to stop the Petitioners salaries and other remunerative allowances.
 - xii. It is the Respondents' position that to the extent that the Petitioners admit that they have not reported to their new stations to date and make allegations of being constructively dismissed, their right to receive salary and other remunerative allowances is, and remains by law, unavailable, as they continue absenting themselves from duty without reasonable and/or lawful cause.
 - xiii. It is further deposed that the 2nd Petitioner is an employee of the State Department for Vocational and Technical Training and is qualified to teach in any institution within the country.
 - xiv. That for the reasons foregone, the depositions, the Amended Petition and its Supporting Affidavit, are therefore baseless, misconceived, bad in law and devoid of any merit and the orders sought should not be granted.
16. The 2nd Respondent (Teachers Service Commission) similarly opposed the amended petition vide a replying affidavit sworn by a DR. Julius Olayo, on 7th December, 2023. He deposes thus:
- i. That on 27th July, 2018, the Teachers Service Commission issued a Circular No. 17/2018 transferring the technical training functions to the Ministry of Education, and that as a result, 3,780 Technical and Vocational Education Training (TVET) lecturers who were then in the employment of the TSC were transferred to the Ministry of Education, State Department for Vocational and Technical Training
 - ii. That being aggrieved by the transfer, the Kenya Union of Post Primary Education Teachers (KUPPET) filed a case in Employment and Labour Relations Court, Nairobi ELRC Cause No. 85 of 2018 praying for the circular to be declared null and void on the grounds inter alia, that the Commission has the sole mandate to employ and manage teachers as provided in *the Constitution*.
 - iii. That similarly, five (5) TVET lecturers filed a Constitutional Petition, Nairobi ELRC Petition No. 97 of 2018, also challenging the decision to transfer them to the Ministry of Education. That the two petitions were later consolidated as they raised similar issues.
 - iv. That Hon. Abuodha J pronounced himself on the issues, and declared the TSC circular transferring the TVET lectures to the Ministry of Education as null and void and unconstitutional.



- v. He states that a Notice of Appeal against the decision was filed, and that parties sought and obtained orders for stay of execution of the orders and decree flowing from the judgment issued by Hon. Abuodha J.
- vi. That again on 15th July, 2019, the parties in the consolidated suit entered a consent, agreeing that the stay orders issued staying the execution of the Judgment of Abuodha J, do remain in force.
- vii. It is the 2nd Respondent's assertion that after several appearance in court by the parties to report on the progress as contemplated in the said consent order, the court on 18th January 2021 marked the file closed, and subsequently nullified the consent. It avers that the stay orders issued have never been set aside and/or vacated thus remain in force to date.
- viii. It is the position of the 2nd Respondent that the prayers sought in the instant petition relate to a circular to which courts of concurrent jurisdiction have rendered judgment on, and further made pronouncements on the same. That consequently, adjudicating on prayers 1, 2 & 3 in the instant petition will amount to the court re-opening a matter already adjudicated upon.
- ix. That following the transfer of service and the subsequent orders for stay, the Petitioners herein became employees of the Public Service Commission and have since remained under the management of the Public Service Commission, the Ministry of Education, and the relevant state department and officers under the Ministry of Education.
- x. It is its further position that as at the time the consent was executed, 3,780 Technical and Vocational Education Training (TVET) lecturers, the Petitioners included, were already under the ministry of Education where they have remained to date.
- xi. It is the 2nd Respondent's case that the mandate of the Teachers Service Commission to manage teachers is restricted to basic learning institutions to wit, the public primary and secondary schools, and the teacher training institutes. It further states that the Universities, Colleges and Technical and Vocational Education Training Institutes, which equally form part of the education sector, are not under the mandate of the Commission.
- xii. The Respondent states that in so far as the Petitioners claims stems from the transfer of their services from the Teachers Service Commission to the Ministry of Education, and consequently managed by the Public Service Commission, the same amount to res judicata.
- xiii. That no iota of evidence has been adduced by the Petitioners to justify grant of special damages for constructive dismissal and/or exemplary and aggravated damages as against the TSC. The Petitioners have failed to specifically illustrate what personal injury they stand to suffer by commission or omission of the TSC.
- xiv. The 2nd Respondent prays that the amended petition be dismissed with costs to the Respondents for being vexatious and an out-right abuse of the court process.

17. Submissions were filed for all the parties.

The Petitioners' Submissions

18. It is submitted for the Petitioners that the Respondents had no mandate to direct, transfer, commission a disciplinary or deprive the Petitioners of their TSC membership, which was accompanied by membership in KUPPET, KNUT, Medical Priviledges, Mwalimu Sacco, Tsc Promotion Guidelines, as per their contract without their involvement and/or consent.



19. It is the Petitioners' submission that even assuming their services were validly transferred, they were still entitled to legal due process as there was a valid contract between them and the TSC and a circular does not have the effect of setting aside the provisions of the Employment Act, Fair Administrative Actions Act, and provisions of the Aonstitutions on fair administrative action and fair labour practice.

The Respondents' Submissions

20. The Respondents submit that this Court should strike out the Authority to swear and the Supporting Affidavit, together with the exhibits annexed thereto, for being a classic perjury punishable under Section 108 of the Penal Code and is an abuse of this Court's processes that should be sanctioned
21. It is submitted that it is factually incorrect to say that the Petitioners Appeals have not been heard and that the Respondents have denied them audience.
22. The Respondents submit that the Petitioners are employees of Ministry of Education, State Department of Vocational & Technical Training and therefore their employment is managed by both the Ministry and the PSC. It is their further submission that their contracts of employment have not been altered, but were transferred in the capacities they held at the Kisii National Polytechnic and therefore Section 10(5) of the Employment Act, 2007 does not come into play.
23. It is their submission that the consequential effects of stopping the Petitioners salaries particularly on paid-up memberships to various voluntary labour organizations, does not amount to a violation of their rights that can be ascribed to the Respondents.
24. It is submitted that to the extent that the Petitioners admitted not to have reported to their new stations to date, and make allegations of being constructively dismissed, their right to receive salary and other remunerative allowances is, and remains by law, unavailable.
25. They further submit that to the extent the instant petitioner refers to actions whose basis, relation and origin is Circular No. 17/2018 and/or can be attributed to the impugned Circular, this Court and Courts of similar jurisdiction are functus officio and they cannot exercise and/or assume jurisdiction over the same. Courts have severally declined to exercise jurisdiction when called upon to do so, this includes this Court.
26. The Respondents submit that granting prayers 1, 2, 3 and 4 of the Amended Petition, is tantamount to this Court reopening the determination in Nairobi ELRC Petition No. 17 of 2018, Rose Nyambura Chege & 4 Others vs. Teachers Service Commission & 3 Others to which this Court is functus officio. They submit that this Court should decline exercising this jurisdiction.
27. The Respondents submit that the Petitioners have not proved their case and should be dismissed with costs.

Analysis and Determination

28. Having considered the amended petition, the replies by the Respondents and the submissions by all the parties, the following issues present for determination:
- i. Whether the petition as amended is res judicata
 - ii. Whether the Petitioners rights were violated, hence entitled to the prayers sought



Whether the petition is res judicata

29. The Respondents contend that by dint of the decision of this court (differently constituted) in Nairobi ELRC Cause No. 85 of 2018 and Nairobi ELRC Petition No. 97 of 2018, declaring the Circular by the Teachers Service Commission null and void, and further premised on the subsequent staying of the order, by Justice Ongaya, the petition is res judicata.
30. It is the Respondents assertion that the validity and constitutionality of Circular No. 17/2018, where TSC gave a directive that all lecturers, teachers, instructors, trainers and institutional administrators who were on its payroll as of 30th June, 2018, have their services transferred to the Ministry of Education and therefore were under the Public Service Commission w.e.f August 1, 2018, has been litigated and courts of concurrent jurisdictions have rendered themselves on the issue, hence the petition herein is res judicata.
31. Section 7 of the *Civil Procedure Act*, states: -
- “No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.”
32. The Supreme Court in *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2021] eKLR, had this to say on res judicata: -
- “We restate the elements that must be proven before a court may arrive at the conclusion that a matter is res judicata. For res judicata to be invoked in a civil matter the following elements must be demonstrated:
- a) There is a former Judgment or order which was final;
 - b) The Judgment or order was on merit;
 - c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
 - d) There must be between the first and the second action identical parties, subject matter and cause of action”
33. Petition No. 97 of 2018 was instituted by TVET lecturers who were aggrieved by the decision to transfer their services to the Public Service Commission and against the Teachers Service Commission, Technical and Vocational Training Authority and the Public Service Commission. The second petition No. 85 of 2018, that was consolidated with 97 of 2018, was filed by KUPPET against TSC, PSC, Ministry of Education and the Attorney General.
34. I note further that the two former suits had the circular transferring TVET lecturers to Ministry of education, department of vocational training as the substantive issue, hence the reason the two petitions were consolidated.
35. The court in its judgment of 1st March, 2019, declared the subject circular No. 17/2018 dated 27th July, 2018, unconstitutional, null and void. This decision was later stayed by Justice Ongaya, and a



- subsequent consent order entered by the parties where they agreed to stay the judgment of Justice Abuodha, was set aside and the appeal by the Respondents dismissed for want of prosecution.
36. Orders of stay cannot in my opinion exist in a vacuum. If the file was closed and the subsequent consent by the parties nullified, then it is foolhardy to suggest that the stay orders are still in force. They are not.
37. It then follows that what subsists is the holding of the unconstitutionality of Circular No. 17/2018, the consent order for stay having been set aside, and which in my view, superseded the temporary stay earlier granted by Justice Ongaya.
38. Going back to the question of res judicata, the former suits concerned the issue of transfer of TVET lecturers pursuant to circular No. 17/2018. Further, the former suits and the instant petition to a large extent have commonality of parties, and which lead me to the conclusion that the issues raised in the former petitions were directly and substantially the same as those raised in the current petition.
39. Having however held that Justice Abuodha's orders of unconstitutionality of the subject circular are still in force, goes to say that the only part of the petition that is res judicata is that very determination of the legality of the said circular, and which I will not belabour in determining this petition.
- Whether the Petitioners rights were violated, hence entitled to the prayers sought
40. On whether the Petitioners rights were violated, it goes without saying that the circular under which the Petitioners were transferred having been declared unconstitutional, any action emanating therefrom cannot be said to be lawful, as nothing legal comes out of an illegality.
41. Further, I do agree with the submissions of the counsel for the Petitioners that with or without the subject circular, the Petitioners were still entitled to due process, and which they were not accorded.
42. On the specific prayers sought, the Petitioners sought that this court declares them employees of the Teachers Service Commission. This was the effect of the decision made by abuodha J in Nairobi ELRC Cause No. 85 of 2018 and Nairobi ELRC Petition No. 97 of 2018, and which I do not wish to restate. I let it rest.
43. Special damages as we know it, is a claim that must be specifically pleaded and strictly proven. Further, at no point in these proceedings did the Petitioners allege that they were dismissed from service. All they said, is that their salaries were stopped, and which in my considered view is not the same thing as a dismissal.
44. Remedies under Section 49 of the *Employment Act*, 2007, are only available upon prove of a termination/dismissal. The Petitioners have not provided any basis for the award of special damages and the prayer is declined.
45. In the end I make the following orders:
- i. A declaration that the transfer instituted by PSC against the Petitioners is illegal and unconstitutional.
 - ii. That the Petitioners salaries be reinstated forthwith, and they be allowed to report back to work with immediate effect.
 - iii. Costs be borne by the Respondents jointly and severally.
46. Judgment of the Court.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 18TH DAY OF APRIL, 2024.



C. N. BAARI

JUDGE

Appearance:

Mr. Otieno Obiero for the Petitioners

Mr. Moimbo present for the 1st to 7th Respondents

Mr. Mulaku present for the 8th Respondent

N/A for 9th Respondent

Erwin Ongor- C/A

