



Sum v Njaggah & 2 others; Attorney General (Interested Party) (Constitutional Petition E130 of 2023) [2024] KEELRC 1638 (KLR) (28 June 2024) (Ruling)

Neutral citation: [2024] KEELRC 1638 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CONSTITUTIONAL PETITION E130 OF 2023**

B ONGAYA, J

JUNE 28, 2024

BETWEEN

MRS. DORCAS CHELEGAT SUM: DEPUTY PRINCIPAL OF MOI GIRLS SCHOOL NAIROBI PETITIONER

AND

MRS. MARGARET NJAGGAH: THE PRINCIPAL OF MOI GIRLS SCHOOL NAIROBI 1ST RESPONDENT

THE BOARD OF MANAGEMENT OF MOI GIRLS SCHOOL NAIROBI 2ND RESPONDENT

TEACHERS' SERVICE COMMISSION 3RD RESPONDENT

AND

HON. ATTORNEY GENERAL INTERESTED PARTY

RULING

1. The petitioner filed the Notice of Motion dated 07.03.2024 through Masika & Koross Advocates and brought under Section 1 A, 3A, 63 (e) and 80 (a) of the *Civil Procedure Act*; Rule 33 and 34 of the *Employment and Labour Relations Court (procedure) Rules*, 2016, Article 159 (1), (2) of the *Constitution* of Kenya 2010 and all other enabling powers and provisions of the law seeking the following orders:

1. That the present application be certified urgent.
2. That the Judgement in the instant proceedings delivered on 23rd February 2024 be reviewed by way of granting the orders of certiorari quashing the twin decisions of the interdiction and warning of the applicant among others as prayed in the amended petition.



3. That costs of the application be provided.
2. The application was based upon the grounds set out in the application and the supporting affidavit of the applicant and annexures thereto filed together with the application and sworn on 07.03.2024. The applicant's case is as follows:
 - a. That the Honourable court delivered judgement on the substantive petition on 23.02.2024.
 - b. That it is not true as held at paragraph 6 of the judgement that the allegations levelled against her were true. She particularly cited that the allegation that she did not submit her report for onward transmission to the TSC were false since the said report was annexed by the 1st and 2nd respondents in their replying affidavit sworn on 11.07.2023.
 - c. That the Honourable Court completely omitted and ignored her robust pleadings and submissions in regards to the Commission's punishment or warning via a letter dated 17.08.2023.
 - d. That the Court wrongly held that the applicant did not raise before the disciplinary panel the issue of the board members' decision to turn themselves into complainants and still were the makers of the decision to terminate her. She states that she raised the issue via a letter dated 14.07.2023.
 - e. That the Honourable Court omitted and ignored the fundamental statutory issue of the illegal composition of the Adhoc Disciplinary Panel that sat on 25.07.2023.
 - f. That the Honourable Court wrongfully made a declaration that her transfer was not one of the disciplinary punishments in the TSC code of regulations or any relevant laws.
 - g. That the Honourable Court ignored and omitted to consider the fact that someone else was since hired to her position of Deputy Head Teacher.
 - h. That the Honourable Court ignored her evidence and witness testimonies as were produced and filed in Court.
3. The 1st, 2nd and interested party filed their replying affidavit through the Attorney General dated 06.05.2024 to oppose the application.
4. The 1st, 2nd and interested party urged that the application herein is an abuse of the Court process and that the petitioner or applicant has not established an error apparent on the face of the record to warrant the review of the judgement and the grounds raised amounts to appealing the judgement of Court which is only available at the Court of Appeal.
5. The 3rd respondent filed grounds of opposition dated 30.04.2024 raising the following:
 - a. That the application is res judicata and should be struck out since the said matter had been fully determined on 23.02.2024 hence the Court is functus officio.
 - b. That the application does not fall within any of the rubrics under section 16 of the *Employment and Labour Relations Act*, Rule 33 of the *ELRC (Procedure) Rules*, 2016, section 3A of the *Civil Procedure rules* hence is bereft of any statutory or legal foundations.
 - c. That the content, tenor and import of the application before Court amounts to a substantive appeal against the judgement of the Court disguised as an application for review.



- d. That this Honourable Court does not have jurisdiction to sit on appeal on its own decision and re-try a case it has already determined.
6. The parties filed final submissions. The Court has considered all the material on record. The Court returns as follows.
7. The Court has considered the parties' respective submissions and the material for and against the application. The applicant says she is dissatisfied with the judgment and is urging the court to change its analysis in the judgment. As urged for the respondents and interested party, the applicant has raised grounds to demonstrate her dissatisfaction and such do not amount to any of the known grounds for a review. The applicant has not established an error on record or new evidence or any other known ground to justify the review. The proper path was to invoke appeal process, as indeed, the Court is functus officio as it has fully pronounced its opinion on the matters it is being invited to reconsider and change its analytical position and findings.
8. As the parties are still in relationship, to foster harmony at workplace, each to bear own costs.

In conclusion the application is hereby dismissed and each party to bear own costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 28TH JUNE 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

