



**Kimiti v Teachers Service Commission & another (Petition  
E068 of 2023) [2024] KEELRC 2059 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2059 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E068 OF 2023**

**B ONGAYA, J**

**JULY 26, 2024**

**BETWEEN**

**ROBERT KYALO KIMITI ..... PETITIONER**

**AND**

**TEACHERS SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**KENNETH MARAGU ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicant Teachers Service Commission filed the Notice of Motion dated 25<sup>th</sup> April, 2024 through Isaac Ochieng' Advocate under Article 159 of *the Constitution*, Sections 34, 75, 78 of the *Civil Procedure Act*, Order 42 rule 6 & 8 and Order 51 rule 1 of the Civil Procedure Rules, Sections 21(1) and (3) of the *Government Proceedings Act* and all enabling provisions of law and prayed the following orders:
  1. That the application be certified urgent and the same be heard ex parte in the first instance.
  2. That the Honourable Court be pleased to order stay of execution of the judgement and decree by Ongaya J delivered in this matter on the 8<sup>th</sup> April, 2024 and all the consequential orders pending hearing and determination of the application.
  3. That the Honourable Court be pleased to order stay of execution of the judgement and decree by Ongaya J delivered on 8<sup>th</sup> April, 2024 and all consequential orders pending the hearing and determination of the intended appeal.
  4. That the costs of this application be provided for.
2. The application was based upon the supporting affidavit by Mollet Sango sworn on 25.04.2024 and upon the following grounds:



3. That he is the Acting Director in charge of Human Resources Management and Development (HR&D) Directorate at the Teachers Service Commission (TSC), the applicant herein.
4. That in the judgement delivered herein on 08.04.24 it was ordered as follows:
5. Declaration that the 1<sup>st</sup> respondent to promulgate by 01.05.2025 and in accordance with Statutory Declarations Act the Regulations prescribed under Section 47(1) (a) of the TSC Act, 2012 providing for the appointment, discipline and removal of secretariat staff of the Commission.
6. Declaration that the provisions of the 1<sup>st</sup> respondent HR manual for secretariat staff, 2018 are ultra vires section 47(1) (a) of the TSC Act, 2012 in so far as the manual's provisions that ought to be anchored upon the regulations contemplated for promulgation under the section and to that extent, the Manual 2018, is null and void.
7. The 1<sup>st</sup> respondent will pay 50% of the petitioner's costs of the petition and the respondents to bear own costs.
  1. That on the said date the Honourable Court issued 30 days stay execution of the judgement which stay was to lapse on 08.05.24 or thereabout.
  2. That the applicant is aggrieved by the entire judgement of the Honourable Court and has filed a notice of appeal before the Honourable Court and requested the requisite documents to enable it file its record of appeal. The said documents are exhibited.
  3. That the applicant is apprehensive that the petitioner will commence the process of execution to enforce the judgement and its consequential orders after the expiry of 30 days of execution.
  4. That in the event that the judgement is enforced in its present form, the applicant herein is likely to suffer irreparable loss and damage in that:
 

The impugned judgement herein will totally cripple the operations of the 1<sup>st</sup> respondent and make it dysfunctional since the learned judge has declared the HR manual null and void.
8. The judgement will expose the Commission to numerous adverse actions against it.
9. The applicant does not have the budgetary allocation to come up with the regulations as ordered by the Court within the short period.
10. The judgement does not accord to the budgetary making process as envisaged in the Finance Act and *Public Finance Management Act*.
11. The respondent may not be able to refund the amount of costs of the suit in the event the applicant's appeal is successful.
12. That by virtue of section 12 of the TSC Act and Article 260 of *the Constitution*, the applicant is exempted from depositing security costs under Order 42, rule 8 of the Civil Procedure Rules 2010 as it is capable of satisfying the decree should the appeal be unsuccessful.
13. That the respondent will not suffer prejudice if the orders sought are granted.
14. In response to the application herein, the respondent through Njeri Ngunjiri Advocates filed a notice of preliminary objection dated the 03.05.2024 on points of law on the following grounds:



1. That this Honourable Court lacks jurisdiction to issue any orders in this case since the Court is functus officio having rendered its decision on this very matter on 8<sup>th</sup> April 2024 in (Robert Kyalo Kimiti Vs. Teachers Service Commission & Kenneth Maragu). In the matter of Telkom Kenya Limited Vs John Ochanda and 996 others (2014) eKLR, the Court of Appeal held that “functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon”
  2. That the orders sought in the Notice of Motion application dated 25<sup>th</sup> April, 2025 are in form of an appeal and that this Honourable Court lacks jurisdiction to allow the application, as it is functus officio and ought to dismiss the application with costs.
  3. That the Notice of Motion application is frivolous, vexatious, incompetent and improperly before this court and therefore is an abuse of the court process.
15. Both parties filed their written submissions. The court has considered the parties’ respective cases and makes finding as follows:
- After delivery of the judgment on 08.04.2024, the Court consequentially ordered, inter alia, there be stay of action on judgment for 30 days from the date of delivery of the judgment. The 30-days lapsed on 08.05.2024 or thereabouts. The instant application dated 26.04.2024 was properly filed prior to lapsing of the 30 days. The 30-days were to facilitate the respondent to move to Court of Appeal or take such other appropriate action. The instant application was filed.
16. The stay of execution order requires the Court to temporarily hold the finding that the applicant’s human resource is ultra vires section 47(1) (a) of the TSC Act 2012. As submitted for the respondent, it essentially invites the Court to set aside, albeit temporarily, the finding in that respect. It appears to the Court that doing so would amount to sitting on appeal on its finding and the better option would be for the applicant to move the Court of Appeal in that regard.
  17. The applicant has urged that the order to be stayed as given is insensitive to the budgetary cycle and that the respondent lacks funds to promulgate the relevant regulations. The Court considers that the applicant has failed to demonstrate by evidence as alleged in its case. In any event, the respondent was required to promulgate the regulations immediately after the coming into effect of the Act in 2012 but for over ten years after the Act came into operation, the regulations are not in place at all. In those considerations, the Court returns that there is no established good reason based on financial or other constraints that would bar the respondent to comply within the timelines set in the final orders of the Judgment.
18. In conclusion, the application is hereby dismissed with costs for the respondent, the petitioner.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 26<sup>TH</sup> JULY 2024.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

