



**Wambui v Teachers Service Commission (Employment and Labour Relations
Petition E072 of 2024) [2024] KEELRC 2503 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2503 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E072 OF 2024
AN MWAURE, J
OCTOBER 11, 2024**

BETWEEN

PETER NJUGUNA WAMBUI PETITIONER

AND

TEACHERS SERVICE COMMISSION RESPONDENT

RULING

1. The Petitioner/Applicant filed a Notice of Motion dated 30th April 2024 seeking the following orders that: -
 1. spent
 2. pending the inter parties hearing and determination of this Application and/or Petition, this Honourable Court be pleased to order and direct the Respondent to forthwith, immediately and unconditionally allow the Petitioner herein to return back to work;
 3. pending the hearing and determination of this Application or Petition, a conservatory order do issue staying the decision of the Respondent to suspend and interdict/or dismiss the Applicant;
 4. an order do issue directing the Respondent to furnish the Petitioner and this Honourable Court with the following documents and information: -
 - a. certified defense statement by the Petitioner
 - b. all certified witness statement
 - c. certified judgment entered to dismiss the Petitioner
 - d. certified judgment entered to remove the Petitioner from the Register of teachers



- e. video clips showing the Petitioner hugging and kissing the said student, holding her tightly at the waist and touching her breast albeit when the lights were off pursuant to the letter dated 2/10/2023 by Mrs L. Gitahi Principal Muthurwa Girls Secondary School.
5. the cost of this application be provided for.
6. Any other order that this Honourable Court deems fit and just in the circumstances.

Petitioner/Applicant's Case

2. The Petitioner/ Applicant avers that Respondent issued him with a show cause letter dated 2/10/2023 which contained allegations challenged by the Petitioner on their possibility of being witnessed while lights were off. The allegations were later amended in the letter of interdiction on 20/12/2023.
3. The Petitioner/Applicant avers that the Respondent failed to accord him an opportunity to defend himself and its actions were in breach of *the constitution* amounting to unfair labour practices.
4. The Petitioner/Applicant avers that the Respondent's actions greatly injured him and has rendered him jobless and he has suffered mental anguish.
5. The Petitioner/Applicant avers that has never been paid even a single pay or consideration on half pay since interdiction violating his constitutional rights.
6. The Petitioner/Applicant avers that the application was filed without inordinate delay and he will suffer irreparable loss if he is denied the orders.

Respondent's Case

7. In opposition to the Application, the Respondent filed a replying affidavit dated 3rd June 2024.
8. The Respondent avers that in exercise of its mandate under Section 47(2) of the Teachers Service Commission (TSC) Act and section 5 of the Public Officers Ethics Act, it published a Code of Regulations for Teachers ('CORT') and the Code of Conduct and Ethics ('COCE').
9. The Respondent avers that Regulation 146 of CORT, investigations were conducted through the BOM Muthurwa Girls Secondary School where the Petitioner was invited for a disciplinary hearing. Several witnesses including the victim appeared and testified in the Applicant's presence and he was granted an opportunity to cross examine them. Subsequently, the BOM recommended the Applicant's interdiction to pave way for the disciplinary process.
10. The Respondent avers that the Applicant was subsequently invited to a disciplinary hearing and was allowed to present his case but did not bring any witnesses.
11. It's the Respondent's case that upon hearing of the case, the committee recommended for the Applicant's dismissal and removal from the Register of teachers as communicated in a letter dated 7/2/2024.
12. The Respondent avers that the Applicant was also informed of his right to apply for review within 90 days, however, he failed to do so and instead filed this petition.



Respondents' Submissions

13. It's the Respondent submission that the Applicant has not demonstrated that any irreparable loss he risks facing if the orders sought are not granted and/or, and has not demonstrated the existence of a prima facie case.
14. The Respondent submitted that it has a constitutional mandate to exercise disciplinary control over teachers in breach of CORT and COCE. Therefore, interfering with its decision without granting it an opportunity to be heard is unjust and would amount to usurping its mandate.
15. The Respondent submitted that it can avail documents in its possession upon payment of requisite fees as per CORT. However, it is a stranger to video clips requested by the Applicant and that it did not rely on any video clips in making its decision to dismiss the Applicant.
16. The Respondent submitted that it has clearly demonstrated the circumstances leading to the Applicant's dismissal and it will be unjust to allow the application before the full hearing of the case.

Analysis and Determination

17. The main issue for determination is whether the Applicant is entitled to the conservatory orders sought.
18. The principles guiding the grant of conservatory orders was aptly discussed in Petition E408 of 2020 Okiya Omtatah Okoiti v Judicial Service Commission; Philomena Mbete Mwilu & another (Interested Parties) [2021] eKLR as follows: -

“The locus classicus is the Supreme Court in Civil Application No. 5 of 2014 Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others (2014) eKLR where at paragraph 8 the Court stated as follows: -

- (86) Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant courses.

In Wilson Kaberia Nkunja vs. The Magistrate and Judges Vetting Board and Others Nairobi High Court Constitutional Petition No.154 of 2016 (2016) eKLR after going through several decisions, the Court rightly so, summarized three main principles for consideration on whether to grant conservatory orders as follows: -

- a. An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*.
- b. Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and
- c. The public interest must be considered before grant of a conservatory order.

There is also the need to ascertain whether the conservatory order sought will delay the early determination of the dispute. (See Nairobi High Court Constitutional Petition No. E243 of 2020 Kenya Tea Development Agency Holdings Limited & 55 Others vs. The Cabinet



Secretary Ministry of Agriculture, Livestock, Fisheries & Co-operatives & 2 Others and Kenya Small Tea Holders Growers Association (Kestega) (Interested Party) (unreported).”

19. The Petitioner/Applicant has failed to establish before this court the specific constitutional provisions that may be violated or threatened by the Respondent’s action. Neither has he proved to the court prejudice he may suffer if he is not granted the conservatory orders sought.
20. The court having considered the tenets therein for granting conservatory orders to wit demonstration of a prima facie case, the violation of constitutional rights of a Petitioner and violation of public interest these three are not proved in this case. The court will rather have the main petition heard and determined as granting these orders will be tantamount to determining the main petition in its entirety. In other words if the orders prayed for are granted it will be reinstating the Petitioner to his employment without a hearing. The court cannot be party to preventing an employer from carrying out disciplinary process of its employees.
21. The court therefore holds that the Petitioner has not established sufficient grounds to justify granting him the orders prayed in his application dated 30th April 2024. The same lacks merit and application is therefore dismissed accordingly.
22. The court orders each party to meet their respective costs of this application.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 11TH DAY OF OCTOBER, 2024.

ANNA NGIBUINI MWAURE

JUDGE

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

