



**Nyangongo v Teachers Service Commission & 4 others (Employment and Labour Relations Petition E021 of 2022) [2023] KEELRC 515 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 515 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS PETITION E021 OF 2022  
HS WASILWA, J  
FEBRUARY 23, 2023**

**BETWEEN**

**EVANS MORARA NYANGONGO ..... CLAIMANT**

**AND**

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

**PUBLIC SERVICE COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**MINISTRY OF EDUCATION ..... 3<sup>RD</sup> RESPONDENT**

**PRINCIPAL SECRETARY, STATE DEPARTMENT OF VOCATIONAL &  
TECHNICAL TRAINING ..... 4<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of the petitioner/ Applicant's undated Notice of motion filed on December 15, 2022, pursuant to Rule 21(a) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedom and enforcement of the Constitution) practice and procedure Rules*, 2012, Section 1A, 1B, 3A,3B& 63(e) of the *Civil Procedure Act*, Articles 3,10,21,22,25,27,30,35,41,47,48 and 159(2)(d), (e) of the *Constitution* and all other enabling provisions of law, seeking for the following Orders; -
  1. Spent.
  2. Spent.
  3. That pending the hearing of this application, this Honourable Court do issue conservative Order staying the Cabinet Secretary MOE Letter to all Principals in TVET Institutions dated November 22, 2022 secretly inviting applications from re-designations to Vocational and Technical Education officers.



4. That after hearing of this application, this Honourable Court do issue a conservatory order staying the transfer of the petitioner payroll management services from TSC to PSC vide circular No 17 of 2018.
  5. That after hearing of this application, this Honourable Court do issue an order to have this petition heard through written submissions, sworn affidavits and documentary evidence on priority basis due to the urgency and public interest of this matter to give way for the 3000 intended trainers recruitment meant to enhance delivery of TVET agenda.
  6. That the costs of this petition abide the outcome of this Petition.
2. The application is based on the following grounds; -
- a. That the Constitution and the law is being threatened by the Respondents in the ministry of Education, through the cabinet secretary by the letter dated November 22, 2022, addressed to all principals of TVET colleges to secretly
    - b. process applications for re-designation of trainers to vocational and Technical education officers contrary to Article 232 of the Constitution, that requires the declaration of all vacant positions through a widely circulated advertisement in the local dailies.
    - c. It is averred that neither the Ministry of Education nor Public Service Commission has powers to manage the teachers and trainers, but that the said job is a preserve of the Teachers Service Commission in line with Article 237 of the Constitution.
    - d. It is stated that the PSC 's scheme of service does not provide for the position of trainers to vocational and technical education officer, neither does it negotiate approve and publicize scheme of service for the trainers in the VTT Institutions to guide the re-designation.
    - e. That the move by the cabinet secretary in the Ministry of Education to re-designate is neither in accordance with the delegated powers of PSC circular of 2018 that covered the teacher to job group M only and not Job group N nor Article 237 of the Constitution.
    - f. It is stated that the mass transfer of service and payroll without consent or consultation violates prescribed procedure under section 166 of the Teacher Service Commission Act, 2012 and section 9 and 10 of the Employment Act. Further that such action is illegal, unconstitutional, unprocedural and contrary to the doctrine of natural justice.
    - g. That the delay to file this application was occasioned by fear of the state coercion and challenges in accessing evidence to enable the petitioner challenge this secretive maladministration.
  3. The Application is also supported by the affidavit of the petitioner deposed upon on December 14, 2022, which basically reiterated the grounds of the Application and in addition stated that the re-designation and transfer of their services and payroll from TSC to PSC lead to an explained award of job grade and designation for some trainer without any explanation and discrimination of some trainer like the petitioner who did not benefit from the said promotions.
  4. He stated that the promotions were done politically without undertaking or competitive process. he added that during the said transition, he was illegally removed from KUPPET union by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents without consultation denying him the benefits of negotiated by the Union between the 3<sup>rd</sup> and 4<sup>th</sup> Respondent commencing 2017 to 2021 and the coming one between 2021 and 2025.



5. It is the Applicant's case that during the transfer of service to the vocational training institute, his salary was stopped exposing him to torture since his medical cover collapsed. He added that he was unable to service his Mwalimu Sacco loan and meet family financial obligations.
6. The petitioner maintains that there is a conflict of mandate between the recruitment made by Teachers Service Commission and the one done by MOEST in the Public Service Commission. Further that there is danger of continued violation of the Constitution and the rule of law expressed by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents intention to recruit 3000 more trainers/ teachers, despite the fact they have no constitutional and legal mandate.
7. The applicant urged this Court to move with speed and stop any further actions by PSC and in effect grant the prayers sought in the application.
8. In response to the Application, the 1<sup>st</sup> Respondent filed a replying Affidavit, deposed upon on January 9, 2023, by Dr Julius O. Olayo, the Human Resource management and Development director at the Teacher Service Commission.
9. In the replying affidavit, the affiant avers that the core mandate of TSC is to register trained teachers, recruit trained teachers, assignment of teachers to other Public Institutions, promotions and transfer of teachers, exercise disciplinary control over teachers and terminate employment of teacher in the public service.
10. It is stated that the issue herein arose in 2018 when TSC issued a Circular No 17 of 2018 transferring the technical training function in the commission to the Ministry of Education, as a result 3,780 Technical and Vocational Education training (TVET) lecturers who were then in employment of TSC were transferred to the Ministry of Education, State Department for Vocational and Technical Training.
11. Aggrieved by the transfer KUPPET filed a case in employment Court in Nairobi serialized as ELRC Cause no 85 of 2018 praying for the circular to be declared null and void on the grounds inter alia that TSC has the sole mandate to employ and manage teachers as provided for under the Constitution. Additionally, five (5) TVET Lectures, file a constitutional petition at Nairobi being ELRC Petition 97 of 2018 challenging the decision to transfer them to the ministry of Education.
12. The two cases were later consolidated and a decision was arrived at by Justice Abuodha who quashed the circular transferring the teacher to the Ministry of Education. Soon after an appeal was preferred by the PSC together with TVET Authority. They appellants sought for stay Orders which were granted. On July 15, 2019 the parties agreed by consent to; allow stay Orders issue by Abuodha J remain in force; cabinet secretary ministry of education to sanction the amendment to TVET Act to provide for employment authority, the ministry of education to enter into a recognition agreement with KUPPET; the current employer of TVET lectures to recover and remit Union dues and agency fees to KUPPET; TVET authority to advice on harmonized scheme of service for the trainers, the five petitioners currently under the TSC to remain under TSC during the transition period and the parties to periodically update the court on the progress of the amendments to the TVET Act.
13. The parties then appeared before the court severally and updated the Court on the progress and on January 18, 2021, the trial court file was marked as closed.
14. The deponent avers that the issues raised in this petition relate to circular of 2018 which was subject of litigation in the suits stated above and judgement rendered on them as such to litigate over the same issues would be reopening a matter that has already been handle by a court of concurrent jurisdiction. Further that as per the Orders of the Court the petitioner and more than 3000 other trainers were



- transferred to the ministry of education and remain subject of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent and are no longer under the management of the 1<sup>st</sup> Respondent.
15. The deponent avers that it is not privy to the terms of service of the TVET lecturers released to the 2<sup>nd</sup> Respondent therefore cannot tell its working including its job grade, review and promotions thereafter.
  16. The affiant maintained that the petitioner is a member of KUPPET and the issue raised therein in relation to KUPPET membership was litigated upon and parties agreed on the modalities as such cannot be subject of fresh litigation. Therefore, that any issues arising from implementation of the consent orders should be an issue to be taken up by KUPPET and the Ministry of Education, without dragging the 1<sup>st</sup> Respondent into it.
  17. The affiant stated that the issue as raised were dealt with in earlier suit as such the application should be dismissed with costs for violating the doctrine of res-judicata.
  18. The application was conversed by written submission with the applicant filling on the January 17, 2023 and the Respondent on January 31, 2023.

### **Applicant's Submissions.**

19. The Applicant submitted on two issues; whether the petitioner's TSC employment contract is valid, binding and enforceable and whether the petitioner's application dated December 14, 2022 has a prima facie case to be granted the conservatory orders as outlined in [\*Katiba Institute v Judicial Service Commission and Attorney General\*](#) in Petition 128 of 2022.
20. It was submitted that the Petitioner is a TSC employee promoted as Head of Agriculture department and the brainchild of a donor project dubbed "Skills Initiative for Africa(SIFA)" at Kisii National polytechnic. He argued that the employment contract he entered into was between the TSC and himself, which contract was entered into without coercion or fraud thus valid, enforceable and legally binding in compliance to section 3 of the [\*Contract Act\*](#), thus this court cannot rewrite it for the parties except to enforce and protect the contract as was held in [\*Margret Njeri Muiruri v Bank of Baroda Kenya ltd\( 2014\) eKLR\*](#)
21. The Petitioner submitted that the Teachers Service Commission is mandated to perform the staffing function of registration recruitment, posting, deployment, transfer, promotion, discipline and maintenance of teaching standards as provided for in Article 237 of the [\*Constitution\*](#) which does not conflict with the prescribed mandate of Public Service Commission (PSC) in Article 234(3) and MOE that draws its mandate from article 53 and 55 of the [\*Constitution\*](#). He argued that TSC unilaterally transferred payroll management services to MOE, SDVTT in contravention of the strict procedure of Section 9 & 10 of the [\*Employment Act\*](#) 2007 that require written and enforceable contractual relationship between MOE, VTT and the petitioner. He added that these actions was in violation of procedures provided for under section 166 of the [\*TSC Act\*](#).
22. It was submitted that without an employment contract between the petitioner and the TVET authority, the authority cannot be held liable for any acts committed against the petitioner and the 3780 Trainers arbitrarily transferred to the Ministry of Education. To support this argument, he relied on Civil Appeal case no EO13 of 2021 between Mark Otanga Atiende V Denis Aduor Aduor. He argued further that the 1<sup>st</sup> respondent's conduct of arbitrary surrendering its constitutional mandate is contrary to their oath of office to respect, uphold and promote the [\*Constitution\*](#), rule of law and public interest evident by blatant violation of the Contracts Act, [\*TSC Act\*](#) 2012 and [\*Employment Act\*](#) 2007. Therefore, that the presumed contract with VTT or TVET Authority is invalid, un-enforceable, and null and void ab initio on the doctrine of privity to contract.



23. The Petitioner also submitted that the decision to transfer services and payroll from TSC to MOE, VTT infringed on the petitioner fundamental rights to be consulted or heard by an independent and impartial body as provided in Articles 47 and 50 of the Constitution. In this he relied on the decision by Uganda Supreme court in case of The Management committee of Makondo primary school and another v Uganda National Examination Board. HC Civil Misc Application no 18 of 2010 where the Court declared that the rights to natural justice is superior to law made by mankind and therefore any administrative decision that contravene the rule of natural justice is null and void ab initio and is of no effect.
24. The Petitioner submitted that the transfer of payroll management services occasioned unconscionable and fraudulent deployment, promotions that has discriminated against the Petitioner, because PSC suspended mandatory competitive process since 2018. Further that the Petitioner stands to miss out in the ongoing adverts for TSC promotions having been removed from TSC register. He argued that he has missed all MOE, VTT promotion that are corruptly awarded grades of L, M, N to as high as Grade R and T in less than four years without compliance to merit and competitive process of Article 232 of the Constitution. Also that the petitioner has stagnated in his job group ten years and his professional services exploited because he does not belong to any scheme of service or trade union.
25. He argued that PSC removed his name from KUPPET Union effectively denying him the rights to associate, join a union and enjoy CBA benefits violating his rights provided for under section 4 of The Labor Relations Act. Further, that the 2<sup>nd</sup> respondent did not place the petitioner into any negotiated, approved and publicized scheme of service in the MOE, VTT and is denied TSC performance appraisal tools imposing irreparable emotional persecution, slavery and servitude, inhuman treatment and degrading punishment in the hands of a stranger contrary to Articles 25, 27, 28, 30, 31 & 41 of the Constitution.
26. The Petitioner submitted that 3<sup>rd</sup> respondent's letter to principals secretly inviting applications for re-designation, is not only unlawful but also exceeds his mandate in Articles 53 and 55 of the Constitution and now seeks to usurps the TSC mandate and altogether rubbishes the mandatory requirements of an advert being public in widely circulating dailies and in the official websites. He added that the respondents' conduct through impugned Circular is arbitrary, oppressive, unconscionable and outrageous, which manifests abuse of office that brings dishonor, disrespect to more than 3780 teachers and erodes public confidence in their commitment to uphold, promote and defend public interest, constitutionalism and rule of law.
27. In conclusion, the Petitioner submitted that the actions by the Respondent in unilaterally changing the terms of engagement and transferring their services to the Ministry of Education without consultation was in violation of the law. He argued that Article 23(3) provides for issue of judicial review conservatory orders once its proved that the administrative decision had no mandate, was in excess of jurisdiction, was procedurally unfair and where inviolable rules of natural justice were not complied with as held in the case of Kenya Human Rights Commission and another v NGO Coordination Board and another (2018) eKLR.
28. On that basis he argued that, it is in the best public interest and justice to uphold, respect, and protect constitutionalism and rule of law to avoid irreparable, confusion, uncertainty and disputes between TSC and PSC, MOE, VTT that will not only affect standards and quality of teaching but also occasion irreparable societal break down and dysfunction.



## 1<sup>st</sup> Respondent's Submissions.

29. The Respondent submitted that the issue before court relate to a circular transferring the services of TVET teachers to the 2<sup>nd</sup> Respondent, which issues was litigated upon in Nairobi ELRC Cause number 85 of 2018 as consolidated with Nairobi ELRC Petition number 97 of 2018 which parties by consent stayed the ruling of the Court declaring the circular null and void and to have status quo maintained, which status quo was to have the TVET teachers at the management of the 2<sup>nd</sup> Respondent. He argued that since the issue herein is similar to the ones litigated upon in 2018, the application and the suit herein is res-judicata and thus offends section 7 of the Civil Procedure Act.
30. To emphasized on their argument, the 1<sup>st</sup> Respondent cited the case of Independent Electoral & Boundaries Commission v Maina Kiai & 5 others [2017] eKLR where the Court held that;
- “The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”
31. The Court went further and relied on the Indian Supreme Court case of Lal Chand v Radha Kishan, AIR 1977 SC 789 stated, and we agree;
- “The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue.” And stated that the practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties –because it is the court itself that is debarred by a jurisdictional injunct, from entertaining such suit.”
32. Accordingly, it was submitted that the application herein and by extension the suit is in violation of Section 7 of the Civil Procedure Act and urged this Court to dismiss it with costs for being incurable bad in law.
33. I have examined the averments and submissions of the parties herein. The respondents have submitted that the application is res judicata having been litigated upon in Nairobi ELRC Pet No 85/2018 as consolidated with Petition No 97/2018.
34. The applicants have not responded to this submission. That being the position and in view of the provision of Section 7 of the CPA, I find this application res judicata and by extension the entire petition.
35. I strike it out accordingly with no order of costs.

**RULING DELIVERED VIRTUALLY THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2023.**

**HON LADY JUSTICE HELLEN WASILWA**



**JUDGE**

**In the presence of:-**

**Mulaku for 1<sup>st</sup> Respondent – present**

**Petitioner in Person – present**

**Court Assistant – Fred**

