



**Karuru v Attorney General & 10 others (Employment and Labour Relations
Petition 21 of 2013) [2023] KEELRC 1242 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1242 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION 21 OF 2013**

B ONGAYA, J

MAY 25, 2023

**FORMERLY PETITION ELRC NO. E002 OF 2022 AT NYERI)
IN THE MATTER OF THE ALLEGED CONTRAVENTION
OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER
ARTICLES 25(A) AND (B), 30(1) AND (2) AND 41(1),
(2) (A) AND (B**

BETWEEN

FRANCIS NDIRITU KARURU PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

TEACHERS SERVICE COMMISSION 2ND RESPONDENT

SECRETARY, TEACHERS SERVICE COMMISSION 3RD RESPONDENT

CABINET SECRETARY FOR EDUCATION 4TH RESPONDENT

HIGHER EDUCATION LOANS BOARD 5TH RESPONDENT

**BOARD OF MANAGEMENT OF MUIRUNGI SECONDARY SCHOOL,
OTHAYA 6TH RESPONDENT**

**ITOBI FRANCIS N, PRINCIPAL OF MUIRUNGI SECONDARY
SCHOOL 7TH RESPONDENT**

**ABUNGU, THE IMMEDIATE FORMER SUB-COUNTY DIRECTOR,
TEACHERS SERVICE COMMISSION, NYERI SOUTH SUB-
COUNTY 8TH RESPONDENT**

**CURRENT SUB-COUNTY DIRECTOR, TEACHERS SERVICE COMMISSION,
NYERI SOUTH SUB-COUNTY 9TH RESPONDENT**



RULING

1. The petitioner is Francis Ndiritu Karuru. He is acting in person. He filed the petition on February 1, 2022. He states that he has been employed by the 2nd respondent effective May 23, 1988. His registration number is xxxx and he was posted to Muirungi Secondary School in Othaya with effect from February 3, 2020 to date as Deputy Principal. Alongside the petition he filed an application by the notice of motion dated January 22, 2022. The petitioner prayed for orders:
 - a. The Teachers Service Commission of Kenya of PO Private Bag 00100 Nairobi being his employer has withheld his monthly payment from April 2021 upto the date of filing the petition in utter disregard of the Code of Regulations for Teachers, 2015 published by the Teachers Service Commission.
 - b. That the Teachers Service Commission pays all the moneys due to him and withheld for each of the months from April 2021 included to the date of the award.
 - c. That all moneys due to him by virtue of his employment by the Teachers Service Commission before the stoppage of the payments and after the stoppage be factored into the payment.
 - d. That the same payment in No 2 and 3 above be paid within 7 days from the date of the award.
 - e. That the same money be taxed for the purpose of PAYE tax discretely, month after month.
 - f. That the Teachers Service Commission ceases and desists from withholding any benefits to the petitioner without following the due process as outlined in the Code of Regulations for Teachers, 2015 as published by the Teachers Service Commission.
 - g. Or such other orders as the Honourable Court shall deem just.
2. The grounds in urging for allowing of the application are as follows:
 - a. The Teachers Service Commission has stopped the petitioner's monthly salary effective April 2021 and continues to be withheld as at the time of filing the petition. The petitioner informed the School Principal about the stoppage of his remuneration and the Principal offered no intervention or protection.
 - b. On January 7, 2021 a subordinate colleague published a teachers' duty rota in total conflict with the practice, the upshot of which was insubordination and mutiny. The Principal offered no intervention about the published rota. The petitioner had also seen presence of a lady teacher at the staff room without the petitioner's prior knowledge. He also noticed a strange person at the School kitchen and learned that he was a new school watchman.
 - c. As Deputy Principal he is the administrative supervisor of teachers and non-teaching staff. He is in charge of teaching allocations and instructional timetables.
 - d. He sensed a lack of faith and confidence in his service delivery and on the part of the School Principal, the 7th respondent.



- e. Allegations levelled against him by the 2nd respondent were never disclosed prior to stoppage of his remuneration. Any disciplinary action taken by the 2nd respondent against him would be illegal. No disciplinary action has ever been taken against him. He is not aware of any investigations panel into his conduct as an employee – as prescribed in the Teachers Service Commission Code of Regulations for Teachers, 2015. Regulation 148(1) provides for payment of half salary in event of interdiction but his half salary cannot be withheld because he is not aware of any interdiction decision made against him.
 - f. The 2nd respondent has no legal reason to withhold his pay or any benefit.
3. The petitioner also filed a document titled 'Technical Objection' dated June 20, 2022 stating that it was an application and urging the Court to find and order as follows:
- a. The petitioner has first right to be heard per Order 18 rule 1 of the *Civil Procedure Rules, 2010*
 - b. The representation in court for all the respondents does not conform to order 9 rules 1 and 2 of the Civil Procedure Rules. The persons purporting to appear have not filed a memorandum of appearance per order 6 rule 1, 2 or 3 and per court orders given on February 4, 2022.
 - c. The advocates who have not filed their due their live or current practicing certificates are not competent to act for any of the respondents. The motion dated January 22, 2022 is therefore not defended. The prayers in the notice of motion should therefore be granted.
4. The 1st, 4th, 6th, and 7th respondents filed a notice of appointment of advocates on October 11, 2022 by learned counsel P Gisemba Litigation Counsel for Attorney General to act in that behalf.
5. The 2nd respondent filed on October 18, 2022 the replying affidavit of Dr Julius Olayo, Director Human Resources Management & Development for the 2nd respondent. It was stated as follows:
- a. In January 2021 the 2nd respondent received information that the applicant had deserted duty effective January 11, 2021 in breach of Regulation 140 of the Code of Regulations for Teachers (CORT) and per the exhibited appointment and casualty return dated January 27, 2021 signed by the 7th respondent. The 2nd respondent received it on April 13, 2021. In order to avert overpayment of the applicant and the ensuing government liability, the 2nd respondent immediately stopped the applicant's monthly salary.
 - b. The 2nd respondent's agent being the 6th respondent Board convened a meeting on July 20, 2021 per Regulation 146 of CORT to deliberate on the applicant's misconduct for appropriate action to be taken.
 - c. The Board returned the recommendation that the applicant be issued with an administrative warning, reinstated on the payroll and that he writes a committal letter. The Board noted that the applicant had been away from duty from January 11, 2021 to April 12, 2021 and since then he had reported back and executing his duties as Deputy Principal. He had explained his absence to be due to Government directive that during the then prevailing Covid 19 situation, employees above 58 years of age work from home and he was in that age bracket. However, he had failed to inform the relevant authorities about that reason for the absence. He wrote the letter of commitment to work as Deputy Principal dated July 20, 2021. the 2nd respondent through the School Principal issued the applicant with the administrative warning dated July 21, 2021.
 - d. The disciplinary proceedings having been concluded the 2nd respondent reinstated the applicant on the payroll on February 18, 2022 and in addition processed and paid his arrears.



- e. The petition and the application are therefore without merit and should be dismissed with costs.
6. For the Attorney General no replying affidavit was filed. The other respondents being 5th, 10th, and 11th respondents did not enter appearance or participate in the proceedings. Submissions were made by the petitioner and the 2nd respondent on the application and on the petition. The Court has considered all material on record in that regard and returns as follows.
 7. First, as submitted for the 2nd respondent, the petitioner questions the validity of learned counsel Sylvia Ngere Advocate to appear for the 2nd respondent but without availing the relevant evidence to show that Counsel is so disqualified to appear. As to notice to appear, counsel filed on October 18, 2022 the notice of change of advocates dated October 17, 2022 stating that she had been appointed in the place of Faith Kaluai to act for the 2nd, 3rd, 8th, and 9th respondents. The Court finds that Counsel was properly on record as well as the Attorney General acting for the respondents per the notice of appointment on record. The applicant has failed by evidence to defeat appearance of counsel as duly appointed to act for the stated respondents. The technical objection will fail besides its being a strange document to the Court's rules of procedure.
 8. Second, as for the reliefs sought in that application, as submitted for the 2nd respondent they are final reliefs and similar to the ones in the main petition. They fall short of being interlocutory in nature. By that reason alone the application should fail because it would dispose of the main petition if determined one way or the other.
 9. Third, as for the merits of the application, it appears that the applicant wrote the committal letter by which the Court finds he submitted to the findings of the School Board of Management after the disciplinary hearing before the Board exercising the 2nd respondent's delegated powers. In that case and view, the applicant waived his right to shift from the findings of the Board. The Court finds that he is bound accordingly. His salary appears to have been stopped due to his unexplained absence from duty. After the disciplinary hearing he explained himself and the Board's recommendations on administrative warning, reinstatement on the payroll and then comital letter were all implemented. It appears that all withheld salaries were released and there is nothing left of the dispute. The alleged contravention of rights and fundamental freedoms appears not established at all.
 10. Fourth, the petitioner appears to make prayers for withheld salaries without quantifying the same and being special or liquidated claims. The 2nd respondent has explained that all withheld monies have been released to the petitioner. The petitioner being silent on that point the Court returns that the payments subject of the petition and application have since been released and paid on a balance of probabilities.
 11. Fifth, the application and the petition make the same prayers and claims and which the Court has found not to have been established or shown to be justified. The Court considers that in the circumstances, nothing is left of the petition (unless otherwise established) as the matters in the petition were similar to the application and both are liable to determination with liberty of parties to apply in 7 days if anything residual is thought to be outstanding and failing such application, the petition to be rested as dismissed accordingly. It is in the interest of justice that the application and the petition stand determined. Looking at the parties' positions and all circumstances of the case each party to bear own costs of the proceedings.

In conclusion the application and the petition being similar in grounds and prayers both are hereby determined with orders:

1. The application and 'technical objection' are hereby dismissed.



2. Parties at liberty to apply within 7 days in event of any established residual dispute in view of the petition and failing, the petition to stand dismissed as well.
3. Each party to bear own costs of the proceedings.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 25TH MAY, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

