



REPUBLIC OF KENYA



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**Kenya Union of Pre-Primary Education Teachers v Secretary, Laikipia
County Public Service Board & another (Employment and Labour Relations
Cause 14 of 2020) [2023] KEELRC 2003 (KLR) (1 August 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2003 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 14 OF 2020
ON MAKAU, J
AUGUST 1, 2023

BETWEEN

KENYA UNION OF PRE-PRIMARY EDUCATION TEACHERS CLAIMANT

AND

**SECRETARY, LAIKIPIA COUNTY PUBLIC SERVICE BOARD 1ST
RESPONDENT**

**COUNTY SECRETARY, LAIKIPIA COUNTY GOVERNMENT 2ND
RESPONDENT**

RULING

1. The application before the Court is the claimant's Notice of Motion dated May 15, 2023 brought under section 12 of the *Employment Act* and sections 1A, and 3A of the *Civil Procedure Act*. The Applicant prays for orders that:
 - a. Lucy Wanjiku Waweru, be issued with appointment letter under the same terms and conditions of employment with effect from July 1, 2022 as the rest of the grievants covered by the judgement of this Honourable Court delivered on February 25, 2021.
 - b. The cost of this Application be paid by the Respondents.
2. The Application is supported by an affidavit sworn on May 15, 2023 by the said Lucy Wanjiku Waweru in which she deposed that she has been teaching as an ECDE teacher in various centers in Laikipia since 2012; that she was grievant number 241 in list of grievants in the suit; and that she had expectation of being granted similar benefits to those of the other grievants in the case.
3. She further deposed that she has been pushing the claimant union to ensure that she is included in the employment as ordered by this Court in the judgment delivered on February 25, 2021. She stated that



Mr Opiyo had informed her that he had written to the Respondents requesting that she be considered for employment but the same was unattended to hence the Application.

4. She contended that all the ECDE teachers who were engaged on stipend basis were employed following the said judgement and thus she believed that she was unfairly discriminated by being excluded from employment yet she was also covered by the said judgement. Therefore, she urged the Court to allow her application and order the Respondents to accept and process her documents with the view of issuing her with an appointment letter.
5. The Respondents, opposed the Application vide Grounds of Opposition and a Replying Affidavit sworn by Rachel Wambui Thumbi, the Director Legal Department of the County Government of Laikipia dated May 22, 2023. In brief, the respondents contend that: the Court lacks jurisdiction to entertain the application for reasons that:
 - a. By Court Order dated November 8, 2022, which adopted the conciliator's report and issued on January 7, 2023, this file was marked as closed.
 - b. The Court is functus officio on the issue of the employment of one Lucy Wanjiku Waweru as she was not among the 212 teachers to be employed by the Respondent as per the decision and order of the Honourable Court.
 - c. The orders 3,4,5 and 6 of the judgement entered on February 25, 2021 have already been complied with but Lucy Wanjiku was among the 216 teachers who, after the audit, did not meet the set requirements for qualification for employment as an ECDE teacher agreed on between the claimant and respondents' Department of Education before the conciliator.
 - d. The Application is an afterthought and an abuse of the Court process
 - e. The Claimant's application is misconceived, mischievous, in bad faith, is frivolous and vexatious and should therefore be dismissed in its entirety with costs.
 - f. The only avenues available for the applicant is appeal, review or execution of the court orders.
 - g. The claimant through Mr Opiyo participated in all the conciliation proceedings and signed the agreements which were adopted in court in his presence.
6. The Application was argued orally in Court where the parties just reiterated their respective averments above. However, the Respondents relied on cases of *Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR*, *Telkom Kenya limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya limited) [2014] eKLR* and *Leisure Lodges Limited vs Japheth S Asige & Another 2018 eKLR* to fortify their case that the Court is functus officio.

Issues for determination and analysis

7. Having considered the application, affidavits and the submissions by both sides, the following issues comment themselves for determination:
 - a. Whether this Court is functus officio and without jurisdiction over the application.
 - b. Whether the Application is merited.
8. The Respondents contended that this Court lacks the jurisdiction to entertain the application because the Court is now functus officio in view of its judgement delivered on February 25, 2021 and the



subsequent orders in this matter. The Black's Law Dictionary 9th edition defines *Functus Officio* as follows:

' [having performed his or her office] (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.'

9. The issue before the Court as framed by the Applicant regards the execution of the order of the Court against the Respondents, wherein the Applicant claims that the Respondent has failed to adhere to the order in so far as the employment of Lucy Wanjiku Waweru is concerned. The said Lucy was among the 428 grievants represented by the Applicant in the suit against the Respondents. She was number 241 in the list.
10. On the other hand, the Respondents maintained that Lucy Wanjiku Waweru was not among the 212 teachers who met the qualifications for employment as agreed between the claimant and the Department of Education during the conciliation. They produced a list of the 212 teachers, the Conciliator's reports of July 13, 2021 and November 18, 2021 to demonstrate that the judgment was fully complied with.
11. I have read the court record and observed that there is indeed a judgment rendered by Marete J on February 25, 2021, in which he made the following orders among others:
 3. That the respondents do and are hereby ordered to regularize and convert terms and conditions of employment of all the 428 grievants whose names appear in the schedule annexed herewith to permanent and pensionable terms applicable to the minimum terms and conditions under the *Employment Act*, 2007 and or the ERCDE Teachers Schemes of Service, the County Human Resource Manual and the Salaries and remuneration Commission Guidelines.
 4. That an audit be had by the parties to verify the position of the difference between 428 and newly brought out 711 alleged grievants with a view to incorporating them to employment and therefore the benefits of these orders of court.
 5. That the commissioner of Labour be and is hereby ordered to manage and supervise, with involvement of the parties, the execution of these orders of the court, to wit, amounts and means of pay, conversion of the terms from casual to permanent employment of the 428 grievants in consultation with the Salaries and Remunerations Commission and the Teachers Service Commission and also ensure that the court orders in Petition 127 of 2014 is complied with in this process.
 6. That the Commissioner of Labour be and is hereby further ordered to be architectural and articulate in the implementation of this delicate exercise of execution of these orders of the court and report back in 120 days.'
12. Many court battles, in the nature of applications and preliminary objections, were fought after the said judgment with the effect of delaying the implementation of the judgment by the Commissioner



of Labour. Finally, a Conciliator was appointed to help in implementation of the judgment, and he invited the parties to a meeting on July 13, 2021 where the parties agreed as follows:

' - Develop standards for ECDE Teachers within 7 days from today. To carry out an audit on the 428 grievants within 21 days. Parties to report back to the Labour Office after 30 days from today i.e on August 17, 2021 at 2.15 PM. Parties have requested the Court to give them 90 days to report back.'

13. Subsequently, the parties signed a settlement agreement before the Conciliator at the Labour Office. The agreement is contained in the Conciliator's Report dated November 18, 2021, which indicated that:

' The parties met on November 18, 2021 at 2.15 PM and agreed upon the following:

1. That there are 212 teachers to be employed.
2. 24 teachers are exiting through age retirement and that they too will be paid their arrears.
3. Those teachers that retired after 2016 having been qualified and were in the list of 428 in the Court judgment also be considered for the payment of arrears.
4. The office of the County Secretary together with the Public Service Board shall tabulate salary and compute the arrears owed as per Job Groups and give a payment plan.
5. The payment of arrears will be subjected to all the statutory deductions.
6. The parties to agree on the mode of payment.'

14. The claimant pressed for the adoption of the above report but the respondents resisted citing some unclear items. After hearing the parties, the court decided in favour of the claimant by adopting the conciliator's Report of November 18, 2021 vide a ruling delivered on March 16, 2022.

15. The Conciliator filed yet another report dated July 14, 2022 stating that the parties met on the same date and agreed as follows:

1. 'That the county public service board has employed 453 employees which include the 212 employees who met the requirements for employment as ECDE teachers as per scheme of service. This was done after the suitability test that was done. However the issuance of the appointment letters is pending signatures by the county secretary. Due to unavailability of appointment letters, the terms and conditions of employment are not known.
2. The appointment letters shall carry the salaries and allowances as approved by the salaries and remuneration commission together with the scheme of service, which employers committed to furnish to the union.
3. The issue of retirees, arrears and mode of payment are pending deliberations by the parties.'

16. On November 8, 2022, the matter was mentioned before me and I directed respondents to comply with the judgment by issuing appointment letters to the remaining four employees and in default execution to proceed under the watch of the Deputy Registrar since I was of the opinion that the court had



completed its work by rendering the judgment. However, the claimant kept coming back until the letters for all the 212 ECDE teaches were issued to them.

17. Surprisingly, the claimant brought the instant application seeking appointment letter for Lucy Wanjiku Waweru on the day Mr Opiyo confirmed that the last of the 212 grievants went to collect her appointment letter. Lucy Wanjiku Waweru was not in the list of 212 teachers who had qualified for appointment based on the criteria agreed during the conciliation. Her claim at this time is an afterthought and a tactic by the claimant to keep engaging the court in endless proceedings.
18. The Supreme Court in the case of Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR held that a Court can only exercise its decision making power only once in the same matter. It held as follows:

' The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.'
19. I therefore agree with the Respondents that the Application is not only a total abuse and waste of judicial time but also completely scandalous and with no legal basis. Litigation must come to an end and its conclusion must have a finality. Accordingly, a matter cannot be reopened just because a party is of the view that the decision was not quite favourable to it.
20. I am alert to the fact that the trial judge appreciated the delicate nature of the dispute herein and directed the Commissioner of Labour to be very "architectural" in implementing the judgment by involving and consulting with the parties. The parties were involved in the consultations all through and that is how the agreements and the conciliators reports were arrived at, and later brought to the court for adoption as orders of the court. The said orders have not been challenged in any manner and they bind the parties. They have in fact been fully executed and the matter settled by issuing all the 212 qualified grievants with appointment letters.
21. It follows that this court is now functus officio and without jurisdiction to entertain any new matters which ought to have been raised before the agreements were signed by the parties during the conciliation and subsequently adopted as final orders of the court and then executed. Consequently, I find no merits in the Chamber Summons dated May 15, 2023 and I dismiss it with costs.
22. As a parting shot, I wish observe that the ERLC Procedure Rules do not provide for moving of the court by Chamber Summons. The second observation is that the suit herein was not brought against the Laikipia County Government and the County Public Service Board but their official. Finally, there were two purported amendments to the Statement of Claim, done by filing fresh pleadings. Parties are cautioned against invoking the jurisdiction of the court through alien procedures which can easily render proceedings a nullity.

DATED, SIGNED AND DELIVERED AT NYERI THIS 1ST DAY OF AUGUST, 2023.

ONESMUS N MAKAU

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 April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

