



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NUMBER EO68 OF 2021

BETWEEN

GEORGE SAMSON MARANGO.....PETITIONER

VERSUS

1. TEACHERS SERVICE COMMISSION

2. THE CABINET SECRETARY, MINISTRY OF EDUCATION SCIENCE & TECHNOLOGY

3. PUBLIC SERVICE COMMISSION

4. JOHN OGAMBA MATIANG'I.....RESPONDENTS

RULING

1. In his Application dated 3rd May 2021, the Petitioner seeks the following main orders: -

§ Pending hearing and determination of the Application, the Honourable Court do issue interim orders, restraining the 3rd Respondent, either by themselves [sic], their servants, agents or other person acting on its behalf, from transferring the services of the 4th Respondent from the Teachers Service Commission to the Public Service, and further restrained from appointing the said Respondent [4th], to the position of Deputy Director of Education Job Group ‘R’/ CSG. 6 in the Ministry of Education.

§ Pending hearing and determination of this Application, this Honourable Court do issue orders, restraining the 4th Respondent from assuming and/ or taking over the office as to perform the duties of the Deputy Director of Education, Job Group ‘R’ / CSG. 6 at the Ministry of Education.

§ The 2nd Respondent is restrained from allowing the 4th Respondent to assume and/or take over office, so as to perform the duties of the Deputy Director of Education, Job Group ‘ R’ / CSG.6 at the Ministry of Education, pending hearing and determination of the Petition.

2. The Application is supported by the Affidavit of the Petitioner, sworn on 3rd May 2021.

3. He states that the 4th Respondent is a Teacher. He was employed by the 1st Respondent [TSC] way back in 1990. He was elected the National Treasurer of the Kenya National Union of Teachers [KNUT] in 2012. He resigned from KNUT on 29th April 2021.

4. He, on 5th April 2021, requested for transfer of service from TSC to the 3rd Respondent [PSC], in anticipation of taking up employment at the Ministry of Education.

5. The 1st Respondent issued a no-objection letter to the 4th Respondent, but requested the 4th Respondent to furnish a copy of the contract letter, to enable the 1st Respondent finalize the process.

6. The 2nd Respondent wrote to the 3rd Respondent, indicating that there was a vacant position of Deputy Director of Education, within the Ministry of Education. The 2nd Respondent requested transfer of service of the 4th Respondent and his appointment to the vacancy.

7. The 2nd Respondent appointed the 4th Respondent as Deputy Director of Education. The position was not advertised. There was no interview. The 4th Respondent accepted the offer of employment, on 6th May 2021.

8. The 1st Respondent filed a Replying Affidavit, sworn by Dr. Julius Alayo, on 16th June 2021. He repeats the employment history of the 4th Respondent by the 1st Respondent; the 4th Respondent's early history with KNUT and subsequent ascension to the national leadership of KNUT; and his appointment as Deputy Director of Education. Dr. Alayo states the 4th Respondent's qualifications for the position are unquestionable, and the process of transfer of service and appointment, beyond reproach.

9. Dr. Julius O. Jwan, Principal Secretary at the State Department for Early Learning and Basic Education in the Ministry of Education, swore a Replying Affidavit on behalf of the 2nd Respondent, on 16th June 2021.

10. He states that the 3rd Respondent may, where appropriate and in writing, delegate any power or assign any duty conferred on it under the Constitution or the Act, to its members, an officer, body or authority in the public service, under Section 31 of the Public Service Commission Act, No. 10 of 2017.

11. Regulation 14[1] [a] of the Public Service Commission Regulations 2020, allows the 3rd Respondent to delegate its power to appoint, to an authorised officer, in terms of Section 31 above. Cabinet Secretaries are designated as authorised officers.

12. The 2nd Respondent, in exercise of delegated powers, forwarded his recommendations to the 3rd Respondent, with respect to the transfer of the 4th Respondent. The 2nd Respondent acted at all times within the confines of his statutory and constitutional powers. The Petitioner's application is misplaced.

13. The 4th Respondent filed his Replying Affidavit, sworn on 17th June 2021.

14. He states in detail that he holds: P1 Certificate in teaching from Kamagambo Teachers College, 1990; Bachelor of Education Arts Degree from the University of Nairobi, 2004-2008; Master's Degree in Education Administration from University of Eastern Africa Baraton, 2010-2013; and was PhD candidate, University of Nairobi, at the time of swearing the Affidavit.

15. Professional courses / meetings attended, include: sub-saharan conference on education post-2015 agenda on SDGs, Kigali Rwanda, 2015; commonwealth conference for Ministers of Education, Fiji, 2017; international education conference, Istanbul Turkey, 2018 [presented a paper on ICT and Education in 21st century]; ILO conference on gender violence, Geneva, 2019; annual international conference on research and innovation, University of Nairobi, 10th September 2019; and attended and presented a paper to post-graduate students, at University of Nairobi @50 celebrations, on the topic of Collective Bargaining Process in Education.

16. The 4th Respondent states, he has over 30 years' experience in education sector. He was a teacher in various primary schools including Sosera, Riang'ombe, and Nyansakia; Deputy head-teacher at Sosera, Ensoko, and Riang'ombe; Head-teacher at Nyansakia primary school; Branch Executive Secretary Borabu KNUT Branch; Assistant- National Treasure of KNUT; National Treasurer KNUT; Member TSC remuneration committee; committee member NACADA 2010-2012; was nominated, but declined appointment, as a commissioner SRC; and, served as Trustee Public Service Superannuation Scheme for 3 years, until 2020.

17. The 4th Respondent served in a position equivalent of job group 'R' following his academic achievements. He was not lastly in job group 'K', as alleged by the Petitioner. He applied for transfer of service, against the background of his academic and professional achievements.

18. He exhibits his application letter and the no-objection letter from the TSC. He was appointed as Deputy Director, and accepted appointment. It was a merit appointment. It is not true that the 4th Respondent was unqualified, and that qualified persons were overlooked. No law was breached. The 4th Respondent restates the position adopted by Dr. Jwan on the law.

19. There is no arguable, *prima facie* case, to warrant grant of the Application.

20. Parties were directed to file Submissions, which with the exception of the 3rd Respondent's, are traceable in the record.

The Court Finds: -

21. The orders sought by the Petitioner seem to have been overtaken by the events. `

22. It is common ground that transfer of service from the 1st Respondent to the 3rd Respondent, took place. The 4th Respondent was appointed Deputy Director of Education. He accepted appointment, on 6th May 2021.

23. On what ground would the Court restrain transferring of service; restrain the appointment of 4th Respondent as Deputy Director of Education; restrain the 4th Respondent from assuming office; and restrain the 2nd Respondent from allowing the 4th Respondent to assume office?

24. The 4th Respondent's transfer of service and appointment, were consummated on 6th May 2021, when he accepted the offer of appointment.

25. The Court does not act in vain, and issue orders which cannot be implemented.

26. That aside, the Petitioner appears not to have a *prima facie* case, with probability of success. The 1st, 2nd and 3rd Respondents appear from the material availed to the Court, to have acted within the law, in transfer and appointment of the 4th Respondent.

27. The 4th Respondent is pre-eminently qualified for the position of Deputy Director of Education. No Court should stand in the way of meritocracy. He has the academic and professional credentials. He has a rich experience in the education sector. There is nothing to suggest that his appointment, does not meet the values and principles of public service, under Article 232 of the Constitution. There is no compelling reason shown, by way of *prima facie* evidence, to warrant placing of barriers in the 4th Respondent's desire to serve the public, and in his career advancement.

28. Let the Petitioner pursue his main Petition, if he is minded to do so. Interim orders sought, have been overtaken by the events, and have no merit.

IT IS ORDERED: -

a. The Application by the Petitioner dated 3rd May 2021 is declined.

b. Costs to be paid by the Petitioner to the 1st, 2nd and 4th Respondents.

Dated, signed and released to the Parties electronically, at Nairobi, under the Ministry of Health and Judiciary Covid-19 Guidelines, this 25th day of January 2022.

James Rika

Judge