



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

CAUSE NO. E001 OF 2022

KENYA NATIONAL TEACHERS PRESSURE GROUPCLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

RULING

1. By a Motion dated 5th January, 2022, the claimant /Applicants sought orders among others that:

a) That this Honourable court be pleased to stay the implementation of the officials and/or members of the Claimant's transfer to their new stations as conveyed in their letters Ref: TSC/520048/30 dated 15th November, 2021, TSC/34323/112 dated 15th November, 2021 communicated to the officials and/or members of the Claimant one Mr. Nelson Kirui, Ms. Malika Mwanasudi Annuary, Mr. Felix Osotsi, Ms. Anne Njeri Wanyoike and Ms. Menya Martha of its decision to transfer them from their respective current working stations to new stations within the Republic of Kenya pending the hearing and determination of this Application.

b) That this Honourable Court be pleased to issue an interim injunction restraining the respondent, its servants, agents or howsoever from causing and/or effecting any transfer of any of the officials and/or members of the Claimant/Applicant to their new working stations pending the determination of this claim.

c) That this Honourable Court be pleased to issue an interim injunction barring and/or restraining the Respondent from causing and/or meting out any disciplinary action against any of the members and/or officials of the claimant/applicant pending the hearing and determination of this claim.

d) That this Honourable Court be pleased to allow the affected members and/or officials of the claimant/applicant to continue serving in their capacity as teachers in their former station without any disturbance and/or interruption from the Respondents and/or its agents, servants until the matter is heard and fully determined.

2. The application was supported by the affidavit of Nelson Kiprotich Kirui who deponed among others that:

a) That I am a male adult Kenyan of sound mind and the Deputy Secretary of the claimant/applicant herein, duly authorized and therefore competent to swear this affidavit on behalf of the claimant/applicant.

b) That I am an employee of the Respondent, a constitutional Commission established under the Constitution of Kenya with the mandate to register and employ teachers, deploy teachers to public schools and institutions, promote, transfer, discipline and terminate employment of teachers and I was previously teaching at Kaptich Primary School in Eldoret, Uasin Gishu County before I was arbitrarily, maliciously, unprocedurally and unlawfully transferred to Lamu County by the Respondent.

c) That for the entire time the members of the Claimant/Applicant have had a good working relationship with the respondent and we have never had any problems and/or disciplinary issues with the respondent. The members of the Claimant are and have always been diligent and committed employees of the respondent as teachers in various Primary and Secondary schools within the Republic of Kenya and have held many responsibilities in various capacities in their work stations.

d) That the Respondent vide its Letters Ref: TSC/520048/30 dated 15th November, 2021, TSC/471613/35 dated 15th November, 2021, TSC/703121/30 dated 19th November, 2021, TSC/34323/112 dated 15th November, 2021, TSC/380662/164 dated 12th November, 2021 communicated to the officials and/or members of the Claimant one Mr. Nelson Kirui, Ms. Malika Mwanasudi Annuary, Mr. Felix Osotsi, Ms. Anne Njeri Wanyoike and Ms. Menya Martha of its decision to transfer them from their respective current working stations to the new stations within the Republic of Kenya.

e) That the Respondent has arbitrarily, maliciously, unprocedurally, unlawfully transferred the aforesaid members of the

Claimant/applicant and did not inform them of the reason of its decision to transfer them to their new working stations within the Republic of Kenya.

f) That the aforementioned members of the claimant appealed vide their letters dated 27th November, 2021 by Malika Mwanasudi Annuary, 23rd November, 2021 by Felix Osotsi Omwakwe, 22nd November by Anne Wanyoike, 23rd November, 2021 by Nelson Kirui, 23rd November, 2021 by Menya Martha against the Respondent's decision to transfer them from their respective current working stations to new stations within the Republic of Kenya. However, the Respondent rejected the appeals of the aforementioned officials and/or members vide its letters Ref: TSC/47613/39 dated 30th November, 2021 for Nelson Kirui, TSC.520048/34 dated 30th November, 2021 for Felix Osotsi Omwakwe, TSC/703121/36 dated 16th December, 2021 for Annuary M. Malika, TSC/341323/117 dated 30th November, 2021 for Anne Njeri Wanyoike, TSC/380662/170 dated 30th November, 2021 for Menya Martha.

g) That the transfers have been meted out on the affected members of the claimant/applicant because they have been vocal about the Teachers Professional Development and also because they are members of the Kenya National Teachers Pressure Group (KNTPG). the transfer by the Respondent targeted the members of the claimant/applicant who were against the Teachers Professional Development among other policies by the Respondent.

h) That the transfer of the members of the claimant/applicant by the respondent has been done out of malice as the Respondent has not had any consideration of the members' families, health, security etc. the transfers is going to worsen the health conditions of some of the affected members of the claimant/applicant and their security is going to be threatened.

i) That the transfer of the members of claimant/applicant to new stations is malicious, punitive and lacks consideration of their families, security and health.

j) That I beseech this Honourable Court to stop the transfer of the affected members of the claimant to their new stations be because if affected immediately it would prejudice their young families, their young school going children, their health, the distance etc.

k) That we beseech this Honourable Court to also issue an injunction suspending any disciplinary action or measure already meted out on the members of the claimant until the matter is heard and determined.

3. The respondent filed a replying affidavit through one **Rita Wahome** who deponed that:

a) That I am the Director in-charge of staffing of public schools at the Teachers Service Commission the respondent in this application/claim and I am by virtue of my said position conversant with the matters and circumstances relating to this matter Affidavit on behalf of all Respondents.

b) That I am advised by our advocate on record, which advise I believe to be sound and proper, that the application and the substantive suit are deliberate distortion and fabrication of material facts to suit the applicant's malicious intents.

c) That I have also been advised that the application and the claim are bad in law and incurable defective as the alleged claimant is not a juridical person known to law hence incapable of suing on its own name and/or being sued. To this end the pleadings should be struck out with costs to the respondent.

d) That the above notwithstanding, the Teachers service Commission, the respondent in this matter (hereinafter referred to as the Commission) is established under Article 237 (1) of the Constitution of Kenya, 2010 with its primary functions under Article 237(2) thereunder being:-

- i) To register trained teachers;
- ii) To recruit and employ trained teachers;
- iii) To assign teachers in its service to teach in various public schools;
- iv) To promote and transfer teachers;
- v) To exercise disciplinary control over teachers;
- vi) To terminate the employment of teachers.

e) That further under Article 237 (3) (b) of the Constitution, the Commission is conferred with the mandate to review the demand and supply of teachers across the country which is aimed at to guaranteeing the appropriate balance in the teacher staffing levels and equitable distribution of teachers in all public schools within the country so as to enhance optimal use of the teaching resource.

f) That in exercising this constitutional mandate, the commission is pursuant to Article 249 of the Constitution not subject to direction and/or control by any person or authority.

g) That administratively and in compliance with Article 6 of the Constitution, the Commission may either act directly or effect such transfer and/or deployment at the instance of/or through its officers at the County levels.

h) That in addition to the above constitutional provisions, the Commission has statutory mandate under the Teachers Service Commission Act No. 20 of 2012, to transfer and/or deploy any teacher in its service to any educational institution where it deems the teacher qualified to teach and where his/her services are required.

i) That in exercise of its mandated under Section 47 (2) of the TSC Act, the Commission has published a Code of Regulations for Teachers (hereinafter referred to as the “Code”).

j) That under Regulation 62 of the Code, the Commission is empowered to assign any teacher for service in any public school/Institution in Kenya which it considers him/her qualified to teach.

k) That further Regulation 67 of the Code grants the Commission the discretion to transfer teachers in its serve as the circumstances may demand even where a teacher has not applied for a transfer.

l) That in the Letters of Appointment, the Claimants’ employment are subject to the provisions of the Code of Regulations for Teachers. Accordingly, they are bound by the mandatory provisions of the Code.

m) That the claimant’s having duly signed and acknowledged service as employees of the Commission are bound by the provisions of the appointment letters which candidly state “**A condition for employment is readiness to serve anywhere in Kenya in any school which the TSC (Commission) considers you are qualified to teach.**”

ANNUARY M. MALIKA TSC NO. 703121

a) That on 19th November, 2021, in the routine exercise of the Commission’s contractual/constitutional mandate, duly guided by the Code of Regulations for teachers and having evaluated the staffing levels in public secondary schools across Kilifi County, transferred the claimant from Mareneni Secondary school in Homa-Bay County. (**Annexed hereto and marked as RW-2 is a copy of the transfer letter dated 19th November, 2021.**)

b) That contrary to the allegations set forth by the claimants, each of them was granted 14days to report to their new station.

c) That on 19th November, 2021 the claimant was officially released to report to her new station. (**Annexed hereto and marked as RW-03 is a letter dated 19th November, 2021**)

d) That the claimant appealed against the decision of the Commission to transfer her to Mwiraria Secondary School.

e) That the respondent considered the claimant’s and upon considering all factors upheld the decision to transfer the claimant, which decision was communicated to the Claimant on 16th December, 2021. (**Annexed hereto and marked as RW-4 is a letter dated 16th December, 2021**)

f) That thereafter, the claimant applied for compassionate leave which was duly considered and granted from 30/11/2021. Despite the approval, the claimant failed to report back to school after the expiry of the Compassionate Leave.(**Annexed hereto and marked as RW-5 are letters dated 30/11/2022 and 4/1/2022 confirming the Compassionate leave and the fact that she failed to report**)

g) The claimant was subsequently issued with a show Cause letter dated 18/12/2021 to respond to her failure to report to work, which action amounted to desertion and professional misconduct. To date she has not reported at her new station, and her whereabouts remain unknown to the Commission.(**Annexed hereto and marked as RW-5A is a copy of the Show cause letter**)

OSOTSI FELIX OMWAKWE TSC NO. 520048

a) That on 15th November, 2021, in the routine exercise of the Commission’s contractual/constitutional mandate, duly guided by the Code or Regulations for teachers and having evaluated the staffing levels in public Primary schools across Vihiga County, transferred the claimant from Vihiga County to Kwale County. (**Annexed hereto and marked as RW-6 is a copy of the transfer letter dated 15th November, 2021**)

b) That on 18th November, 2021 the Respondent officially released the claimant from Vihiga county to report to Kwale County where he was posted to Mamba Primary. (**Annexed hereto and marked as RW- and RW-8 are; release letter dated 18th November, 2021 and posting letter dated 29/11/2021 respectively**)

c) That the claimant appealed against the decision of the commission to transfer him.

d) That the respondent considered the claimant’s appeal and upon considering all factors upheld the decision to transfer the claimant, which decision was communicated to the claimant. (**Annexed hereto and marked as RW-9 is a letter dated 30th December, 2021**)

e) That the Respondent received an Entry & Exit Report notifying it that the claimant absconded duty from 20/12/2021. The claimant’s whereabouts remain unknown to date. (**Annexed hereto and marked as RW-10 is a copy of the report dated 10th January, 2022**)

NJERI A. WANYOIKE TSC NO. 341323

- a) That on 15th November, 2021, in the routine exercise of the commission's contractual/constitutional mandate, duly guided by the Code of Regulations for teachers and having evaluated the staffing levels in primary schools across Kitui County, transferred the Claimant from Nairobi County to Kitui County. (***Annexed hereto and marked as RW-11 is a copy of the transfer letter dated 15th November, 2021.***)
- b) That the 17th November, 2021 the respondent officially released the claimant from Nairobi County to report to Kitui County where she was posted to Kyenini Primary School. (***Annexed hereto and marked as RW-12 and RW-13 are; letter dated 17th November, 2021 and posting letter dated 29/11/2021 respectively***)
- c) That the claimant appealed against the decision of the commission to transfer her.
- d) That the Respondent considered the claimant's appeal and upon considering all factors upheld the decision to transfer the claimant, which decision was communicated to the claimant. (***Annexed hereto and marked as RW-14 is a letter dated 30th November, 2021***)
- e) That since then, the claimant has settled in her new station and she is discharging her duties. Subsequently, she has been paid her transfer allowance, hardship allowance as per the Code. (***Annexed hereto and marked as RW-14A is a copy of the Pay Charge Advice***)

KIRUI NELSON KIPROTICH TSC NO. 471613

- a) That on 17th November, 2021, in the routine exercise of the Commission's contractual/constitutional mandate, duly guided by the Code of Regulations for teachers and having evaluated the staffing levels in public Primary schools across Lamu County, transferred the claimant from Uasin Gishu County to Lamu County. (Annexed hereto and marked as RW-15 is a copy of the transfer letter dated 15th November, 2021.
- b) That on 17th November, 2021 the Respondent officially released the claimant from Uasin Gishu County to report to Lamu County where he was posted to Kizingitini Boys Primary School. (***Annexed hereto and marked as RW-16 and RW-17 is a letter dated 18th November, 2021 and posting letter dated 29/11/2021 respectively***)
- c) That the claimant appealed against the decision of the commission to transfer him.
- d) That the respondent considered the claimant's appeal and upon considering all factors upheld the decision to transfer the claimant, which decision was communicated to the claimant. (***Annexed hereto and marked as RW-18 is a letter dated 30th December, 2021***)
- e) That Mr. Kirui duly reported on 30/11/2021 as per the Entry Report. He sought for paternity leave vide letter dated 30/11/2021. The same was duly granted for 21 days as per the 2021-2025 CBA between the Commission and the duly registered and recognized teachers union representing the interests of the claimant's whereabouts remain unknown to the Commission. (***Annexed hereto and marked as RW-18A are the entry Report, Application for paternity leave and the Approval thereof***)

MENYA MARTHA AWUOR TSC NO. 380662

- a) That on 12th November, 2021, in the routine exercise of the Commission's contractual/constitutional mandate, duly guided by the Code of Regulations for teachers and having evaluated the staffing levels in public Primary schools across Trans Nzoia County, transferred the Claimant from Uasin Gishu Lamu County. (Annexed hereto and marked as RW-19 is a copy of the transfer letter dated 12th November, 2021.
- b) That on 15th November, 2021 the respondent officially released the claimant from Nairobi County to report to Trans Nzoia County where she was posted to Cheptumelio primary school. (***Annexed hereto and marked as RW-20 and RW- 21 are; letter dated 15th November, 2021 and posting letter dated 26/11/2021 respectively***)
- c) That the claimant appealed against the decision of the Commission to transfer her.
- d) That the respondent considered the claimant's appeal and upon considering all factors upheld the decision to transfer the claimant, which decision was communicated to the claimant. (***Annexed hereto and marked as RW-22 is letter dated 30th December, 2021***)

4. In support of the application Cheruiyot for the applicants submitted in the main that the members of the claimant concerned had not written to the respondent seeking for the transfers and that the applicants had established a prima facie case as was stated in the case of **Mrao Ltd -v- First American Bank Ltd & 2 others [2003] KLR 125 and Nguruman Ltd -v- Ian Bonde Nelson & 3 other [2014] eKLR.**

5. According to Mr. Cheruiyot the transfer of the claimants members to hardship, insecure far flung areas was not for genuine reason but maliciously done to punish the members for agitating for their right that the respondent had violated.

6. Under article 41 of the Constitution every worker had a right to fair labour practices such right extended to fair treatment in relation to transfer of workers from one station to another with more consideration to the employees' families and health issues. It was not a fair labour practice for a public officer to chest thump that all authority to hire and fire or transfer and deploy under the law or policy belongs to him. Every authority must be viewed through the lens of article 10 of the Constitution and further article 236 of the Constitution protected public officers from victimization and unfair punishment for doing their job in accordance with the law.
7. According to Counsel the said right to protection of law was violated or about to be violated when the claimant's members were being subjected to punitive transfer for agitating for their rights according to the constitution.
8. Mr. Cheruiyot further submitted that whereas he did not dispute the power and functions of the respondent, counsel admitted that the respondent had power under article 237 of the Constitution including promotion and transfer of teachers however the said power had been blatantly and flagrantly abused by the respondents to meet its own agenda and objectives. The transfers were punitive, malicious, arbitrary and unlawful and were for reasons not related to work or conduct of the members of the claimant. The claimant had suffered the wrath of their employer by being transferred to far flung areas within the country. The inconveniences and the suffering that had been occasioned to the members of the claimant was life threatening, inhuman, degrading and irreversible. The main aim of transferring the claimants' members away from their previous work stations without considering other factors such as distance, health, their families, their security was to make them to resign from their jobs and quit as teachers.
9. Counsel for the respondent Mr. Anyuor on the other hand submitted that the respondent had a contractual obligation/duty and or management prerogative underpinned by the constitution, statute and contract to transfer teachers. Accordingly, the Court should therefore exercise restraint in delving into such management prerogatives. The claimants terms and condition of service were regulated by provisions of the Code of Regulations for Teachers. (CORT), the Code of Conduct and Ethics and Employment Act and other contractual conditions. According to Counsel, the issue of transfer from one station to another was a contractual issue regulated by CORT and ought to be interpreted against contractual obligations of each party.
10. Mr. Anyuor further submitted that according to the respective letters of appointments duly acknowledged by the claimant's members, one of the mandatory terms of the contract was that they were ready to serve anywhere in the Republic of Kenya where the employer considered them qualified to teach. A similar stipulation was made under regulations 55(3) of the CORT.
11. In transferring the claimants, the respondent was exercising its prerogative/discretion as an employer in the management of its employees. Prior to effecting the transfers, the respondent considered numerous factors including staffing situation in various stations, constitutional imperative to equitably distribute teachers in public schools across the country, the best interest of learners and their right to access quality education through provision of quality teaching and the claimant's teaching subjects, competencies and length of stay at their previous stations. Counsel thus submitted that claimants could not choose which school to serve as in doing so would encroach and or diminish the respondent's mandate and prerogative. In support of the submission counsel relied on the case of **Mary Ngangasi Ratemo & 9 Others -v- Kenya Police Staff Sacco Ltd & Another [2013] eKLR** and **Henry Ochido -v- NGO Co-ordination Board [2015] eKLR**
12. Mr. Anyuor further submitted that the respondent being a constitutional commission with authority to act independently while complying with constitutional safeguards, has a solemn obligation under the law to fairly and equitably distribute teachers across the country in a just, reasonable and non-discriminative manner. Such transfers were done after consideration of several factors as highlighted in the respondents Replying Affidavit and the Court ought not to take away such functions through judicial craftsmanship.
13. In this regard Counsel relied on the case of **TSC -V- Thomas Onyano Nakuru Civil Appeal No. 122 of 2015.**
14. Counsel for the respondent's further submitted that the claimants were guilty of non-disclosure of material facts and or misrepresentation of material facts. At the time of filing the claim on 6th January, 2022 the members concerned had all reported to their respective new working stations and at the time of filing the suit three of them namely Nelson Kirui, Melika Annuary and Felix Osoi had all deserted duties and were no longer serving in their respective stations. Counsel therefore submitted that the application had been overtaken by events and any orders issued by the Court would be in vain.
15. On the juridical status of the claimants, counsel submitted that the claimant was not a juridical person/legal entity hence lacked the competence to initiate a suit. Counsel drew the attention of the Court to paragraph 1 of the statement of claim where the claimants averred that it was a proposed Association that had not been registered at the time of filing the suit.
16. This is an interlocutory application seeking interim orders pending hearing and determination of the claim. The principles which guide the court in whether to grant or refuse interlocutory orders are now settled. They were succinctly set out in the famous case of **Gielu -v- Cassman Brown**. That is to say the applicant must demonstrate a prima facie case with probability of success and that damages would not offer adequate compensation if successful and that if the Court is in doubt the matter would be decided on a balance of convenience. That is to say whether it would be more convenient to grant the interim orders than refusing the same. The applicant further must furnish adequate undertaking as to damages in event that it turns that the interim orders were wrongfully issued.
17. On the issue of prima facie case with probability of success, the claimants have contested the transfers concerned stating that they are malicious and were initiated and motivated by the intention to punish the members concerned for their association with the claimant who allegedly has been at the forefront and vocal about the Teachers Professional Development amongst other policies by the respondent.
18. The respondent on the other hand has denied the accusations and reiterated that the transfers were initiated and effected pursuant to the respondent's constitutional mandate, CORT and the individual contracts of employment signed by each of the teachers in which they committed to serve in any part of the country.
19. The affidavit sworn by Mr. Nelson Kiprotich Kirui in support of the application does not have any exhibits to support the allegations

contained therein. The Court has however taken the liberty to peruse the documents filed in support of the main claim to make for the omission in the affidavit.

20. All the five teachers the subject of this claim faulted the transfer alleging they were malicious and motivated by bad faith. This aspect was raised in their individual appeals to the respondent challenging the transfers.

21. It is not disputed that the power to transfer is the constitutional and statutory mandate of the respondent. The power is further anchored on the CORT and individual contracts of employment signed by the teachers upon employment.

22. The allegations by the five teachers that their transfers were motivated by malice however remain purely an allegation and is subject to further inquiry through adducing evidence and subjecting the same to cross-examination. No prima facie material has so far been placed before the Court to support the allegation of malice. This will therefore be brought about at the full trial and after evidence has been adduced and subjected to cross-examination.

23. The respondent raised a critical issue that could if inquired into further, raise the issue of the *locus standi* of the claimant before the Court. The claimant has pleaded at paragraph 1 of the statement of claim that it is a proposed association of affected teachers in employment of the respondent and is in the process of registration.

24. Section 12(1) and(2) of the Employment and Labour Relations Court Act provides:

i) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

a) Disputes relating to or arising out of employment between an employer and an employee;

b) Disputes between an employer and a trade union;

c) Disputes between an employers' organisation and a trade union's organisation;

d) Disputes between trade unions;

e) Disputes between employer organisations;

f) Disputes between an employers' organisation and a trade union;

g) Disputes between a trade union and a member thereof;

h) Disputes between an employer's organisation or a federation and a member thereof;

i) Disputes concerning the registration and election of trade union officials; and

j) Disputes relating to the registration and enforcement of collective agreements.

(2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose

25. The claimant herein has admitted by its own pleadings that it is not yet a juridical person. Therefore it is not competent to commence an action before this Court and indeed before any other Court or Tribunal. As things stand now, the Court is uncertain whether the claimant is a trade union, a society, welfare Group, political party or any of the creatures permitted under the regulatory framework governing collective organizations.

26. It would therefore not be safe to grant interim orders sought even assuming the claimant put forward a prima facie case with probability of success because *ex facie*, the claimant admits that its not yet a recognizable juridical person capable of benefitting from a discretionary order of the Court such as an interlocutory injunction. It would even be more dangerous to impose an order of undertaking as to damages if it turns out the injunction was wrongfully granted because the claimant before the Court is a soap bubble, a phantom so to speak. The Court cannot therefore hang the bugle of its sacred order on an invisible baldrick.

27. The application is hereby dismissed with costs to be borne by the persons behind the phantom litigant before the Court.

28. **It is so ordered.**

DATED AND DELIVERED AT ELDORET THIS 18TH DAY OF MARCH, 2022

ABUODHA NELSON JORUM

