



**Kabugi v Teacher Service Commission (Cause 132 of 2017)  
[2022] KEELRC 1274 (KLR) (20 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1274 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 132 OF 2017  
MA ONYANGO, J  
JULY 20, 2022**

**BETWEEN**

**KIMANI J. F. KABUGI ..... CLAIMANT**

**AND**

**TEACHER SERVICE COMMISSION ..... RESPONDENT**

**JUDGMENT**

1. By way of statement of claim dated and filed in Court on 25<sup>th</sup> January, 2017, the Claimant herein filed the instant claim seeking the following reliefs:-
  - a. A declaration that the recovery of the Special School Allowance paid to the Claimant by the Respondent is illegal and unlawful.
  - b. A permanent injunction restraining the Respondent from recovering special school Allowance paid to the Claimant
  - c. The Respondent to refund to the Claimant all the money deducted as special school allowances since September 2016
  - d. The Respondent to pay the Claimant special school allowances withheld since the month of October, 2016 when the Respondent stopped paying
  - e. An order that the costs of this suit be awarded to the Claimant with interest thereon from the date of filing the Claim.
  - f. Any other relief the Court deems fit to grant.
2. In his claim the Claimant avers that he is a teacher registered with the Respondent and holder of Teacher's Service Commission Number 183931 since the year 1981 when he was first employed by the Respondent.



3. That upon his appointment he was assigned to teach in a regular school until the year 1995 when the Respondent transferred and assigned him to teach at Joy Town Special School, a school specifically exclusive to students with special needs only.
4. As a result of the change his salary was reviewed to include Special School Allowance pursuant to Legal Notice Number 534 of 1997. The amount was periodically increased following negotiations between the Respondent and the teacher's union.
5. On 2<sup>nd</sup> August 2016 the Special School Allowance was illegally and unlawfully withdrawn from his payslip. The Respondent indicated that it would be recovering the sum of Kshs.426,344.65/- already paid to him as special school allowances on grounds that he lacked special skills to qualify for the allowance.
6. The Respondent indicated that it would be making a monthly deduction to the Claimant's salary in the sum of Kshs.15,293.35/- to recover the Special Allowances, which position the Claimant vehemently opposed.
7. In response to the statement of claim, the Respondent filed its amended memorandum of response and counter claim dated 20<sup>th</sup> January, 2022. The Respondent denied that the Claimant was eligible for payment of special school allowance between the period 1<sup>st</sup> July, 2006 to 30<sup>th</sup> June 2016.
8. The Respondent stated that special school allowance was only payable to teachers with training in special education who are deployed in special schools or special units in accordance with the Revised 2005, Code of Regulations for Teachers (CORT).
9. It maintained that even though the Claimant was deployed to a Special School, the Claimant lacked specialized training and was therefore not eligible to receive the special school allowance in line with the 2005 CORT.
10. This is the basis of the Respondent's Counter Claim against the Claimant. In its Counter Claim the Respondent seeks the following reliefs: -
  - a. The dismissal of the Claimant's Suit with costs to the Respondent
  - b. Finding for the Respondent in the Counter Claim herein.
  - c. Special damages amounting to Kshs.382,880.45/- being public funds erroneously drawn by the Claimant with effect from 1/7/2006 to 1/7/2016
  - d. Costs of the suit.

### **Evidence**

11. This matter was scheduled for hearing on 17<sup>th</sup> November, 2021. On the hearing date the parties agreed to canvass the same by way of witness affidavits and written submissions.

### **Claimant's Case**

12. In support of his claim the Claimant relied on his statement of claim and his witness statement dated 12<sup>th</sup> July, 2021, together with the attachments thereto.
13. He stated that between the year 1981 when he was appointed as a teacher and the year 1995, he was deployed to a regular school before the Respondent transferred him to Joy Town Special School in Thika, Kiambu County, a school for students with physical disabilities.



14. The Claimant stated that between 23<sup>rd</sup> July, 2003 and 25<sup>th</sup> July 2003 whilst teaching at Joy Town Secondary School he attended a course in guidance and counselling that was organized by the Kenya Institute of Professional Counselling and was awarded a certificate of registration by the Institute as evidenced by his annexure KJFK 2.
15. That subsequently on 16<sup>th</sup> February, 2005 he was appointed as an Assistant Guidance and Counselling Teacher at the said Joy Town Secondary School by the School Principal, vide the letter dated 16<sup>th</sup> February, 2005 on the account of his qualification.
16. The Claimant states that in the year 2007 he was elevated to the position of Head of Department – Guidance and Counselling by the school principal vide the letter dated 29<sup>th</sup> May, 2007.
17. That as from August 2012 the Respondent paid him all the Special Allowances that had accumulated over time totalling to Kshs.30,585/- and thereafter continued to pay him the Special School Allowance at the rate of Kshs.2,039/- which was later increased to Kshs.3,591/-.
18. The Claimant stated that on 5<sup>th</sup> July, 2013 a return to work formula was entered into between the Respondent and his representative union (Kenya Union of Post Primary Education Teachers, KUPPET) whereby it was agreed inter alia that all withheld allowances be released to all union staff, including him.
19. He further stated that another agreement was entered into between his union (KUPPET) and the Respondent which saw the Special Needs School Allowances increased to Kshs.10,000/- as evidenced by annexure KJFK 8 a copy of the agreement dated 11<sup>th</sup> July, 2013. That as a result his allowances increased to the said Kshs.10,000/-.
20. The Claimant stated that he was subsequently issued with a letter on 5<sup>th</sup> September, 2016 dated 2<sup>nd</sup> August, 2016 from the Respondent seeking to recover the Special School Allowances that he was lawfully and legally receiving. The Claimant maintained that this action by the Respondent was not only unfair but unconstitutional as it contravened the various provisions of *the Constitution* of Kenya, 2010 in particular his right to fair administrative action and fair labour practice.
21. The Claimant further stated that following the Respondent communiqué his Special School Allowances were abruptly, illegally and unreasonably deducted from his August, September, October November, December of 2016 and February 2017 salaries as evidenced by the attached payslips of the respective months.
22. As a result of the unfair deductions the Claimant moved this Court under certificate of urgency and was granted interim orders that barred the Respondent from making any further deduction pending the hearing and determination of the application. Following the Respondent's failure to respond to the Application in or appear for the hearing thereof the Claimant was issued with injunctive Orders to bar any form of deduction pending the outcome of the main claim.
23. In conclusion the Claimant urged this Court to find merit in his claim and allow it in terms of the reliefs sought therein.

### **Respondent's Case**

24. In support of its case the Respondent relies on its Amended Memorandum of Response and Counter Claim, the Witness Affidavit by Pamela Ochieng', its Deputy Director Human Resource Management sworn on 2<sup>nd</sup> February, 2022 and the list and bundle of documents dated 2<sup>nd</sup> February, 2022.



25. In her witness affidavit, the affiant reiterated the averments made in the amended memorandum of response and counter claim. She stated that prior to the year 1997, the Respondent's Code of Regulations (1986) had no provision for payment of Special Allowance. However, vide the circular number 13/1997 the Respondent introduced the special allowance effective 1<sup>st</sup> July, 1997. It was to be paid at the rate of 10% of the minimum salary for all teachers deployed in Special Schools who possessed either diplomas or Certificates in Special Education. For emphasis the Respondent referred this Court to its Appendix 1 being a copy of the circular number 13/1997 dated 24<sup>th</sup> November, 1997.
26. The affiant contended that at the time of his deployment as a teacher to Joy Town Special Secondary School the Claimant was legible for the transfer as it was initiated on the sole basis of his ability to teach. That subsequently, owing to the increase in the number of teachers qualified as special needs education teachers the Respondent through its circular No. 21 dated 27<sup>th</sup> July, 2006 reviewed the terms of payment of special allowances as it was unsustainable.
27. She further stated that the Respondent also revised its 2005 Code of Regulations for Teachers (CORT) in which it provided under Regulation 94 that: "The Commission shall from time to time pay special school allowance to a teacher who possesses skills in special education and who is assigned to a special school or special unit."
28. She stated that the Respondent received a letter dated 11<sup>th</sup> May, 2016 from the principal of Joy Town Secondary School informing it that the Claimant was erroneously drawing special school allowance yet he had not received any training in Special education as from 1<sup>st</sup> July, 2006 to 30<sup>th</sup> June, 2016.
29. That upon receipt of the above information the Respondent conducted a payroll audit which confirmed that the Claimant was indeed receiving special allowances erroneously without

#### **meeting the requirements.**

30. Ms. Ochieng' further stated that the Respondent communicated to the Claimant this position and informed him of the Respondent's intention to recover the overpayments through its notice dated 2<sup>nd</sup> August, 2016.
31. She further stated that the Respondent had a duty to recover a total of Kshs.382,880.45/- erroneously paid out to the Claimant, that the Respondent's action was not in fact unlawful and unfair as contended by the Claimant herein.
32. She argued that the claim as filed is without merit and should be dismissed with costs to the Respondent. She maintained that the Respondent had proved its counter claim against the Claimant and therefore urged the Court to enter Judgment in the Respondent's favour in terms of the counter claim.

#### **Claimant's Submissions**

33. In his submissions the Claimant maintained that he had acquired rigorous training in professional development training in accordance with the provisions of Regulations 48 (1) and 48 (2) of the Teacher's Service Commission Code of Regulations for Teachers, 2015 and was therefore eligible for payment of the Special School Allowance.
34. The Claimant further submitted that this Court did issue orders on 27<sup>th</sup> January, 2017 and 28<sup>th</sup> March, 2018 restraining the Respondent from making deductions with respect to the Special School Allowance, which orders remain in force to date and the withholding of the same by the Respondent is in complete disobedience of the Court Orders. To buttress this argument the Claimant relied



upon the cases of *Caroline Mutuku v Amos Kones Mabele & 2 others* [2021] eKLR, *Republic v Principal Secretary, Ministry of Defence Ex-Parte George Kariuki Waitbaka* [2018] eKLR, *Teachers Service Commission v Kenya National Union of Teachers & 2 others* [2013] eKLR, *Kenya Tea Growers Association v Francis Atwoli & 5 others* [2012] eKLR and *Clarke & Others v Chadburn & Others* (1985) 1 ALL E.R. (PC) 211 where the Court emphasised on the need for parties to obey Court Orders as the same are not made in vain.

35. He further submitted that he was indeed qualified to teach at a Special School as evidenced by his transfer to teach at the school. He therefore maintained that the Respondent's argument that he was not qualified to hold the position was unfounded and baseless and as a result urged this Court to disregard the submission.
36. He further submitted that the Respondent is not justified to demand the recovery of the Special School Allowance he had received and any recovery would be illegal as there are orders in place prohibiting the same. For emphasis the Claimant relied on the cases of *Teachers Service Commission v Kenya National Union of Teachers & 2 others* (supra) and *Susan Murila & another (COTU) v Richard Kipkoech Langat & another* [2019] eKLR and the provisions of Sections 10(2)(h) and (5) of the *Employment Act*, 2007.
37. The Claimant submitted that the Respondent's Claim for recovery of Kshs.618,566.40 is unjustified and should therefore not be allowed by this Court.
38. The Claimant further submitted that he has proved his case on a balance of probabilities and therefore urged this Court to award the reliefs sought.
39. On the issue of costs, the Claimant submitted that the same is discretionary and urged the Court to award him costs. For emphasis the Claimant relied on the Court of Appeal decision in the case of *Farah Awad Gullet v CMC Motors Group Limited* [2018] eKLR.

### **Respondent's Submissions**

40. The Respondent on its part submitted that the Claimant was initially eligible for and was duly paid the Special School Allowance by virtue of the fact that he was transferred and was teaching at Joy Town Special Secondary School. However, following the release of the Respondent's Circular No. 21 dated 27<sup>th</sup> July 2006 and the amendment of the Respondent's Code of Regulations for Teachers, the Claimant had to fulfil two conditions to continue receiving the allowance. These were that he must be trained in Special Needs Education and teaching in a Special Education Schools or Special units. That the Claimant failed to meet criteria 1 (one) as he did not have any special needs training.
41. It is on this basis that the Respondent contends that the Claimant was not eligible for payment of the Special School Allowance that was paid out to him. This was the reason for the recovery of the sums already paid out to him.
42. The Respondent further submitted that the Claimant had a chance, following the changes in regulations, to further his training in special needs in order to continue benefitting from the Special School Allowance but failed to do so and as such cannot benefit from the Special School Allowance.
43. On whether the Respondent rightfully made deductions on special allowances erroneously earned, the Respondent relied on the provisions of Section 19(1) of the *Employment Act*, 2007 and maintained that it was justified to make the deductions as the same were erroneously earned. To buttress this argument the Respondent relied on the cases of *Mistry Jadva Parbat & Co. Ltd v Kenyatta University* [2020] eKLR and *Herman Musabi v Teachers Service Commission [TSC] & Attorney-General (Third Party)* [2018] eKLR where Courts authorized deductions of amounts paid to the employees in error.



44. The Respondent submitted that the Claim as filed is mischievous, frivolous, vexatious, an abuse to the Court process and should be dismissed in its entirety with costs to the Respondent.
45. The Respondent submits that it has made out a case for the grant of the orders sought in the counter claim and therefore urged this Court to allow the counter claim as prayed.

### **Analysis and Determination**

46. I have examined the pleadings in this case, the facts on record, the Affidavits, submissions and authorities cited by the parties hereto and find that the following are the issues for determination:-
  - i. Whether the Claimant was entitled to special school allowance;
  - ii. Whether the Respondent rightfully deducted the Claimant's special school allowance already earned;
  - iii. Whether the Claimant is entitled to the reliefs sought;
  - iv. Whether the Counter Claim is merited.

### **Whether the Claimant was entitled to Special School Allowance**

47. I have examined arguments for and against the Claimant's eligibility for payment of the Special School Allowance. The Claimant was first employed by the Respondent in the year 1981, and placed in an ordinary school before he was subsequently transferred to Joy Town Special School, Thika in year 1995.
48. The Respondent argued that the Claimant's transfer to Joy Town Special School was a normal transfer and that he was entitled to and was paid, at that time, the Special School Allowance by virtue of the fact that this school was a Special Needs School.
49. The Respondent maintained that following the increase in the number of teachers who were qualified in special needs education it became difficult for it to sustain payment of special school allowances to all teachers and as a result all teachers teaching in specialized schools had to undergo training in special needs education in order for them to qualify for the Special School Allowance.
50. The Claimant maintained that he did go through rigorous training in the field of Guidance and Counselling and was issued with a certificate of Registration by the Kenya Institute of Professional Counselling.
51. He further averred that he additionally acquired the required skills having passed his special needs examinations and was issued with Certificates of merit issued on 27<sup>th</sup> May 2005, 4<sup>th</sup> June 2005 and 12<sup>th</sup> September 2014 by the Ministry of Education as a result of which he was entitled to Special School Allowance.
52. The Respondent maintained that with the change in its policy the Claimant was not entitled to payment of Special School Allowance having not been specifically trained in special needs.
53. Clause 1.5 (b) of the Respondent's Circular No. 13/1997 dated 24<sup>th</sup> November, 1997 states as follows:

Special Allowance payable to Teachers in the Teaching Service who are deployed to teach in special schools/Institutions and Teachers who possess Diplomas or Certificates in Special



Education deployed to teach in special units shall be at the rate of 10 percent of the minimum basic salary W.E.F 1<sup>st</sup> July, 1997.

54. Further Regulation 94 of the Code of Regulation for Teachers provides as follows:

The Commission shall from time to time determine to pay Special School Allowance to a teacher who possess skills in special education and who is assigned to a special school or special unit.

55. There is no evidence annexed to the Claim to prove that the Claimant had met the minimum requirement of training and possessing of a Diploma or Certificate in Special Education as required under both Circular 21 and Regulation 94 of the Code of Regulation for Teachers.

56. The Respondent in its evidence admits that initially the transfer of teachers to special needs schools was not pegged on qualification in terms of attaining specialized training in specialized needs. It went on to state that the Claimant had a chance to get the requisite qualifications but failed to do so.

57. I have examined the certificates issued to the Claimant on 27<sup>th</sup> May, 2004, 4<sup>th</sup> June, 2005 and 12<sup>th</sup> September, 2014 and note that contrary to the Claimant's allegation that they are proof of his attaining the requisite special needs training the certificates were an award for exemplary performance for the school in various fields.

58. In the circumstances I find that the Claimant failed to meet the minimum requirements for eligibility for the special school allowance.

Whether the Respondent rightfully deducted the Claimant's special school allowance already earned

59. Having found that the Claimant was not entitled to Special School Allowance, I find that the Respondent was in fact justified to deduct such monies erroneously paid out to the Claimant under that head.

### **Whether the Claimant is entitled to the reliefs sought**

60. In his Claim the Claimant seeks the following reliefs:

a. A declaration that the recovery of the Special School Allowance paid to the Claimant by the Respondent is illegal and unlawful

61. Having found that the Claimant was not qualified post Circular 21 of 1997 and Amendment of the Code of Regulation for Teachers, this Court declines to make a declaration that the recovery of the allowances paid was illegal. Such deductions are authorised under Section 19(1) of the [Employment Act, 2007](#) which provides:

1. Notwithstanding section 17(1), an employer may deduct from the wages of his employee—
  - a. any amount due from the employee as a contribution to any provident fund or superannuation scheme or any other scheme approved by the Commissioner for Labour to which the employee has agreed to contribute;
  - b. a reasonable amount for any damage done to, or loss of, any property lawfully in the possession or custody of the employer occasioned by the wilful default of the employee;
  - c. an amount not exceeding one day's wages in respect of each working day for the whole of which the employee, without leave or other lawful cause, absents himself from the premises of the employer or other place proper and appointed for the performance of his work;



- d. an amount equal to the amount of any shortage of money arising through the negligence or dishonesty of the employee whose contract of service provides specifically for his being entrusted with the receipt, custody and payment of money;
  - e. any amount paid to the employee in error as wages in excess of the amount of wages due to him;
  - f. any amount the deduction of which is authorised by any written law for the time being in force, collective agreement, wage determination, court order or arbitration award;
  - g. any amount in which the employer has no direct or indirect beneficial interest, and which the employee has requested the employer in writing to deduct from his wages;
  - h. an amount due and payable by the employee under and in accordance with the terms of an agreement in writing, by way of repayment or part repayment of a loan of money made to him by the employer, not exceeding fifty percent of the wages payable to that employee after the deduction of all such other amounts as may be due from him under this section; and
  - i. such other amounts as the Minister may prescribe.
- b. A permanent injunction restraining the Respondent from recovering special school allowance paid to the

### **Claimant**

62. Having found that the recovery was legal the Claimant is not entitled to an order restraining the Respondent from recovering the said monies. The orders restraining the recovery is hereby lifted. The Respondent is at liberty to recover the balance thereof.
- c. The Respondent to refund to the Claimant all the money deducted as Special School Allowances since September 2016
63. This prayer fails having found that the recovery was authorised by law.
- d. The Respondent to pay the Claimant Special School Allowances withheld since the month of October, 2016 when the Respondent stopped paying
64. Similarly, this prayer fails as the Claimant does not meet the minimum requirements for eligibility for payment of Special School Allowance.
- e. An order that the costs of this suit be awarded to the Claimant with interest thereon from the date of filing the claim.
65. Having not succeeded in his claim, the Claimant is not entitled to costs.

### **Whether the Counter Claim is merited**

66. This Court finds merit in the counter claim and allows it in terms of the reliefs sought therein.
67. In conclusion, the Court makes the following orders:
- i. The claim herein is dismissed with no orders as to costs.
  - ii. Judgment be and is hereby entered in favour of the Respondent for the sum of Kshs.382,880.45 to be recovered from the Claimant being the balance of public funds erroneously drawn by the Claimant for the period 1st July 2006 to 1st July 2016.
  - iii. There shall be no orders for costs on the counter claim.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20TH DAY OF JULY 2022**

**MAUREEN ONYANGO**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the [Civil Procedure Rules](#), which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of [the Constitution](#) which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of [the Constitution](#) and the provisions of Section 1B of the [Civil Procedure Act](#) (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**

