



**Nyang'ongo & another v Cabinet Secretary, Ministry of Education & 6 others
(Petition E007 of 2022) [2022] KEELRC 13344 (KLR) (1 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13344 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E007 OF 2022
CN BAARI, J
DECEMBER 1, 2022**

BETWEEN

EVANS MORARA NYANG'ONGO 1ST PETITIONER

CHARLES MORARO MOGUNDE 2ND PETITIONER

AND

THE CABINET SECRETARY, MINISTRY OF EDUCATION .. 1ST RESPONDENT

**THE PRINCIPAL SECRETARY, MINISTRY OF EDUCATION, DEPARTMENT
OF VOCATIONAL & TECHNICAL TRAINING 2ND RESPONDENT**

THE ATTORNEY GENERAL 3RD RESPONDENT

**DIRECTOR, DIRECTORATE OF TECHNICAL EDUCATION, MINISTRY OF
EDUCATION 4TH RESPONDENT**

**ELICANAH M. MISIORI, DIRECTOR, HUMAN RESOURCES
MANAGEMENT 5TH RESPONDENT**

**THE CHAIRMAN, KISII NATIONAL POLYTECHNIC GOVERNING
COUNCIL 6TH RESPONDENT**

PRINCIPAL, KISII NATIONAL POLYTECHNIC 7TH RESPONDENT

RULING

1. Before court is the petitioner's motion dated September 29, 2022, brought pursuant to rule 21 (a) of the *Constitution (Protection of Rights and Fundamental Freedoms and Enforcement of n the Constitution Practice and Procedure Rules*, sections 1A, 1B and 3A of the *Civil Procedure Act*, and articles 50 and 159 (2)(d) of the *Constitution*. The applicants seek orders as follows:

- i. Spent



- ii. Spent
 - iii. That after hearing of this application, this honourable court does issue a conservatory order staying the transfer letters dated November 11, 2021, and promotion letter/directive dated July 6, 2022, prohibiting the respondents, their agents, employees, proxies and or such other persons acting on their behalf, from taking action directly or indirectly against the salaries, employment and entitlements of the petitioners/applicants and that if any portion of their salaries has been retained, the same be released forthwith.
 - iv. That an order of injunction do issue to the respondents from taking such administrative actions against the petitioners and all Teachers Service Commission teachers illegally transferred to State Department of Vocational and Technical Training and/or Public Service Commission, without regarding their active contracts with Teachers Service Commission that binds them with the *Teachers Service Commission Act*, policies, manuals and procedures.
 - v. That if any other orders sought herein has been implemented either fully or partially, the same be stayed until the petition is determined on the merits.
 - vi. The costs of the application abide the outcome of the petition.
2. The application is supported by grounds on the face of it and the affidavit of Evans Morara Nyang'ongo, the 1st petitioner/applicant. The crux of the motion being that the respondents have withdrawn/stopped the petitioners' pay without adhering to due process and that their properties are at risk of being attached by banking institutions where they had borrowed loans.
 3. The respondents opposed the motion vide a replying affidavit sworn by one Elcanah on October 21, 2022.
 4. Parties orally urged the application on October 24, 2022.
 5. Counsel for the petitioners told the court that the petitioners have demonstrated that they have a prima facie case premised on the existence of a contract of service between them and TSC and not with the Public Service Commission. Counsel further argued that a contract between parties cannot be varied by provision of statute from one of the parties.
 6. It is argued that the respondents are infringing on the petitioners contracts through a circular that has been declared unconstitutional by a court of law. Counsel further urged that the correspondence between the PSC and the employees of the TSC has no basis since their contracts have not been amended.
 7. It is the petitioners further argument that they stand to suffer loss that cannot be compensated by way of damages as their salaries have maliciously been stopped.
 8. The petitioners aver that the application herein meets the principles set out in *Giella v Cassman Brown & Co Ltd [1973] EA 358* and that the balance of convenience favours the petitioners.
 9. The petitioners' counsel finally argues that the respondents assertion that the stay orders they relied on were stayed by another court, is not true for reason that the orders submitted in evidence are not signed, and hence cannot be verified
 10. Counsel for the respondents argue that circular Nos 17/2018 and dated July 27, 2018, that the petitioners referred to, is the borne of contention in the case before the Court of Appeal, where the court has stayed Justice Rika's decision and thus this court is functus officio as it cannot hear the matter



a fresh. Counsel further argues that for reason of the stay granted by the Court of Appeal, the circulars remain in force.

11. The respondents further argue that the petitioners have absconded duty for over a year, and were thus under duty to stop their salaries in accordance with their Human Resource Policies as read with the disciplinary manual for public service.
12. The respondent through counsel further argue that the reasons given by the petitioners for failure to report to their duty stations are neither lawful nor justified.
13. It is the respondents' position that the orders sought by the petitioners are final in nature, while others such as conservatory orders are unknown to court. The respondents further aver that the affidavit filed in support of the petition are fatally defective for reason that the counsel who is said to have commissioned the same denied the signature appended thereon. They had reliance in the holding of Justice Njagi in *David Wamatatsi Omutotsi v The Retraining Officer, Mumias East Constituency & 2 others (2017) eKLR* where he held that an affidavit with a forged signature is not an affidavit envisaged under cap. 15 of the Laws of Kenya.

Determination

14. The issue for determination herein, is whether the petitioners are deserving of the orders sought. It is their case that they have established a prima facie case with chances of success, and further that for reason that their salaries have been stopped, they stand to suffer irreparably.
15. The court in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others Civil Appeal No 39 of 2002*, described a prima facie case as follows:

“In a civil case, it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has been infringed by the opposite party as to call for an explanation or rebuttal from the latter”
16. Further, the Court of Appeal in *Giella v Cassman Brown & Co Ltd [1973] EA 358* set out the legal principles that underpin the grant of injunctive reliefs, which include proof of a prima facie case with a probability of success, that an applicant stands to suffer irreparable injury, and finally, if the court is in doubt, then it can decide the application on a balance of convenience.
17. The petitioners seek conservatory orders against the effect(s) of a letter dated November 11, 2021. This letter is more than a year old. This clearly shows that if the letter has not been implemented to the petitioner's detriment in the last year, nothing shows it will be implemented before the determination of this petition.
18. Further, stoppage of salaries in circumstances such as those in this case, is in my view an enforcement mechanism available to an employer where employees fail to adhere to lawful instructions and/or administrative decisions. The petitioners have not denied absconding duty, and in this regard, an employer is under no obligation to pay for services not rendered.
19. The issue of the circulars subject of this matter was already determined by a court of concurrent jurisdiction and whose decision has been challenged in the court of appeal.
20. The applicants in their second prayer, seek a final order in the nature of an injunction, at an interlocutory stage, and which as drawn, will have a blanket effect on persons who are not parties to this application and petition.



21. The applicants seek to stop the respondents from taking administrative action against themselves and any other teacher in the service of both the TSC and the PSC who are not party to this petition. Administrative action is an employer's prerogative and which can only be stopped where the actor oversteps their mandate.
22. In my view, the petitioners/applicants have not demonstrated a prima facies case, nor have they proved that they stand to suffer loss that cannot be compensated by an award of damages.
23. In the final analysis, I find the applicants' motion devoid of merit and is for dismissal. Accordingly, the application is dismissed in its entirety with costs to the respondents.
24. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 1ST DAY OF DECEMBER, 2022.

CHRISTINE N BAARI

JUDGE

Appearance:

Ms Otunga h/b for Mr Obiero for the applicants/petitioners

Mr Moimbo Momanyi present for respondents

Ms Christine Omollo -C/A

