



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT NAIROBI
PETITION NUMBER 151 OF 2018

BETWEEN

TEACHERS SERVICE COMMISSION.....PETITIONER /1ST CONTEMNOR

VERSUS

KENYA NATIONAL UNION OF TEACHERS.....RESPONDENT

AND

THE SECRETARY /CHIEF EXECUTIVE

OFFICER, TEACHERS SERVICE COMMISSION.....2ND CONTEMNOR

THE CHAIRPERSON, TEACHERS SERVICE COMMISSION.....3RD CONTEMNOR

AND

CABINET SECRETARY FOR LABOUR AND

SOCIAL PROTECTION.....1ST INTERESTED PARTY

KENYA UNION OF POST PRIMARY TEACHERS.....2ND INTERESTED PARTY

KENYA UNION OF SPECIAL NEEDS

EDUCATION TEACHERS.....INTENDED 3RD INTERESTED PARTY

Rika J

Court Assistant: Emmanuel Kiprono.

Mr. Anyuor Advocate for the Petitioner.

Senior Counsel Mr. Muite appearing with Mr. Mbaluto, and Mr. Sigei, Advocates for the Respondent.

Ms. Akello, Advocate for the 2nd Interested Party.

Mr. James Torome, General Secretary for the Intended 3rd Interested Party.

RULING

1. Judgment in this Petition was delivered on 12th July 2019.

2. The Petition originally involved the Petitioner, the Respondent and the 1st Interested Party.
3. Parties appear not to agree on whether Judgment has been implemented as ordered. Applications for contempt of court have been filed.
4. The Judgment appears also, to have affected the collective rights and interests of other Unions, who were not in the original proceedings.
5. The Kenya Union of Post Primary Teachers [KUPPET] states, it has already been joined to the Petition post-judgment. The Respondent, Kenya National Union of Teachers [KNUT] disputes that KUPPET was ever made an Interested Party.
6. Kenya Union of Special Needs Education Teachers [KUSNET] has applied through a Notice of Motion dated 22nd January 2021, to be joined as 3rd Interested Party. The application was heard virtually, on 29th January 2021.
7. The Ruling herein seeks to determine if KUPPET has already been joined, or should be joined as a 2nd Interested Party; and second, if KUSNET should be joined as 3rd Interested Party.
8. The question of joinder comes against the background of an application made by KNUT, dated 20th January 2021, which seeks:
 - That the Court be pleased to cite and punish by issuance of order of committal to civil jail for 6 months, against the 2nd and 3rd Contemnors for disobeying the orders of this Court, of 12th July 2019, directing the stay of implementation of career progression guidelines, issued under circular No. 7 of 2018, TSC/ ADM/192A/VOL.1X/37 of 2nd May 2018.
 - That, pending hearing and determination of this application, an order be issued restraining, and staying, any implementation of the career progression guidelines issued under circular no 7 of 2nd May 2018, and further, the 1st, 2nd and 3rd Contemnors by themselves, their agents and/or servants or employees be restrained from taking any action, on any applications, that may have been tendered by any candidates, through the 1st Contemnor's website, for positions advertised on the strength of the said circular, which applications were to be received on or before 13th January 2021.
 - Costs be borne by the Contemnors.
9. The Application by the intended 3rd Interested Party is based on the affidavit of General Secretary James Torome, sworn on 22nd January 2021. He explains that his Union is registered under the Labour Relations Act. The Union represents Teachers with special needs, and Teachers engaged in special needs education. It has about 9000 members, who are employed by the Petitioner.
10. The Petitioner advertised for filling of the positions of Deputy Principals, Senior Lecturers, Head Teachers, Senior Masters and Curriculum Support Officers. Members of the Intended 3rd Interested Party, were encouraged to apply.
11. The Judgment of the Court dated 12th July 2019, ordered that the Petitioner, will undertake teacher promotion in accordance with the relevant provisions of the Code of Regulation for Teachers, and the Scheme of Service, with respect to all Unionisable Teachers, eligible to join the Respondent Trade Union [KNUT].
12. The Intended 3rd Interested Party argues that the order above was specific to the Respondent, KNUT. Intended 3rd Interested Party's members, are not eligible members of the Respondent, KNUT. The Petitioner was at liberty to engage members of the Intended 3rd Interested Party. The orders sought by KNUT, in its application for contempt, has the potential to lock out members of the Intended 3rd Interested Party from the promotions, which have been advertised by the Petitioner. The Intended 3rd Interested Party prays to be added to the Petition post-judgment, to protect the rights and interest of its members.
13. The Respondent is opposed to the application for joinder of the Intended 3rd Interested Party, and as observed from the outset, disputes that the 2nd Interested Party was ever added to the proceedings.
14. It is submitted for the Respondent, that Judgment was delivered on 12th July 2019. The Intended 3rd Interested Party has waited until the 11th hour to make its application. The Petition was filed way back in 2018. Joinder should have been sought before Judgment. The Petition is currently at the execution stage. It is between the Petitioner and the Respondent.
15. The Respondent further submits that the Court directed the Petitioner and the Respondent, to engage at their own level, in dealing with the application for contempt. KUPPET was not joined to the proceedings. Joinder has a reason. It is to assist the Court, in fully resolving all the issues placed before it. It can only be made before Judgment. None of the Intended/ Interested Parties have asked for review of Judgment. They have not asked for setting aside of Judgment. What happens after the Court has allowed joinder? The subject matter is already spent. The Intended 3rd Interested Party does not have a Recognition Agreement with the Petitioner. KUPPET did not prosecute its application for joinder. Both Intended /Interested Parties are guilty of laches. They are merely seeking to delay the Respondent's application for contempt. Application for contempt is personal. The Intended/ Interested Parties have no business, filing reply to that application. The issues between the principal Parties were determined fully. Proceedings should not be re-opened. Execution of the Judgment has not been stayed.
16. The Petitioner does not oppose the application for joinder of the Intended/Interested Parties. It is submitted that the Respondent has sneaked prayer 2 in its application for contempt, seeking to stop all teacher promotions, which would affect members of the Intended/Interested Parties. The Intended/Interested Parties seek to protect the interests of their members.
17. KUPPET does not oppose the application by the Intended 3rd Interested Party. It also insists that it has already been allowed to join the

proceedings, and should not be taken back, to argue its application for joinder.

The Court Finds: -

18. The Court has not been able to trace orders for Joinder of the 2nd Interested Party. The typed proceedings run up to 30th January 2020. KUPPET was still referred to, as Intended 2nd Interested Party on this date. There is no order seen by this Court, joining KUPPET as a 2nd Interested Party.

19. The issue in the view of the Court is whether KUPPET and KUSNET should be made Interested Parties, after Judgment was delivered on 12th July 2019?

20. Joinder of parties can be done at any stage of the proceedings. It may be denied where it leads to practical problems in handling an existing cause of action; is unnecessary; or will just occasion delay and costs to the Parties.

21. In Supreme Court of Kenya decision, *Communication Commission of Kenya & 4 Others v. Royal Media Services Limited & 7 Others [2014] e-KLR*, it was held: -

“ An Interested Party is one who has a stake in the proceedings, though he was not a party to the cause ab initio. He or she is a one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated, unless he himself or she herself, appears in the proceedings and champions his or her cause.”

22. The Supreme Court held further that a party could be joined for reasons that: -

- ***His presence will result in complete settlement of all the questions involved in the proceedings.***
- ***It is necessary to provide protection for the rights of a party who would otherwise be adversely affected in law.***
- ***It is necessary to prevent likely proliferation of litigation.***

23. In *JMK v. MWM & Another [2015] e-KLR*, the Court of Appeal explained that, ***“ we would agree that Order 1 Rule 10 [2] of the Civil Procedure Rules, contemplate an application for joinder of parties where proceedings are still pending before the Court...the Court of Appeal of Tanzania, in Tang Gas Distributors Limited v. Said & Others [2014] E.A. 448, held that the Court has power to add a party to proceedings, at any stage. A party can be joined even without applying. Joinder may be done either before, or during trial. It can be done after judgment. It can be done even at the appellate stage.”***

24. Rule 7 [1] of the Constitution of Kenya [Protection of Rights and Fundamental Freedoms] Practice and Procedure Rules 2013, under which the Court understands the Petition herein to have been originated, allows a person, with the leave of the Court, to orally or in writing, apply to join proceedings as an Interested Party. Under Rule 7 [2], the Court may on its own motion, join any Interested Party to the proceedings before it.

25. The Court agrees with the Respondent, that ordinarily, joinder of Interested Parties should take place before or during trial. Courts have an obligation to hear and determine all issues placed them, and litigation, must come to an end. The doctrine of finality is important to the effectiveness and efficiency of the judicial system.

26. However, as shown in the decisions of Superior Courts above, it could be necessary to add Interested Parties post-judgment, that is to say after Judgment has been delivered or execution is underway, or even at the appellate stage. In interpreting or executing a Judgment, a party may affect the rights and interests of non-parties.

27. In the instant Petition, the 2nd and 3rd Intended /Interested Parties have shown that the prayer 2 in the Respondent’s application for contempt, would affect adversely, the interest of their members. It is the Respondent who appears to have roped in the Interested Parties, by seeking after Judgment, to have implementation of circular No. 7 of 2nd May 2018 stayed. This a substantive prayer, going to the root of the Judgment on record, and with the potential of affecting rights and interest of Unions which were not in the original litigation. It is the interpretation by the Respondent, of the Judgment on record, which appears to impinge on Intended/ Interest Parties’ collective rights and interests, that compels their joinder post-judgment. The Court does not think that the Intended/ Interested Parties, would be seeking joinder, if there was a common understanding of the Judgment on record, and if the application dated 8th January 2021 filed by the Respondent, was confined to the prayer seeking to punish the Contemnors. The Intended/Interested Parties should be heard on the circular of 2nd May 2018. The Court is not able to tell whether the Intended/Interested Parties have a problem with the Judgment of 12th July 2019. They just seem to understand that Judgment differently from the Respondent. The Court cannot require of them to invoke review jurisdiction, rather than joinder post-judgment. They appear to have a problem with a specific order sought by the Respondent in the application for contempt. The submission by the Respondent that the Intended 3rd Interested Party has approached the Court irregularly or belatedly, is countered by the fact that the Intended 3rd Interested Party, has approached the Court mainly in reaction to the application by the Respondent filed on 8th January 2021. Its members would be shut out from career progression, if the Court barred them from applying for the jobs which have been advertised by the Petitioner. Their members are not potential members of the Respondent. It is important to hear the Interested Parties before an order staying implementation of the circular of 2nd May 2018, can be given. They can only be heard by allowing joinder.

IT IS ORDERED: -

a. KUPPET and KUSNET are joined to the Petition as 2nd and 3rd Interested Parties.

b. Hearing of the application for contempt to proceed with the participation of the Interested Parties.

c. Costs in the cause.

Dated and delivered at Nairobi this 19th day of February 2021.

James Rika

JUDGE