



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT UASIN GISHU

COURT NAME: ELDORET LAW COURT

CASE NUMBER: ELRCPET/12/2020

CITATION: PATRICK WANYONYI KHAEMBA

VS

TEACHERS SERVICE COMMISSION(TSC), FRANCIS TANUI AND OTHERS

RULING

1. The respondents herein by a Notice of Preliminary Objection dated 28th August, 2020 objected to the Petition herein on the main grounds that pursuant to section 7 of the Civil Procedure Act, the Court lacked jurisdiction to entertain, interrogate and determine the petition as the same was res judicata, the substratum thereof having been filed, heard and determined by a Court of competent jurisdiction. Further that the the respondent objected that the issues of law and fact raised in the petition were substantively canvassed by the same parties in Kisumu ELRC Petition No. 23 of 2015: Patrice Khaemba Wanyonyi vs. TSC & Others and Kisumu ELRC Petition 30 of 2017: Patrick Khaemba Wanyonyi vs TSC & Others. According to Counsel, the Petition was therefore bad in law, frivolous and amounted to gross abuse of the court process.

2. The doctrine of res judicata as stated in section 7 of the Civil Procedure Act has been explained in a number of decided cases. A citation of one of the them would suffice. In the case of The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR), the Court of Appeal held that:

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a) The suit or issue was directly and substantially in issue in the former suit.
- b) That former suit was between the same parties or parties under whom they or any of them claim.
- c) Those parties were litigating under the same title.
- d) The issue was heard and finally determined in the former suit.
- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

3. The Court further stated that:

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for

swift, sure and certain justice.”

4. Kisumu ELRC Petition No. 23 of 2015 filed on 9th October, 2015 was between the same parties as the current petition before this Court. In the former Petition, the Petitioner sought several repetitive orders including:

a) A declaration that the 2nd Respondent and 3rd Respondent’s failure to reveal to the their witnesses, and particulars of evidence they had against him before the hearing of the disciplinary case on 29/7/2015 was a breach of his right to fair administrative action under article 47 of the Constitution.

b) A declaration that the 2nd and 3rd respondent did not comply with the law and regulations concerning the hearing the disciplinary case on 29/7/2015 as a consequence of which the 2nd and 3rd respondent fell into error and violated /infringed on the petitioner’s right to a fair hearing envisaged under article 47.

c) A declaration that the 1st respondent as a constitutional commission was not subject to the control or direction of the Schools Board of Management or any of the Ministry of Education, Science and Technology departments or Committees established under the Basic Education Regulations, 2015 in the lawful discharge of its constitutional mandate under article 237 of the Constitution and therefore the letter dated 3/8/2015 purporting to direct the 1st respondent to investigate, consider and determine the allegations made against the petitioner unconstitutional, hence null and void.

d) An order of certiorari issued bringing into the honourable court for purposes of quashing, the letter of interdiction dated 3/8/2015 presented to the 1st respondent by the 2nd and 3rd respondent seeking to remove the petitioner’s name from the Register of Teachers.

5. The present petition before the Court filed on 29th July, 2020 sought orders among others that:

a) an order do issue declaring that the particulars of the impugned paragraph numbered 2 on page 2 of the TSC/CIRCULAR NO:3/2010 dated 29th April, 2010 pursuant to which the petitioner was interdicted and dismissed from teaching service were impermissibly vague and overbroad, offending article 24(1) as they lacked the qualitative requirement of law and were not demonstrably reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom and therefore all consequential decisions and measures made arising therefrom were null and void for any purposes.

b) A declaration be issued that the 1st respondent’s decision contained in its letter dated 14/9/2016 to dismiss the petitioner from employment was unfair labour practice, unconstitutional and not for any just and fair cause envisaged by the Employment Act, 2007 and therefore all consequential measures made arising therefrom are null and void.

c) A declaration that the petitioner was not guilty of any immoral behavior for the reason that prohibition of sending students to his house did not constitute an immoral behavior envisaged by circular No. 3 of 2010 from the 1st respondent and section 34 of the Teachers Service Act, No, 20 of 2012.

d) A declaration that the petitioner was substantively and procedurally unfairly dismissed from teaching service by the 1st respondent on 29/8/2016 and that the 1st respondent terminated the petitioner’s employment in breach of the terms of his contract of employment.

6. The Court has reviewed and considered the two petitions, that is to say petition 23 and the one before the Court. They both concern allegations of immoral or unprofessional conduct by the petitioner. Briefly, the allegations against the petitioner was that the 3rd respondent received information on 21st July, 2015 on the 2nd respondent’s students by the name Faith who had been confirmed pregnant and released to go home had been staying in the petitioner’s residential house. The 3rd respondent also received information that the petitioner had sent two female students to deliver books to faith in his house. According to the 3rd respondent, these acts were a fundamental breach of the provisions of the Code of Regulations for Teachers. According to the 3rd Respondent, a preliminary investigation was launched which involved calling of ten witnesses. The 3rd respondent thereafter compiled a report and handed over the matter to the 2nd respondent’s Board of Management (BOM) for deliberations and further action. The BOM set a meeting for 29th July, 2015 and invited the petitioner, Faith and all other relevant persons in the matter. The 3rd respondent served the petitioner with the letter of invitation but according to him the petitioner refused to receive the same. The petitioner attended the meeting and admitted sending the students and having faith in his house. At the conclusion of the deliberations, the BOM interdicted that petitioner and forwarded the matter to the 1st respondent for further action.

7. Lady Justice Maureen Onyango who heard Kisumu ELRC Pet. No. 23 of 2015 considered the above facts both from the petitioner’s and respondents’ perspective and came to the conclusion that the allegations and challenges to the interdiction by the petitioner lacked merit and proceeded to dismiss the petition.

8. The Court as stated before, has gone through the two petitions. The present petition (Eldoret Pet. 12 of 2020), from paragraphs 8 through to 29 contains factual disputations and complaints about the reasons for which the petitioner was interdicted by 3rd respondent and eventually dismissed from Teaching Service by the 1st respondent. Whereas the petitioner in the present petition seeks orders to annul the decision by the 1st respondent to dismiss him from teaching service on 14th September, 2016, no new allegations have been raised against the 1st respondent challenging the reasons and procedure followed by the 1st respondent prior to the termination of his service. The petitioner relies on the selfsame facts that were considered by Lady Justice Maureen Onyango in Kisumu ELRC Pet. 23 of 2015 and at the conclusion of which the learned Judge found the petition without merit and disallowed the same.

9. The petitioner was dismissed on 14th September, 2016 after filing the Kisumu petition on 9th October, 2015. The Judgment therein was delivered on 16th July, 2019. It is not clear why the petitioner did not move the Court for a stay of any further disciplinary proceedings against him pending the outcome of the petition or better still seek leave to amend his petition to include the fact that his interdiction had

been escalated to a termination of service by the respondent and seek appropriate orders. The Court is alive to the fact that the petitioner was a pro se litigant but going by the number of suits he has engaged his employer in, he ought have known this.

10. The foregoing having been said, the res judicata rule serves the purpose of bringing finality to litigation. It is designed to protect against time and resource wasting suits. It serves as a protection to defendants who in its absence would face multiplicity of suits by claimants who hope in filing several suits against the same parties, on same facts, they would succeed in getting a favourable outcome.

11. According to the res judicata rule, the matter in issue does not refer to any particular matter to the exclusion of others in dispute between the parties but to the entire subject matter in controversy. The issue of termination of the petitioner's service was so interconnected with his earlier interdiction to render the same incapable of being litigated as a new and separate suit without violating the res judicata rule. To this extent the Court upholds the preliminary objection and hereby orders struck out with costs, the present petition.

DATED AT ELDORET THIS 19TH DAY OF MAY, 2021

DELIVERED AT ELDORET THIS 19TH DAY OF MAY, 2021

12. It is so ordered.

SIGNED BY: HON. JUSTICE J. N. ABUODHA

THE JUDICIARY OF KENYA.

ELDORET ELRC

EMPLOYMENT AND LABOUR RELATIONS COURT

DATE: 2021-05-20 09:05:35+03