



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 224 OF 2019

HON. WILSON SOSSION.....1st PETITIONER

KENYA NATIONAL UNION OF

TEACHERS.....2nd PETITIONER

VERSUS

NANCY NJERI MACHARIA.....1st RESPONDENT

TEACHERS SERVICE COMMISSION.....2nd RESPONDENT

JUDGMENT

1. Hon Wilson Sossion (Hon Sossion) was employed as a teacher around 1 September 1993 by the Teachers Service Commission (the Commission). In June 2001, the Hon Sossion was elected as Executive Secretary, Bomet Branch of the Kenya National Union of Teachers (KNUT).
2. With time, Hon Sossion was elected as Secretary-General of KNUT and was re-elected on 4 March 2016. In light of the duties of the office, the Commission granted Hon Sossion leave of absence from teaching duties.
3. After the 2017 general elections, Hon Sossion was nominated to the National Assembly by the Orange Democratic Movement to represent the interest of workers. KNUT affirmed the nomination at its Annual Delegates Conference on or around 14 December 2017.
4. On or around 14 December 2017, the Commission issued a notice to Hon Sossion referenced *Notice of Termination from the Teaching Service*.
5. The reason given by the Commission for the Notice was stated to be the nomination and acceptance by Hon Sossion to serve as a member of the National Assembly.
6. The acceptance of the nomination, the Commission stated, was contrary to Regulation 187(2) of the Code of Regulations for Teachers, 2015, which required teachers to resign/retire from service upon opting to participate in political activities.
7. Hon Sossion was requested to reply to the Notice within 7-days, and he did respond on 9 January 2018.
8. On 17 January 2018, the Commission notified Hon Sossion of the termination of his services as a teacher and Regulation 187(1) & (2) of the Code of Conduct for Teachers as read with section 16(2) of the Public Officers Ethics Act and clause 16 of the Code of Conduct and Ethics for Teachers, 2015 was cited.
9. Hon Sossion was aggrieved, and he commenced legal action against the Commission in Nairobi Petition No. 12 of 2018, *Hon Wilson Sossion v Teachers Service Commission*.
10. Amongst the pleas in the Petition were that:

(m) The decision of 17 January 2018 to terminate the Petitioner on account of the alleged breach of regulation without subjecting him to procedurally and legally required processes has been prompted by malice, ill-will, bad faith, and it is a gross abuse of the office of the Secretary/Chief Executive Officer to the TSC and the powers under the Teachers Service Commission Act, Chapter 212 of the Laws of Kenya.

(n) The decision to terminate the Petitioner is therefore unfair, inappropriate, inapplicable and illegal for the foregoing and following reasons:-

....

(g) The offence allegedly committed by the Petitioner warranting the drastic action by the Commission is not one among those provided for under regulation 141 and 187 of the CORT.

11. In a judgment delivered on 26 July 2019, the Court found the Petition without merit and dismissed it.

12. Hon Sossion was aggrieved, and he preferred an Appeal to the Court of Appeal.

13. At around the same time, there was related litigation questioning whether Hon Sossion could serve in the dual roles of a nominated member of the National Assembly and Secretary-General of KNUT (see Nairobi Petition No. 83 of 2017, *Patrick Njuguna v Wilson Sossion & Ors* (consolidated with Petition No. 28 of 2018, *Kenneth N. Wahwai Bande & Ors v Wilson Sossion & Ar*).

14. In a judgment delivered on 27 September 2019, the Court found no conflict or unlawfulness/unconstitutionality in Hon Sossion holding the position of Secretary-General and serving as a nominated member of the National Assembly.

15. On 1 November 2019, the Commission caused to be issued a gazette notice removing Hon Sossion from the register of teachers pursuant to section 30 of the Teachers Service Commission Act.

16. The Gazette Notice prompted Hon Sossion to move the Court on 20 November 2019, alleging that the decision to remove him from the register of teachers was made in bad faith, was unfair, unjust and unreasonable and meant to kill the education sector in the country.

17. Hon Sossion sought the following orders:

(a) A declaration that Regulation 187 of the Code of Regulations for Teachers 2015 CORT is null and void to the extent of its inconsistency with Article 38 of the Constitution of Kenya.

(b) A declaration that Regulation 16 of the Code of Conduct and Ethics for Teachers is null and void to the extent of its inconsistency with Article 38 of the Constitution of Kenya.

(c) A declaration that section 16(2) of the Public Officers Ethics Act, 2003 is null and void to the extent of its inconsistency with Article 38 of the Constitution of Kenya.

(d) A finding that Gazette Notice Number 10382 of 2019 was published in bad faith, aimed at defeating ongoing litigation and the resultant effect of denying the Petitioner's their rights under Article 41 of the Constitution.

(e) A prohibitory order to restrain the 1st and 2nd Respondents from implementing and/or in any manner whatsoever, Gazette Notice Number 10382 of 2019.

(f) An order quashing Gazette Notice Number 10382 of 2019.

(g) A prohibitory order to restrain the 1st and 2nd Respondents from removing the 1st Petitioner from the register of teachers.

(h) Costs of the Petition.

(i) Such other relief and/or further relief as the Honourable Court may deem fit to grant.

18. Filed together with the Petition was a Motion under a certificate of urgency seeking interim conservatory orders.

19. When the application was placed before the Court on 21 November 2019, it directed that it be served for *inter- partes* hearing/directions on 25 November 2019.

20. On the said date, the Court gave comprehensive instructions requiring the parties to file and exchange affidavits and submissions on the Petition. The Court also granted an interim interdict.

21. Although the Commission filed a replying affidavit on 6 December 2019, the parties did not comply with other directives within the agreed timelines, and the Court extended the timelines on 29 January 2020.

22. On 27 February 2020, Hon Sossion filed a Motion seeking an order enjoining the Honourable Attorney General into the proceedings. The Commission filed grounds of opposition to the application on 4 March 2020.

23. In an *ex-tempore* Ruling on the same day, the Court declined to allow the application and reserved the giving of reasons.

24. The reasons that prompted the Court to decline to allow the joinder of the Honourable Attorney General were that Hon Sossion knew from the outset the type of case he intended to prosecute, and he should therefore have joined the Honourable Attorney General right from the start of the proceedings.

25. Secondly, by the time the application was being made, the Court had already given directions on the filing and exchange of submissions.

26. Lastly, in the view of the Court, the dispute presented by Hon Sossion and KNUT in this Petition revolved around individual/private rights and interests.

27. Eventually, Hon Sossion and KNUT filed their submissions on 20 February 2020, while the Commission filed its submissions on 28 February 2020.

28. The Petitioners identified the Issues for determination as:

(a) Whether the proceedings herein are *res judicata* given the proceedings and Judgment in ELRC Petition No. 12 of 2018, *Wilson Sossion v Teachers Service Commission*?

(b) Whether Regulation 187 of the Code of Regulations for Teachers 2015, section 16 of the Code of Conduct and Ethics for Teachers and section 16(2) of the Public Officers Ethics Act, 2003 are inconsistent with Articles 38 of the Constitution of Kenya and therefore null and void?

(c) Whether the Respondents acted in bad faith in moving to deregister the 1st Petitioner?

29. On its part, the Commission raised the following questions:

(a) Whether this Honourable Court has the requisite jurisdiction to entertain this Petition.

(b) Whether Regulation 187 of the Code of Regulation for Teachers (CORT), Regulation 16 of the Code of Conduct and Ethics for Teachers and section 16(2) of the Public Officers Ethics Act, 2003 are unconstitutional.

(c) Whether the publication of Gazette Notice No. 10382 of 2019 was in bad faith and in violation of the 1st Petitioner's right to fair labour practices envisaged in Article 41 of the Constitution.

Jurisdiction: *sub judice* and issue estoppel

30. Submitting that the issues advanced in the instant Petition were *res judicata*, the Commission asserted that the question of the validity of the termination of Hon Sossion's services and removal from the register of teachers was the subject of litigation and Judgment in Nairobi Petition No. 12 of 2018, *Wilson Sossion v Teachers Service Commission* wherein the Court found at paragraph 24 that there existed valid reasons for the termination of the Petitioner's contract as a teacher.

31. In the view of the Commission, and drawing from the Court of Appeal decision in *Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd* (2017) eKLR, Hon Sossion was asking the Court to sit on appeal of its own decision.

32. According to the Commission, the Petitioners were bringing up issues which they could not by dint of sections 6 and 7 of the Civil Procedure Act.

33. On the other hand, the Petitioners contended that *res judicata* and issue estoppel did not arise because they were challenging the constitutionality of Regulation 187 of the Code of Regulations for Teachers, section 16 of the Code of Conduct and Ethics for Teachers and section 16(2) of the Public Officers Ethics Act, which was not under consideration in Nairobi Petition No. 12 of 2018.

34. Taking umbrage in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Ors* (2017) eKLR, the Petitioners submitted that the elements to invoke and find *res judicata* had not been met.

35. Further, the Petitioners asserted that the parties in the 2 Petitions were different.

36. The Court has carefully examined the Petition herein.

37. It was stealthily drafted in such a way that if the Court did not keep a keen eye, a revisit of issues that had already been the subject of litigation and determination would most likely emerge as decisive.

38. The question of the termination of Hon Sossion's contract as a teacher was the subject of Nairobi Petition No. 12 of 2018. The Commission had in the Notice of termination of the contract expressly invoked Regulation 187 of the Code of Regulations for Teachers.

39. In said Petition No. 12 of 2018, Hon Sossion brought into focus the lawfulness of the decision to terminate his contract for alleged violation of Regulation 187, Clause 16 of the Code of Regulations for Teachers and section 16 of the Public Officers Ethics Act. The averments are well captured in paragraph 1(g) & (h) of the Judgment.

40. In the view of this Court, Hon Sossion should have developed the arguments on the unconstitutionality of the 3 statutory provisos in the Petition challenging the termination of his contract, and if he so failed to do so to his satisfaction, the Petitioners cannot attempt to develop such arguments in a cause of action which is distinctly different.

41. The dispute in respect to the constitutionality of Regulation 187, Clause 16 of the Code of Regulations for Teachers and section 16 of the Public Officers Ethics Act, the Court finds, are caught up by the doctrine of *issue estoppel* and/or *res judicata*.

De-registration as a teacher and fair labour practices

42. The gravamen of the present Petition, in the view of the Court, was the decision by the Commission to deregister Hon Sossion as a teacher, a decision which is distinct from the termination of his services as a teacher.

43. The Petitioners did not suggest either in the pleadings and/or submissions that the section was invalid or inconsistent with the supreme law. Their concern was that the Commission had exercised the power to deregister Hon Sossion in bad faith.

44. And in driving the allegation of bad faith, Hon Sossion deposed that the real motive for the action of the Commission was to kill trade unionism in the education sector.

45. According to the Petitioners, the decision was meant to defeat pending legal proceedings before the Court of Appeal, where they had applied for an injunction.

46. Further, the Petitioners maintained, the Commission had exhibited bad faith by failing to take cognisance of the Judgment of the Court in Nairobi Petition No. 83 of 2017, *Patrick Njuguna v Wilson Sossion & Ors* (consolidated with Petition No. 28 of 2018, *Kenneth N. Wahwai Bande & Ors v Wilson Sossion & Ar*) wherein the Court had held that there was no conflict of interest in Hon Sossion serving in the dual roles of a nominated member of the National Assembly and Secretary-General of KNUT.

47. In their submissions, the Petitioners urged that it was a matter of public notoriety that Hon Sossion had been a *thorn in the Commission's flesh* and the decision to remove him from the register of teachers was an act of dealing with a mortal enemy and a steadfast agitator for better terms and conditions of service for the teachers.

48. In its defence, the Commission contended that it served Hon Sossion with a Notice of Removal from the register of teachers dated 29 July 2019, but he declined to respond within 90 days.

49. The Chief Executive Officer of the Commission deposed in her replying affidavit that the process for the removal of Hon Sossion from the register of teachers was anchored in law and that in exercising the powers, she was not motivated by bad faith or any personal interest.

50. The Notice served upon Hon Sossion set out 2 broad allegations firstly, breach of clause (f) of the third schedule to the Teachers Service Commission Act as read with regulation 141(f) of the Code of Regulations for Teachers (causing paralysis of competency-based curriculum training in some 11 named counties) and secondly, breach of clause (f) of the third schedule as read with section 16 of the Public Officers Ethics Act and Regulation 141(f) of the Code of Regulations for Teachers (accepting party nomination to the National Assembly).

51. The *de-registration* of a teacher is governed by section 30 of the Teachers Service Commission Act. The Commission exercises the power as a regulatory authority and not as an employer.

52. Hon Sossion was given a notice of intended de-registration and requested to respond.

53. Hon Sossion did not reply to the Notice from the Commission. He snubbed an opportunity to make representations as to why his name should not be removed from the register of teachers.

54. Hon Sossion did not directly challenge the process leading to the removal of his name from the register of teachers.

55. He appeared to argue that the reasons were not valid and or fair, and he relied on the decisions of this Court.

56. It is not in dispute that this Court (differently constituted) had in Nairobi Petition No. 83 of 2017, *Patrick Njuguna v Wilson Sossion & Ors* (consolidated with Petition No. 28 of 2018, *Kenneth N. Wahwai Bande & Ors v Wilson Sossion & Ar*) held that Hon Sossion could lawfully hold the office of Secretary-General of KNUT and also serve as a nominated member of the National Assembly.

57. The Judgment was delivered on 27 September 2019. The Commission was not a party to the litigation. The Commission issued its Notice to the Hon Sossion on 29 July 2019, well before the Judgment.

58. Hon Sossion and KNUT did not show that they brought the Judgment to the attention of the Commission within the window of 90 days Hon Sossion was given to respond, or at all.

59. The Commission can therefore not be blamed for not taking into consideration the holdings in that Judgment.

60. The Petitioners also alleged bad faith on the part of the Respondents. It was incumbent upon the Petitioners to prove bad faith on the part of the Respondents.

