



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NUMBER 151 OF 2018**

**BETWEEN**

**TEACHERS SERVICE COMMISSION .....PETITIONER /1<sup>ST</sup> CONTEMNOR**

**VERSUS**

**KENYA NATIONAL UNION OF TEACHERS.....RESPONDENT**

**AND**

**THE SECRETARY/ CHIEF EXECUTIVE OFFICER,**

**TEACHERS SERVICE COMMISSION.....2<sup>ND</sup> CONTEMNOR**

**THE CHAIRPERSON .....3<sup>RD</sup> CONTEMNOR**

**AND**

**CABINET SECRETARY FOR LABOUR**

**AND SOCIAL PROTECTION.....1<sup>ST</sup> INTERESTED PARTY**

**KENYA UNION OF POST PRIMARY TEACHERS..2<sup>ND</sup> INTERESTED PARTY**

**KENYA UNION OF SPECIAL NEEDS**

**EDUCATION TEACHERS .....3<sup>RD</sup> INTERESTED PARTY**

**RULING**

1. The Applicant, who is the Respondent in the Petition, seeks through the Application dated 20<sup>th</sup> January 2021, to have the 2<sup>nd</sup> and 3<sup>rd</sup> Contemnors, cited for contempt, and jailed for 6 months, for disobeying the orders of this Court of 12<sup>th</sup> July 2019, directing stay of Career Progression Guidelines [CPG], issued under Circular Number 7 of 2018, on 2<sup>nd</sup> May 2018.
2. The Applicant seeks also, to have the Contemnors restrained from acting on any job applications tendered by any candidate through the Petitioner’s website, for jobs advertised based on CPG. This second prayer in the Application, prompted the joinder post-judgment, of the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties.
3. The Application is anchored on the Affidavit of the Applicant’s Secretary General Wilson Sossion, sworn on 27<sup>th</sup> January 2021.
4. The grounds are that: on 12<sup>th</sup> July 2019 the Court gave a Judgment staying implementation of CPG issued on 2<sup>nd</sup> May 2018; the orders are still in force; the 1<sup>st</sup> Contemnor has defiantly continued to place advertisements and circulars for implementation of CPG; the Contemnors have utterly failed and intentionally ignored the orders of the Court requiring stay of implementation of CPG; orders are not made in vain; the dignity of the Court is under assault from the Contemnors; there is no other available avenue for enforcement; and it is in the interest of

justice that the Court intervenes and punishes the Contemnors.

5. The Petitioner and the alleged Contemnors rely on the Affidavit sworn by Dr. Nancy Macharia, the Secretary/ Chief Executive Officer of the Petitioner, sworn on 21<sup>st</sup> January 2021.

6. Her position is that: the Petitioner has Constitutional and Legal mandate to regulate the teaching service; she had not been served personally with the Application; the office of Chairperson was vacant at the time the Application was filed in Court; the Judgment of 12<sup>th</sup> July 2019 was that the Petitioner would undertake teacher promotion in accordance with the relevant provisions of the CORT and the Schemes of Service with respect to all Unionisable Teachers eligible to join the Respondent Trade Union; Dr. Macharia instructed Petitioner's Director of Human Resources and Human Development to halt implementation of CPG pending conclusion of the matter; that after Judgment, Dr. Macharia froze application of CPG to Teachers eligible to join the Respondent; she directed promotion of Teachers eligible to join the Respondent, to be done in accordance with the Schemes of Service and CORT; and directed that CPG is not applicable to members of the Respondent, and Teachers eligible to join the Respondent.

7. Dr. Macharia further states that the Court did not quash CPG. The Court declined the Respondent's position that CPG should not apply to all Teachers. The other Trade Unions, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties herein were not affected by the orders of the Court, and have always demanded that CPG applies to their Members. Implementation of CPG with regard to the Interested Parties cannot amount to contempt of Court. The Application is based on wrong, skewed and selfish interpretation of the Judgment, and is repugnant to public interest which requires that Schools are administered by competent Administrators.

8. The 1<sup>st</sup> Interested Party did not participate in the Application.

9. The 2<sup>nd</sup> Interested Party filed Grounds of Opposition dated 21<sup>st</sup> January 2021. It associates fully with the position taken by the Petitioner. It has no objection to CPG. Its CBA with the Petitioner is founded on the CPG. Its members have already gained promotion based on CPG. To grant the Application would be injurious to 2<sup>nd</sup> Interested Party's membership. Some members have already been promoted based on CPG. They had stagnated, but have now progressed their careers, under the CPG. They are entitled to fair labour rights under the Constitution of Kenya which CPG extends to them. Granting the Application, from the 2<sup>nd</sup> Interested Party's point of view, would be contrary Section 10[5] of the Employment Act, and amount to discrimination under Article 27 of the Constitution and Section 5 of the Employment Act.

10. Through its General Secretary James Torome, the 3<sup>rd</sup> Interested Party adopts the same approach as taken by the Petitioner and the 2<sup>nd</sup> Interested Party. The 3<sup>rd</sup> Interested Party offers trade union services to Teachers with special needs, as well as Teachers engaged in special needs education. It has a membership of about 9,000 such Teachers. The 3<sup>rd</sup> Interested Party advocates for job security of its membership. Its members were encouraged to apply for positions advertised by the Petitioner under the CPG. It submits that indeed, the Judgment of the Court on application of CPG, was specifically directed at the Respondent, not across the entire teaching profession.

11. The Application was heard virtually on 19<sup>th</sup> March 2021. Representatives for the respective Parties, repeated the arguments contained in the Affidavits and Grounds of Opposition, as summarized above.

12. The Applicant adds that transfer of elected officials was stopped by the Court in its Judgment. The Petitioner did not comply. There was no compliance on TPD modules. The Court agreed with the Applicant stating that Regulations must comply with the Statutory Instruments Act No. 23 of 2013. Parties agreed to consult further on this. The Petitioner did not engage in the intended consultation. The Petitioner chose to misinterpret the Judgment. The Judgment referred to the Respondent, as a representative of all Teachers. The Respondent is authorized by its constitution, to represent all those engaged as Teachers regularly. The Petitioner is in continuous contempt and has not demonstrated good faith. The Judgment was clear as daylight. The Petitioner continued to place advertisements for job vacancies, based on the CPG. It is true that the Contempt of Court Act was declared unconstitutional, but this does not have effect on the Application. The Application is to be dealt with as it would have been dealt with prior to the declaration of unconstitutionality. Dr. Nancy Macharia should be incarcerated for 2 years at Langáta Women's Prison, the Applicant submits.

13. The Petitioner adds that there is no Application specifically naming the Contemnors. There is no Application to commit Dr. Nancy Macharia to Langáta Women's Prison. This is a criminal trial, where the subject must be named, and given time to defend. There was no Chairman at the time the Application was presented. The Application is dead on arrival. There was no such order for stay of implementation of the CPG, as advanced by the Applicant. The Application amounts to retrial by trickery. No decree has been served upon the CEO. None is exhibited by the Applicant. The Applicant filed another Application for contempt, which it has not prosecuted. It is in abuse of the process. Terms of the Judgment must be clear and unambiguous. The Petitioner has interpreted the Judgment correctly. The Court knew there are Teachers, who are not members of the Respondent. They are not eligible members of the Respondent. The Respondent does not represent all Teachers. The job applications under CPG relate to Teachers who are not members of the Respondent. A Union represents its paid-up members. It cannot represent every Tom, Dick and Harry.

14. To succeed in an Application for contempt, the Applicant must show that there is a clear decision of the Court which has been disobeyed; the Contemnor must be shown to have had notice of the decision; service of the decision on the alleged Contemnor must be established; and the Contemnor must be shown to be wilfully in contempt. Proof of contempt has a very high standard which the Applicant has not attained. The issue about transfer of elected officials is not in the Application.

15. The 2<sup>nd</sup> Interested Party restates its Grounds of Opposition in its address before the Court. It adds that, only the Respondent has a problem with the CPG. All other Unions are contented.

**The Court Finds: -**

16. The declaration of unconstitutionality made with respect to the Contempt of Court Act, by the High Court, does not hinder the present Application.

17. The correct position on the law of contempt after the said declaration, is as submitted by Mr. Paul Muite SC. In the High Court decision, **Republic v Kajjado County & 2 others ex parte Kilimanjaro Safari Club Limited [2019] e-KLR**, it was explained that in dealing with contempt today, the Court must revert to the legal regime which governed contempt, prior to the declaration.

18. The High Court at Kajjado held, that the Court has a responsibility in maintenance of the rule of law, and there can be no gap in the law of contempt, hindering the Court from protecting the rule of law through the mechanism of contempt of court. Even in the absence of a means of enforcement of a remedy, the Court is within its right to adopt such a procedure, as would effectually give meaningful relief to the aggrieved Party.

19. The E&LRC cannot therefore fail to punish Contemnors because of a perceived lacuna in the law, after the Contempt of Court Act was declared unconstitutional. It must punish Contemnors anchored on its role as prescribed in Articles 159 and 162 of the Constitution, Sections 3, 12[3] [viii], 13 and 20 of the E&LRC Act, read with the English Law on committal for contempt under Rule 84.1 of the English Civil Procedure Rules, which deals with breach of Judgments, Orders or Undertakings, applicable by virtue of Section 5[1] of the Judicature Act.

20. The Courts must in particular be alert, in detecting and punishing Contemnors in Government Service. There is a trend, where State and Public Officers have drifted into a law unto themselves, and become hard of hearing judicial pronouncements made by the Courts.

21. In the well-known series of contempt decisions involving **Miguna v the Cabinet Secretary Ministry of Interior and Coordination**, it has been established that the Courts must not look the other way, while Public and State Officers ride roughshod over constitutionalism and the rule of law. The series of decisions culminated in **Court of Appeal of Kenya, Fred Matiang'i, the Cabinet Secretary Ministry of Interior and Coordination of National Government v. Miguna & others [2018] e-KLR**, where it was emphatically stated:

“ When Courts issue orders, they do not do so as suggestions or pleas, to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for a Party, be he high or low, weak or mighty, and quite regardless of standing in Society, to decide whether or not to obey, to choose which to obey and which to ignore, and to negotiate the manner of compliance.”

22. The Petitioner TSC, and its leadership represented by Dr. Nancy Macharia, are of course aware of the Judgment delivered by the Court on 12<sup>th</sup> July 2019. The TSC was Petitioner and it is absurd, for the Petitioner and its CEO, to advance the argument about lack of service of the Judgment and Decree. Was it not the Petitioner who moved the Court?

23. The issue is whether the Petitioner, its CEO and Chairman have disobeyed the orders given in the Judgment.

24. The contentious order [d] of the Judgment is worded as follows:

“ The Petitioner will undertake teacher promotion, in accordance with the relevant provisions of CORT and the Schemes of Service with respect to all Unionisable Teachers eligible to join the Respondent Trade Union; and Parties may, within the CBA and the Recognition Agreement, consider reviewing the prevailing Schemes of Service with view to bringing them into alignment with the prevailing CBA pay structure and related matters as will be necessary and without derogating from the provisions of the CORT on teacher promotion- as the Policy Circular of 2<sup>nd</sup> May 2018 on Career Progression Guidelines and purporting to abolish the prevailing three schemes of service, will not apply accordingly.”

25. The Respondent KNUT, holds the view that the order above, required the Petitioner TSC, to stay implementation of CPG issued under Circular of 2<sup>nd</sup> May 2018. The Petitioner has not done so, and is therefore in continuous contempt.

26. The Petitioner and the Interested Parties differ on this interpretation given by the Respondent. They hold that the order was directed at Teachers who are represented by, or eligible to be represented by the Respondent KNUT. The Petitioner is at liberty to promote Teachers who do not subscribe to KNUT in line with the CPG.

27. The Petitioner further argues from paragraph 15 to 18 of Dr. Macharia's Replying Affidavit, that it has complied fully with the Judgment, and lists specific actions taken, in compliance.

28. The Court does not think that the Respondent has shown clear acts or omissions by the alleged Contemnors, with respect to implementation of the Judgment, which would amount to contempt of court.

29. There is a fundamental difference in the understanding of order [d] of the Judgment by the Parties. The Respondent appears to suggest that order [d] applies to the teaching profession across board. The Petitioner and the Interested Parties think the order was directed at the Respondent KNUT.

30. There is always risk in a Judge of cognate jurisdiction, being placed in situation where he has to interpret the Judgment of his colleagues. This is why the law on review of Judgment, encourages Parties who are not clear, on the meaning of certain orders contained in a Judgment, to seek review and interpretation before the Trial Judge/ Court. Under the repealed Trade Disputes Act, there was a provision for what was called Interpretation of Judgment. Under the current E&LRC [Procedure] Rules 2016, Parties can seek review and interpretation under Rule 33 [c] – if the Judgment requires clarification. Rule 33 [d] primarily states that such Application shall be made to the Judge who made the order, or any other Judge if that Judge is not attached to the Court Station.

31. The Judge who made the decision is currently stationed at Mombasa. The Parties involved however are national entities, with membership and offices across the Country. To avoid recurrent and different interpretation of his Judgment, or to avoid a situation where another Judge gives a different interpretation to the Judgment from what was originally intended, this Court would encourage any other Applications, relating to the interpretation of the Judgment of 12<sup>th</sup> July 2019, are placed before the Trial Judge. The file can always be forwarded to the Trial Judge at his current station, or arrangement made for his sitting in Nairobi. The teaching profession would benefit from a binding interpretation of the Judgment on record by going back to where they started this litigation. Parties could also restrain themselves from making further interpretations to the Judgment, through other Applications before this Court, until an Appeal the Court understands was filed by the Petitioner at the Court of Appeal, is heard and determined. Judgments of the Court of Appeal also serve to correct or clarify the decisions of the Courts below.

32. For purposes of the current Application, the Court is of the view that the interpretation to the Judgment made by the Respondent KNUT, is incorrect.

33. Order [d] was not directed at the entire teaching profession, but at the actual and potential membership of the Respondent. The other Trade Unions have no problem with the CPG. They deem CPG to be beneficial to their memberships. These Guidelines, they argue, are in line with their CBAs. Why would anyone bar their implementation with regard to Parties who have embraced them?

34. The Court also is persuaded by the submissions of the Petitioner that there was no order, staying the implementation of the CPG. If such stay was issued, it would be limited to application of the CPG with respect to KNUT, the Respondent herein.

35. Mr. Sigei's submission on the Respondent's area of representation is flawed. Counsel submits that:

“ Judgment stated KNUT is a Union representing all Teachers.”

36. The Respondent does not represent all Teachers. Its constitution, if it does state that it represents all Teachers, is outdated and in urgent need of amendment. If the Court stated that KNUT represents all Teachers, it was a wrong statement, in need of a revisit. It must be acknowledged that the teaching profession has expanded. Union representation is no longer through a monolith. It is not the same teaching profession as of 4<sup>th</sup> December 1957, when KNUT was founded as a single Trade Union serving the entire teaching profession. The 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties have since been registered, representing specific classes of the teaching profession. The Respondent does not speak for every Teacher.

37. The other Unions have their own Recognition and Collective Bargaining structures with the Petitioner. They have their own voices. The Respondent has no role in determining upon what terms and conditions of service, the Petitioner engages teachers represented by the other Unions. If they have accepted CPG and feel it is mutually serving them well, not the Court, and not the Respondent, should meddle in the arrangement between the Petitioner and the other Trade Unions.

38. The Court also agrees, that the Respondent, in arguing its Application, went outside the four corners of the Application, bringing in issues about transfer of elected Union Officials and Teaching Modules. This was not in the Application for contempt placed before this Court, subject matter of today's ruling.

39. Lastly, the Application is defective for lack of specificity. There was no pleading that Dr. Nancy Macharia is imprisoned for 6 months, or 2 years in Lang'ata Women's Prison, as later submitted by SC Mr. Muite. Dr. Nancy Macharia is not named in the Application. The Chairman is not named, and as submitted by the Petitioner, there was no Chairman at the time the Application was filed and canvassed. How is the Court to imprison unidentified persons?

**IT IS ORDERED: -**

**a. The Application filed by the Respondent dated 20<sup>th</sup> January 2021 is declined.**

**b. Costs of the Application to the Petitioner, Contemnors and the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties, to be paid by the Respondent.**

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, UNDER MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, AT MOMBASA, THIS 25<sup>TH</sup> DAY OF JUNE 2021.**

**JAMES RIKA**

**JUDGE**