



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**  
**AT NYERI**  
**ELRC PETITION NO.E001 OF 2021**  
*(Before D.K.N.Marete)*

**KENYA UNION OF PRE-PRIMARY  
EDUCATION TEACHERS.....PETITIONER**

**VERSUS**

**THE BUNGOMA PRIMARY SCHOOL B.O.M.....1ST RESPONDENT**  
**THE BOARD OF MANAGEMENT**  
**BUNGOMA E.C.D.E.....2ND RESPONDENT**  
**COUNTY SECRETARY LAIKIPIA**  
**COUNTY GOVERNMENT.....3RD RESPONDENT**  
**HON.ATTORNEY GENERAL.....4TH RESPONDENT**

**JUDGMENT**

This matter was originated by way of Petition dated 22nd January, 2021.

The 1st and 2nd Respondent in a Replying Affidavit sworn on 4th February, 2021 deny the petition and application and pray that the same be dismissed with costs.

The 3rd and 4th Respondent did not actively participate in these proceedings. This is despite service.

The Petitioner’s case is that this matter is about the termination of service of Joyce Wangui, an ECDE teacher at Bungoma Primary School in Nanyuki Town of Laikipia County. This was vide a letter of termination dated 12th March, 2021 and signed by Florah Wamuyu, Faith Wanja, John Mukunya and Pius Mbithi.

The Petitioner’s further case is that the tiff between the grievant member of the Petitioner and the 1st Respondent dates back to 2019 when one, Amina Abkunu the Primary School head teacher decided to intercept fees paid by the parents of ECDE Centre and divert the same to her own use.

The Petitioner’s other case is as follows;

*iii) The member of Petitioner (grievant) relentlessly pressed the head-teacher to pay her dues but the head-teacher has held her ground that such fees cannot be claimed by E.C.D.E teacher.*

*iv) Just before onset of Covid-19 in March 2020, the head-teacher convened a meeting of parents mainly from the primary section and selected a few of them to act as the B.O.M members for the E.C.D.E centre.*

*v) 3 B.O.M members served Madam Joyce Wangui with a letter of termination dated 12/3/2020 and now teacher Joyce Wangui is rendered jobless having lost her only source of livelihood. The effect is that the county government working in cahoots with the primary school administration has an option of removing her name from the county payroll as has been the practice.*

Her case further comes out as follows;

*i) Petitioner's claim is against usurpation of the role of managing, pre-primary by the primary school head-teacher and the BOM thereof. Under section 2 of the T.S.C Act 2013, a head-teacher is a lead educator or administrator in a primary school level education institution. It therefore follows that the head-teacher has a defined mandate confined to the primary school and not E.C.D.E centre.*

*ii) Section 55 of the Basic Education Act provides that each level of education shall have its own B.O.M. Section 58 of the Act provides for functions and mandate of the pre-primary school B.O.M.*

*iii) Section 62 of the Act also provides that the head of basic education institution shall be the secretary to the Board of Management.*

*iv) The National Pre-Primary Education policy provides at clause 4.2.4 that there shall be a B.O.M for every Pre-primary school as stipulated under Section 55 of the Basic Education Act.*

*v) Clause 3.4.1 of the Pre-primary policy provides that every pre-primary school shall have a head-teacher in charge.*

*vi) The action by the B.O.M members to terminate the services of E.C.D.E teacher Joyce Wangui goes against the laws of natural justice. She has her rights to fair hearing under Article 50 of the Constitution violated since she was not invited to the meeting that decided her fate.*

*vii) Her right to Fair Administrative Justice has been violated as she was NOT informed in writing, the intention to take the action taken by the B.O.M.*

*viii) Her right to fair Labour practice granted under Article 41 of the Constitution has been violated as the termination is summary dismissal constructed outside the provisions of Employment Act 2007.*

She also claims violations as follows;

*i) Violation of rights under Article 41 of the Constitution.*

*ii) Violation of rights under Article 47 of the Constitution.*

*iii) Violation of rights under Article 50 of the Constitution.*

*iv) Usurpation of function under the 4<sup>th</sup> schedule of the Constitution of Kenya 2010.*

She prays thus;

*a) A declaration that a primary school head-teacher as well as the primary school Board of*

*Management lacks mandate to manage pre-primary school.*

*b) A prohibitory order permanently prohibiting the primary school head-teacher and the primary school Board of Management from in any way either by themselves, their agents or staff from interfering with the E.C.D.E teacher in her duties within the E.C.D.E centre.*

*c) An order compelling the 1<sup>st</sup> Respondent to pay Joyce Wangui all her withheld dues from October 2019 to date amounting to Kshs.783,020 and further Kshs.9,000 every subsequent month from January 2021 to the time of this judgment excluding the months schools remained closed due to Covid-19 pandemic.*

*d) An order compelling the 3<sup>rd</sup> Respondent herein to remit all statutory deductions due to Joyce Wangui up to date and continue as long as she continues to offer services to the county government of Laikipia.*

*e) A declaration that the impugned letter of termination dated 12<sup>th</sup> March 2020 is unlawful, irregular, unconstitutional and therefore null and void.*

The 1st and 2nd Respondents case is that the 1st Respondent never withheld any funds from the Claimant/grievant but rather, the BOM made arrangements on collection of fees. Hitherto, and prior to 2017, the grievant collected fees directly from parents illegally for her use and without accounting.

The 1st Respondent's further case is that a meeting was convened by the Laikipia County ECDE Officer where elections were held and a BOM establishing the 2nd Respondent. This is expressed as follows;

*9. THAT it is in the above meeting that elections establishing the 2<sup>nd</sup> Respondent were held.*

*10. THAT currently, the running of the program is fully under the 2<sup>nd</sup> Respondent.*

*11. THAT prior to the establishment of the 2<sup>nd</sup> Respondent, the 1<sup>st</sup> Respondent had made arrangements to bridge the gap.*

*12. THAT the monies are meant to cater for the running of the ECDE program for example lunch, security, salary for the cook among other things.*

*13. THAT further, since the County Government has not fully put in place mechanisms for the realization of the ECDE program as intended under the 4<sup>th</sup> schedule of the constitution, the same is heavily reliant on the primary schools which house the pupils in absence of ECDE centers.*

*14. THAT as it is, it is therefore impossible to fully detach the program from the school because of the above shortcomings.*

The Respondents other case is a denial of issuing a termination letter to the claimant /grievant as they are not employers. The employer is the 3rd Respondent.

The Respondents further deny that they have issues with payment of ECDE teachers and even that there have been numerous complaints against the Petitioner/grievants by parents over mistreatment of pupils and collection of fees and these have been channeled to the 3rd Respondent the employer.

The Respondents penultimate case is that the Petitioner/grievants has not been terminated but is due for transfer because of the above issues.

The issues for determination therefore are;

1. Was there a termination of the employment of the grievant by the Respondents?

2. Is the claimant entitled to the relief sought?

3. Who bears the costs of the cause?

The 1st issue for determination is whether there a termination of the employment of the grievant by the Respondents. The Petitioner in her written submissions dated 21st February, 2021 brings out a case of unfair termination of the employment of the grievant. It is her case that the fundamental rights of the grievant have been violated by the Respondent thus entitling her to compensation.

The Petitioner in further support of her case seeks to rely on the decision in **Petition 151 of 2018 Justice E.C.Mwita in the Constitutional and Human rights Div.Court**, where court held at paragraph 113 of the judgment thus,

*“...there should be no right without a remedy and to remind the state and its agents that rights are for enjoyment and must be respected, enhance and protected as demanded by the Constitution. This sends a clear message that violation of rights will attract compensation.”*

*The court further held at paragraph 111, that, “if a petitioner succeeds in establishing breach of a fundamental right, he is entitled to the relief in exercise of Constitutional jurisdiction as a matter of course.*

*At paragraph 109, the court held that, “Human rights and fundamental freedoms are for enjoyment and to the greatest extent possible but not for curtailment.” The court relied on the Court of Appeal decision in Attorney General vs Kituo cha Sheria & 7 others (2017) eKLR that, “rights have inherent value and utility and their recognition, protection and preservation is not granted nor are they grantable by the state. They attach to persons, all persons by virtual of their being human and not a favour done by the state or those in authority. They merely follow a constitutional command to obey.”*

*... the Respondents herein are public bodies whose operations are governed by rule of law and by denying the grievant her hard earned fruits of her labour and again hounding her out of her work place unceremoniously as demonstrated here, offends the provision of Fair Administrative Action granted under Article 47 of the Constitution and in fortifying this, we rely on the same Court’s decision at paragraph 92, where the court also relied on the Court of Appeal decision in J.S.C vs Mbalu Mutava Musyimi (2015) eKLR which stated thus, “Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a Constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in Article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability...”*

*In the authority variously cited by the Petitioner, at paragraph 90 court holds thus, “...every government authority which would otherwise be wrong or which infringes a man’s liberty must be able to justify it as authorized by law and in every case, it will mean authorize directly by an act of Parliament and such actions by any person, must be shown to have a strictly legal pedigree...”*

The Respondent in the written submissions dated 1st March, 2021 submits and agrees that it is the mandate of County Government to recruit and register E.C.D.E teachers.

*In Kenya National Union of Teachers v Attorney General & 4 others (2016) eKLR, the High Court held at paragraphs 73 and 74, appearing at page 13 of the said judgment that indeed the mandate to recruit pre-qualified and registered ECDE teachers vests with the County Government.*

1. *Provision of capitation grants for children in public pre-primary schools for play and learning material, meals and nutrition, and co-curricular activities;*

2. *Provision of funds for research, monitoring and evaluation; and*

3. *Remuneration of Pre-primary teachers.*

*The above being the position, it is shocking that the Petitioner through the union has turned a blind eye to the same and rigidly stuck to the provision devolving the function and only concerned herself to collection of fees.*

*So much is the greed that the petitioner is keen on earning twice, from the employer and fees collection. My lord, it is ridiculous that the Petitioner who is an employee of the county wants to collect fees for her own use. The reason why the school was involved in the running of the EDCE education is because the county has not taken up the function and left the burden to the school in provision of all the necessary services and facilities.*

I find that there was no termination of the employment of the grievant by the Respondents. The Respondents have demonstrated that they were not anywhere near the involvements of the grievant and the head-teacher. They cannot therefore be held liable for any distractions, if at all, on the part of the grievant.

The claim and allegations of termination of employment seems to arise out of misunderstanding and confusion arising at the work place. The grievant has not in any way demonstrated a case of termination of employment. The only discernable picture is one of collision in the management of the ECDE Centre between the grievant and the head-teacher and board of the centre. This can be resolved differently and amicably.

The Claimant should have evaluated her case before seeking redress in court. This way, she would have realised the futility of her petition or case.

I am therefore inclined to dismiss the claim with orders that each party bears their costs of the same

**Dated and delivered at Nyeri this 19th day of July, 2021.**

**D.K.Njagi Marete**

**JUDGE**

**Appearances**

**1. Mr. Opiyo for the Petitioner Union.**

**2. Mr.Gisemba instructed by State Law office for the 1st, 2nd and 4th Respondents.**

**3. Mr.Muchemi for the 3rd Respondent.**