



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. 120 OF 2020

KENYA UNION OF DOMESTIC, HOTELS,

EDUCATIONAL INSTITUTIONS AND HOSPITAL WORKERS.....PETITIONER

VERSUS

PROFESSOR GEORGE MAGOHA, THE CABINET

SECRETARY FOR MINISTRY OF EDUCATION,

SCIENCE AND TECHNOLOGY..... 1ST RESPONDENT

HON. AMBASSADOR UKUR YATANI KANACHO THE

NATIONAL TREASURY AND PLANNING..... 2ND RESPONDENT

THE ATTORNEY GENERAL..... 3RD RESPONDENT

AND

KENYA SECONDARY

SCHOOL HEADS ASSOCIATION.....1ST INTERESTED PARTY

KENYA PRIMARY SCHOOLS HEADS' ASSOCIATION..2ND INTERESTED PARTY

KENYA ASSOCIATION OF TECHNICAL

TRAINING INSTITUTIONS.....3RD INTERESTED PARTY

KENYA TEACHERS COLLEGES

PRINCIPALS' ASSOCIATION..... 4TH INTERESTED PARTY

JUDGMENT

1. The petitioner filed this petition on 4th August, 2020 praying for an order in the following terms: -

(a) The Respondent(s) be compelled to release emolument funds for due payment of Board of Management employees with immediate effect.

(b) The Respondent be permanently restrained from termination, declaring redundant, suspending or otherwise dismissing the Board of Management employees and remain in paying salaries alongside employees under Teachers Service Commission for the entire period.

(c) Costs of this suit.

(d) Interests on (a), (b) and (c) above at Court rates until payment in full.

2. Petitioner alleges that various Boards of Management issued letters placing employees employed by the Board of Management in various schools on unpaid leave and half pay with effect from diverse dates pursuant to the COVID – 19 containment measure issued by the Ministry of Health on or about 13th March, 2020.

3. The petitioner cited amongst others Nginda Girls Secondary School, Kahatia Secondary School and Muranga High School.

4. The petitioner alleges that the Ministry of Education has continued paying salaries for the employees in Public School employed by the Teachers Service Commission and pledged to continue paying them throughout COVID-19 Pandemic period.

5. The Petitioner alleges that the respondents have thus violated Article 41 of the Constitution of Kenya by treating employees employed by the Boards of Management differently.

6. That in addition the respondents have violated Sections 5(1) (a), (2), (4) and 5 of the Employment Act, 2007 which prohibits different treatment of employees that amounts to discrimination.

7. The Petitioner states that the respondents are under obligation to release funds to the Boards of Management to enable them pay employees employed by Boards of Management since Legal Notice no. 39 of 2015, made pursuant to Education Act, 2013 and regulations 18 thereof provides that: -

“Persons belonging to professional cadres and employed by Board of Management shall be employed on such terms and conditions of service similar to those recommended for equivalent posts in the Civil Service and as per the applicable Scheme of Service.”

Therefore, since the funds are derived from the exchequer, it is in the interest of justice and fair play that these employees continue to be paid just like their counterparts employed by the Teachers Service Commission.

8. The 1st respondent filed a replying affidavit sworn to by P.W.1 George A.O. Magoha, the Cabinet Secretary, Ministry of Education who deposes *inter alia* that the Ministry disbursed 50% of the funds/grants to the Institutions in the beginning of the year which was meant to cater for salaries, emoluments and other expenditures up to 31st June, 2020.

9. That on 17/8/2020, a sum of Kshs 1,167,304.213.40 was disbursed by the Ministry to cover Free Primary Education grants to primary schools to cover the period beginning July, 2020 to December, 2020.

10. That on 9/9/202, the Ministry disbursed Kshs 1,808,680,000 to Secondary Schools to cater for Board of Management salaries from July, 2020 to December, 2021.

11. That the issues raised by the petitioner in the petition have since been addressed.

12. That the petitioner has not demonstrated with precision how its rights and fundamental freedoms have been violated.

13. That the petition is completely devoid of merit and it be dismissed with costs.

14. The petitioner in a further affidavit states that the 1st respondent has only released funds of Free Primary Education but has not demonstrated release of monies meant for secondary school learning.

15. That non-teaching staff have been left out of the disbursements and therefore have been discriminated upon. That the issues raised by the petitioner have not been resolved and the petitioner be granted the reliefs sought.

Determination

16. This Court is satisfied that the 1st respondent has demonstrated that it has released funds for primary and secondary schools to cater for professionals employed by the Boards of Management.

17. That the petitioner has the onus of demonstrating with precision the manner in which its rights have been violated as set out in **Annarita Karimi Njeru (1979) eKLR 154**. The petitioner has not only failed to demonstrate the violations in the petition itself but has also not adduced any evidence to prove specific violations of rights and freedoms of named employees or class of employees by the respondents.

18. Indeed, the Court takes judicial notice that schooling in both primary schools and secondary schools is presently ongoing and the matters raised herein have become moot.

19. Furthermore, employment of support staff by Boards of Management is purely contractual and the terms of employment of the cadre vary from one school to another depending on the particular school's ability to pay. The guidelines by the Ministry on remuneration remain just guidelines to avoid and/or minimize underpayments and create uniformity in that respect.

20. It is the Court's considered finding that the petition lacks merit and the reliefs sought against the respondents are unwarranted. See **Mumo Matemu –vs- Trusted Society of Human Rights, Alliance [2013] eKLR** on the threshold required in a constitutional petition.

21. Furthermore, the onus to prove allegations made in terms of Section 107 and 108 of the Evidence Act, Cap. 80 Laws of Kenya remain with the petitioner. The petitioner has failed in that respect.

22. The petition is dismissed with no order as to costs.

Dated and delivered at Nairobi (virtually) this 30th day of September, 2021.

Mathews N. Nduma

Judge

Appearances:-

KUDHEIHA - claimant

Christine Oyugi, Principal Litigation Counsel for the Respondent