



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT NAIROBI
PETITION NUMBER 97 OF 2018
[CONSOLIDATED WITH PETITION NO. 85 OF 2018]

BETWEEN

- 1. ROSE NYAMBURA CHEGE**
- 2. WECHULI NASHON ERIMA**
- 3. ISRAEL BEN KARIUKI**
- 4. DAVID WAFULA BARASA**
- 5. CHARLES TEMBE HOSEA SAKWA.....PETITIONERS**

VERSUS

- 1. TEACHERS SERVICE COMMISSION**
- 2. TECHNICAL AND VOCATIONAL EDUCATIONAL TRAINING AUTHORITY**
- 3. PUBLIC SERVICE COMMISSIONRESPONDENTS**

RULING

1. Hon. Justice Joram Abuodha conclusively decided this Petition on 1st March 2019.
2. There is a decree on record. It reads: -
 - a. Circular No. 17/2018 dated 27th July 2018 issued by the 1st Respondent is unconstitutional hence null and void.
 - b. An order quashing the said Circular No. 17/2018 issued by the 1st Respondent is hereby issued.
3. The Attorney-General for the 2nd and 3rd Respondents filed an Appeal against the Judgment at the Court of Appeal. 2nd and 3rd Respondents obtained orders of stay of execution on 14th March 2019.
4. In a Consent dated 15th July 2019, the Parties agreed: -
 - a. The orders of stay of execution of Judgment and Decree issued by Hon. Ongaya J on 14th March 2019 staying execution of Judgment given on 1st March 2019 by Abudoha J, to remain in force.
 - b. The Cabinet Secretary for Education to sanction amendments to the Technical and Vocational Education Training Act to provide among others, the employing Authority.
 - c. The Ministry of Education to enter into a Recognition Agreement with KUPPET.

- d. The current Employer of Trainers do immediately recover and remit union dues and agency fees to KUPPET.
- e. TVET Authority to advise on a harmonized scheme of service for the Trainers.
- f. The 5 Petitioners/ Trainers currently under TSC to remain under TSC during transition.
- g. Parties to periodically update the Court on the progress of amendments to TVET Act.

5. Through an Application dated 8th June 2021, the Petitioners have asked to the Court to set aside the Consent Orders they recorded with the Respondents, outlined at paragraph 4 above, effectively reverting to the terms of the decree. The Application is founded on the Affidavit of Akello Misori, General Secretary KUPPET [a Petitioner in consolidated Petition No. 85 of 2018]. He explains that the Respondents have failed to honour the terms of the Consent filed by the Parties.

6. The Application is opposed. The Respondents main line of opposition, is that there exists no ground which would warrant the setting aside of the Consent, Parties having freely negotiated and entered into that Consent, after the Judgment of the Court.

7. Parties agreed to have the Application considered and determined on the strength of their Submissions and Affidavits. They subsequently confirmed filing and service of their Submissions and were advised Ruling would be delivered on 17th November 2021. Ruling is ready for delivery on the date shown below.

The Court Finds: -

8. There is a Judgment on record, and orders staying execution of that Judgment pending Appeal.

9. This Court is *functus Officio*.

10. The Petitioners submit that Courts recognize structural interdicts as effective remedies in enforcement of fundamental rights. The Consent comprises structural interdict. The Judgment of the Court did not allude to structural interdicts. Orders issued in the Judgment are clear, and do not call for the supervision of the Court in their implementation. The Court does not think that structural interdicts, are meant to re-open proceedings Courts have dealt with conclusively. They are not meant to create avenues for introduction of fresh causes of action. They are a form of reliefs, given by the Court and whose implementation is supervised by the Court. The Parties in these proceedings went outside the orders given in the Judgment, crafted their own terms of settlement, including other causes of action, such as recognition of KUPPET by the Ministry of Education. They also consented that the Court is updated in the amendment of TVET Act. Why should the Court be involved in legislative amendment? Why should the Court be involved in the recognition of KUPPET by the Ministry of Education, a subject which was not in the dispute dealt with by Judge Abuodha? Has not the Court completed its work, upon delivering its Judgment, and staying execution of that Judgment pending Appeal, as requested by the Respondents? Litigation must come to an end, and in this file, litigation ended with the Judgment of the Court.

11. The Consent on record is valid and binds the Parties. In ***Kericho Guest House Enterprises Limited v. Kenya Breweries Limited [2018] e-KLR*** and ***Board of Trustees National Social Security Fund v. Michael Mwalo [2015] e-KLR***, invoked by the Respondents, the Courts held that consent orders cannot be set aside or varied, unless it is proved they were obtained by fraud or collusion. It must be shown that there are circumstances, such as would provide good ground for varying or rescinding a contract between Parties.

12. The Petitioners do not hold that Consent on record was made through fraud, collusion or that there is any ground such as would warrant rescinding or varying of a contract between the Parties. Their complaint is that there is no compliance by the Respondents. They ought to pursue compliance, rather than pursue setting aside of an Order they freely negotiated and concluded.

13. In the end the Court finds it is *functus officio*. Hon. Justice Abuodha disposed of the Petition. Execution of the Judgment was stayed, and the matter taken before the appellate jurisdiction. Let the Parties follow to the end, the paths they have carved out for themselves, after the Judgment of the Court.

It is Ordered: -

a. The Application dated 8th June 2021 filed by the Petitioners is declined.

b. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 9TH DAY OF NOVEMBER 2021

JAMES RIKA

JUDGE