



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CONSTITUTIONAL PETITION NO. 4 OF 2020

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 1, 10, 20, 22, 23, 25, 27, 28, 41, 43, 47, 50, 73, 232, 236, 237 & 238 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT; TEACHERS SERVICE COMMISSION ACT; TEACHERS SERVICE COMMISSION REGULATIONS, POLICIES & GUIDELINES; EMPLOYMENT ACT AND THE PUBLIC SERVICE COMMISSION ACT

BETWEEN

MS JANE ANGILA OBANDO

PETITIONER

v

TEACHERS SERVICE COMMISSION

1<sup>st</sup> RESPONDENT

TSC COUNTY DIRECTOR OF NAIROBI COUNTY

2<sup>nd</sup> RESPONDENT

PRINCIPAL MOI GIRLS SCHOOL, NAIROBI

3<sup>rd</sup> RESPONDENT

**RULING**

1. On 18 December 2019, the Teachers Service Commission County Director for Nairobi County (County Director) wrote to Jane Angila Obando (applicant) to notify her of transfer from Moi Girls School, Nairobi to Dagoretti High School. The notification advised the applicant that in case she wanted to appeal, she had 14 days to appeal but first she had to report to the new school.
2. The applicant appealed on 2 January 2020 (the main reason for the appeal was that she had 1 year to retirement) and on the same the County Director advising her to report to the new station.
3. The County Director wrote another letter to the applicant on 2 January 2020, copied to the Principal requesting that the Principal advise her of the date of the applicant's release (the Principal of Moi Girls School had issued a release letter to the County Director on 30 December 2019).
4. The applicant made another appeal through a letter dated 7 January 2020 indicating that the Teachers Service Commission (the Commission) had a policy exempting teachers who had attained 56 years from transfer and more so where a mandatory retirement notification had been issued.
5. On 10 January 2020, the applicant moved the Court under a certificate of urgency seeking orders

1. ...

2. ...

3. **THAT** this Honourable Court be pleased to grant conservatory orders to the Petitioner herein by way of temporary stay of operation or application of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents decisions conveyed vide respective simultaneous letters, Ref. No. TSC/NRB/365515 dated 18<sup>th</sup> December 2019 (Ref. No. TSC/NRB/236515 dated 2<sup>nd</sup> January 2020); and Ref. No. MGCN/01/12TSC365515 dated 30<sup>th</sup> December 2019 (Ref. No. MGCN/01/12/TSC 236515 dated 30<sup>th</sup> December 2019) pending the hearing and determination of the Petition herein.

4. ...

5. ...

6. On the same day, the Duty Court granted a temporary conservatory order staying the operation of the transfer of the applicant pending *inter partes* hearing of the application.

7. The Respondents filed a replying affidavit in opposition to the application on 4 February 2020, and this prompted the applicant to file a further affidavit together with submissions on 12 February 2020.

8. The Respondents filed their list of authorities on 13 February 2020, and the Court took arguments on the same day.

9. The legal principles applicable to the grant of conservatory orders is now well settled.

10. The Supreme Court set the tenor in *Gitirau Peter Munya v Dickson Mwenda Kithinji & 2 Ors* (2014) eKLR thus

‘*Conservatory orders*’ bear a more decided *public law* connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the *public interest*. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as ‘the prospects of irreparable’ harm occurring during the pendency of a case; or ‘high probability of success’ in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the *inherent merit of the case*, bearing in mind the *public interest*, the *constitutional values*, and the *proportionate magnitudes*, and *priority levels attributable to the relevant causes*.

11. The applicant however still had to demonstrate a *prima facie* case, for the foundation to her cause of action is contractual.

12. In an attempt to demonstrate a *prima facie* case, it was incumbent upon the applicant to show the existence of a contractual or legal right, and how it had been breached by the Respondents.

13. To discharge the burden, the applicant asserted that the Commission had a policy on its website providing that teachers who had attained 56 years (and above) would not be subjected to unilateral transfer.

14. The applicant also asserted that she had on 4 November 2019 been issued with a mandatory retirement notice.

15. The applicant further contended that she was released within 14 days upon transfer while of Regulation 66(5) of the Code of Regulations allowed for up to 30 days.

16. In resisting the application, the Respondents contended that the Commission had the legal authority to assign and/or transfer teachers depending on the needs of staffing levels across the country.

17. The Respondents in the same vein drew the attention of the Court to Regulations 62 and 67 of the Code of Regulations for Teachers which authorises the Commission to assign a teacher to any public school in Kenya.

18. The transfer of the applicant, according to the Respondents was a response to a staffing evaluation which showed that the applicant’s services were required at Dagoretti High School.

19. The Court has keenly considered the material placed before it and come to the view that what would be determinative at this interlocutory stage is an examination of the question whether the Commission has a policy exempting teachers aged over 56 years from transfer.

20. It is not in dispute that the Commission has the constitutional mandate to transfer teachers and it is not the duty of the Court to intervene in the exercise of such mandate unless it has exceeded its powers or acts illegally (see *Teachers Service Commission v Thomas Joseph O. Onyango* (2019) eKLR).

21. It is also correct that the Commission should consider the best interest of pupils/students in effecting transfers to balance the staffing needs of each school.

22. The applicant exhibited an extract of a policy she said was from the Commission’s website.

23. The Respondents did not expressly deny the existence of the policy but stated from the bar that the extract of the policy exhibited was from the streets.

24. The applicant also deposed that the Commission confirmed the existence of a transfer policy before the National Assembly on 16 April 2019. The same was not denied in any meaningful way.

25. The Commission is the custodian of all instruments governing the teachers it has employed. Nothing would have been easier than to file a copy of the policy since the applicant had referred to the policy at paragraph 7 of the supporting affidavit.

26. The Court is not called upon at this stage to determine whether the extract of transfer policy filed by the applicant is genuine or not, or

whether such policy would triumph over the substantive legal provisions granting the Commission the power to transfer the applicant or any other teacher.

27. What is of interest is that the Commission appears to have acted contrary to the policy exempting teachers aged 56 years and above from unilateral transfer, and after issuing a mandatory retirement notification.

28. The Court finds that the applicant has established a *prima facie* case warranting the grant of the order sought.

29. The Court orders that

(a) A conservatory order does and is hereby issued staying the operation or application of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents decisions conveyed vide respective simultaneous letters Ref. No. TSC/NRB/365515 dated 18<sup>th</sup> December 2019 (Ref No. TSC/NRB/236515 dated 2<sup>nd</sup> January 2020); and Ref. No. MGCN/01/12TSC365515 dated 30<sup>th</sup> December 2019 (Ref. No. MGCN/01/12/TSC 236515 dated 30<sup>th</sup> December 2019) pending the hearing and determination of the Petition herein.

(b) The Petition be heard on a priority basis.

(c) The Respondents to file/serve Responses, affidavits and documents on or before 31 March 2020.

(d) The Claimant files any further affidavit and submissions on or before 17 April 2020.

(e) Respondents to file submissions on or before 30 April 2020.

(f) A date for highlighting of the submissions be scheduled hereinafter.

30. Costs in the cause.

**Delivered, dated and signed in Nairobi on this 13<sup>th</sup> day of March 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For applicant            Mr. Masika instructed by Masika & Koross Advocates

For Respondents        Mr. Anyuor, Advocate, Teachers Service Commission

Court Assistant        Judy Maina