



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1 OF 2020

FREDERICK MWANGI MBUTHIA.....CLAIMANT

-VERSUS-

TEACHERS SERVICE COMMISSION.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 24th July, 2020)

JUDGMENT

The claimant filed the memorandum of claim on 02.01.2020 through Githui & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the decision made by the respondent to transfer him from Afraha High School in Nakuru to Goseta Secondary School in Trans Nzoia constitutes unfair labour practice, it is discriminatory, unfair, actuated by extraneous considerations and it is in breach of Article 10 of the Constitution.
- b) An order setting aside the decision of the respondent transferring the claimant from Afraha High School in Nakuru County to Goseta Secondary School in Trans Nzoia.
- c) Costs of the claim.

The claimant's case is as follows. He is a teacher assigned the respondent's No. TSC 363178 and employed by the respondent. At the material time he is deployed as the Principal, Afraha High School within Nakuru County. The claimant is also the Chairman of the Kenya Secondary School Heads Association (KESSHA), Nakuru County. KESSHA is established to foster cooperation amongst its membership and amongst stakeholders in the education sector in the Republic of Kenya. Parties to the suit are aware that under KESSHA's constitution, officials serve for a term of 5 years. The respondent has instituted a policy known as delocalization policy under which a teacher ought not to serve in his home county. The policy is to be implemented administratively but subject to relevant law such as Employment Act, Labour Relations Act, and the Constitution of Kenya. Implementation of the policy must be fair, non-discriminatory, and transparent, participatory per Article 10 of the Constitution.

The claimant's further case is as follows. By the circular issued on 10.12.2019 or thereabouts the respondent made and communicated its decision to transfer Principals from their current stations to other stations. The decision was part of the respondent's execution of the delocalization policy. The claimant received his letter on transfer on 23.12.2019. The letter conveyed that the claimant had been transferred to Trans- Nzoia County and he ought to handover his current station by 03.01.2020. While making the decision the respondent knew that the claimant was the Chairman of KESSHA for Nakuru County and as well the Treasurer for Rift Valley Region. The respondent's officers presided over the elections at which the claimant had been elected to the two positions.

The claimant's further case is as follows. In the transfers as made by the respondent in the circular of 10.12.2019 all Principals in Nakuru County subject of the transfer were transferred to schools within the County and only 4 teachers were transferred out of the County and for the majority, it was per their own request. The respondent knew that if the claimant was transferred out of Nakuru County he would automatically lose his position as Chairman. The claimant says his transfer was therefore unfair and actuated with oblique purpose. The transfer required consultation at least with the KESSHA's Nakuru County branch and failing the consultation, Article 10 of the Constitution was thereby violated. The claimant states that the transfer decision was discriminatory, actuated with bad faith, unfair, failed to take into account relevant factors and was in breach of Article 10 of the Constitution.

Alongside the memorandum of claim the claimant filed a notice of motion dated 02.01.2020 for interim orders seeking stay of the transfer in issue. On 10.01.2020 the parties recorded and the court ordered thus, by consent:

- 1) The notice of motion dated 02.01.2020 and the claim dated 02.01.2020 be disposed of by way of written submissions.
- 2) Parties to file their respective submissions and serve on or before 03.02.2020.
- 3) Highlighting of submissions on 13.02.2020 at 9.00am for 30 minutes.
- 4) Interim orders be extended till judgment in the suit.

In view of the orders, the Court considers that the application was in effect abandoned to pave way for determination of the main suit. Parties filed their respective submissions.

The material on record show that the respondent did not file a memorandum of response but filed on 08.01.2020 the replying affidavit of Dorothy Owuor Jonyo, the respondent's Deputy Director in charge of staffing. Learned counsel Flora Manyasa Advocate acted for the respondent. In view of the consent order and provisions of Article 159 of the Constitution of Kenya, 2010, the Court deems that the replying affidavit was deemed the respondent's defence in the case. It was urged for the respondent as follows:

- a) The respondent is a constitutional commission established under Article 237(1) of the Constitution of Kenya, 2010 and its functions are stated in Article 237(2) thereof. The respondent employs teachers who serve in public schools in Kenya. The respondent's function includes transfer of teachers. Under Article 237 (3) (b) the respondent reviews demand and supply of teachers across the country to ensure the appropriate balance in the teacher staffing levels and equitable distribution of teachers in public schools.
- b) The respondent has published the Code of Regulations for Teachers pursuant to section 47(2) of the Teachers Service Act (TSC Act). The code provides for general behavior governing the teaching profession.
- c) Regulation 62 of the Code empowers the respondent to assign any teacher for service in any public school or institution in Kenya which the respondent considers the teacher is qualified to teach. Regulation 67 grants the respondent discretion to transfer teachers in its service as circumstances may demand even if such a teacher has not applied to be transferred.
- d) The respondent employed the claimant as a teacher effective about 02.01.1996 on probationary terms of service and was later confirmed on permanent and pensionable terms of service.
- e) The respondent deployed the claimant as Principal, Afraha Secondary School effective 27.04.2007. By the letter dated 15.11.2019 the applicant was appointed Senior Principal T-Scale 14 Grade, D4. The claimant serves subject to provisions of the TSC Act, Employment Act 2007, the Code of Regulations for Teachers, and the TSC Code of Conduct and Ethics and other administrative policy guidelines issued by the respondent from time to time.
- f) Clause 5 of the letter of appointment states thus, **"A condition for employment is readiness to serve anywhere in Kenya in any school which the Commission considers you are qualified to teach."**
- g) About 10.12.2020 the respondent in exercise of its constitutional and statutory powers decided to transfer the claimant from Afraha Secondary School in Nakuru County to Goseta Secondary School in Trans Nzoia County. The respondent in making the decision considered student population in the two schools, claimant's rank, level of school and availability of similar school in Nakuru County, and the claimant's 14 years' service at Afraha Secondary School. In making the transfer decision the respondent was not subject to the direction or control by any other person or authority such as KESSHA and the claimant's terms of service are not subject to his being an official with KESSHA. Further there is no subsisting agreement between the respondent and KESSHA on modalities of transfer or deployment of its officials who are in the respondent's employment. The claimant's position with KESSHA was an irrelevant factor in transferring the claimant and only relevant law, policy and administrative guidelines applied.
- h) Consequential to the transfer the handover was scheduled for 03.01.2020 but the applicant failed to attend the handover process as was scheduled. In the circumstances a new principal was installed on 03.01.2020, the same date the Court gave an order staying the transfer for 7 days. The suit and application was filed on 02.01.2020 and have therefore been overtaken by events. It is against public policy for the claimant to fail to take up the transfer or deployment as decided by the respondent as he must not circumvent the contract of service to the detriment of the learners.
- i) The claimant had appealed against the transfer by his letter dated 23.12.2019 but which the respondent had not decided. In the appeal letter the claimant had stated thus, of late the policy by the respondent was to transfer teachers within the county; the transfer will lead to his automatic loss of positions of Chairman and Treasurer he held in the KESSHA; he would be disoriented as Trans-Nzoia is very far from his home and his young family will negatively and severely be affected and lower his productivity; and he intended to take early retirement upon attaining the age of 50 years in August 2020.

The Court has considered the material on record and the respective submissions filed for the parties. The only issue for determination is whether the claimant is entitled to the remedies as prayed for in the memorandum of claim. The claimant is seeking that the Court intervenes in the respondent's performance of the human resource function to transfer the teachers in its employment.

Has the claimant established the threshold for the exercise of the Court's rare jurisdiction to intervene in the performance of the human resource functions by respondent? In **Geoffrey Mworira-Versus- Water Resources Management Authority and 2 others [2015]eKLR** thus, **"The principles are clear.**

The court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process."

In view of those principles, the Court returns that looking at the material on record the claimant has failed to pass the test because of the following findings:

- 1) The claimant appealed against the transfer. There is no dispute that he so appealed and the appeal is still pending. The Court finds that the internal employer-employee procedure for resolving the dispute has not been exhausted and there is no justification for the claimant to by-pass that procedure. The internal procedure is available and in the Court's opinion it ought to be exhausted.
- 2) The claimant has not established that in making the transfer decision the respondent is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair. While alleging discrimination, the claimant has failed to establish a proper comparator, that is a Principal in circumstances similar to the claimant and whose transfer was treated more advantageously than the claimant's and bearing in mind the undisputed factors the respondent took into account in making the decision to transfer the claimant at the material time. The allegations of unfairness and discrimination in that regard have not been established. Further, while alleging he held the positions of County and Regional Treasurer, the claimant failed to place before the Court the evidence of his holding such positions and the remainder of the tenure in issue and as was necessary. In any event and as urged for the respondent, the claimant has not established an agreement between the respondent and the KESSHA that would impact on the contract of service between the parties or as impacting on the transfer decision as was made by the respondent in the instant case.
- 3) The Court has reexamined the material on record and nowhere is it established for the claimant that the respondent has proceeded to impose the transfer decision in contravention of the prevailing transfer policy or relevant law.
- 4) The Court finds that in the circumstances of the case, there is no established case for the Court's intervention in the transfer decision. In view that the respondent did not file a formal statement of response to the memorandum of claim, each party shall bear own costs of the suit.

In conclusion judgment is hereby entered for the respondent against the claimant for dismissal of the memorandum of claim with orders that each party shall bear own costs of the suit.

Signed, dated and delivered by the court at Nairobi this Friday, 24th July, 2020.

BYRAM ONGAYA

JUDGE