



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
MISCELLANEOUS APPLICATION NO. 11 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF: ARTICLES 221), 41(1), 47(10), 232 AND 237 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA,
2020

AND

IN THE MATTER OF: TEACHERS SERVICE COMMISSION ACT, ACT NO. 20 OF 2012

BETWEEN

JANE WAMBUI GATHURU

APPLICANT

VERSUS

TEACHERS SERVICE COMMISSION 1ST RESPONDENT

MUTUKU JOSEPH KYALO 2ND RESPONDENT

JUDGMENT

On 5th February, 2019, the Applicant filed a Notice of Motion of the same date under Certificate of Urgency (the **Originating Motion**). The Notice of Motion was brought under **Rule 4** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**. Therein, the Applicant sought inter alia the following orders:-

(i) Spent

(ii) Spent

(iii) That this Court be pleased to issue a temporary injunction prohibiting The 1st Respondent, its employees, servants and/or agents from transferring and/or causing the Applicant herein to vacate her current place of work as the Principal of Githurai Mixed Secondary School, pending hearing and final determination of the Application herein.

(iv) That the Court be pleased to compel the 1st Respondent to issue a standard letter of transfer to the Applicant, communicating to the Applicant which is the next school she is to report as a principal and to who she should hand over the school;

(v) That the costs of the suit herein be borne by the 1st Respondent.

The Originating Motion is supported by a Supporting Affidavit sworn by the Applicant. The grounds in support of the application as pleaded by the Applicant are set out on the face of the Originating Motion and the Supporting Affidavit and these collectively, these grounds are that:-

i. The Applicant applied to the 1st Respondent to be appointed as a Principal. By a letter dated 7th March, 2017, she was subsequently invited to appear before the 1st Respondent's selection board of Kiambu County Regional Office on 16th March, 2017 for an interview.

ii. The 1st Respondent subsequently through a letter dated 4th March, 2018, deployed the Applicant to Githurai Mixed Secondary School (the **School**) as the Principal.

iii. The letter of deployment indicated that the Applicant had been appointed as the Principal to the School temporarily until further notice.

iv. The Applicant dutifully performed her obligation and has legally held the position in the School since her deployment on 4th July, 2018. This was until 30th January, 2019 when the 2nd Respondent arrived at the school and claimed to have been deployed to the School by the 1st Respondent as the new Principal.

v. The Applicant was very surprised when the 2nd Respondent presented an official letter transferring him to the School as the new Principal, from Kambi ya Ndeke Secondary School. This was because the standard procedure of transfer for a head of an institution is that the Applicant as the Principal ought to have been served with a transfer letter indicating to her:-

- a. The school she was being transferred from.
- b. The school she was being transferred to
- c. Who she would hand over to
- d. Who she would take over from in the new school she would be joining

vi. The Applicant lodged a formal complaint vide a letter dated 30th January, 2019 with the 1st Respondent's Director, Kiambu County Region. Therein, she sought and was granted a meeting to discuss her concerns.

vii. The Applicant received a text message from the 1st Respondent's said Director directing her to avail herself for a handover process on 4th February, 2019.

viii. The Applicant has never received any official communication from the 1st Respondent or any formal directions from the 1st Respondent whatsoever concerning her transfer and /or deployment of a new Principal to the School.

On 5th February, 2020, the Originating Motion was placed before this Court wherein the Applicant was heard ex-parte and **Abuodha J.** issued orders as follows:-

1. *That this application be and is hereby certified urgent.*
2. *That this application be served on the Respondents for inter partes hearing on 20th February, 2019.*
3. *That an order be and is hereby issued for maintenance of the status quo in relation to the management of Githurai Mixed Secondary School, which is, the Applicant herein to continue being the Principal of the school pending hearing and final determination of the application herein.*
4. *The interim order to last until then.*

In opposition to the Originating Motion, the Respondents filed a Replying Affidavit sworn by Regina Atieno Oondo; the 1st Respondent's County Director, Kiambu County on 18th February, 2019 and filed on the same day. In summary the deponent deposed that:-

- i. The Applicant has no cause of action against the 2nd Respondent.
- ii. Vide a letter dated 20th November, 2013, the 1st Respondent's County Director, Kiambu County deployed the Applicant as the Deputy Principal of the School and transferred her from Stephen Ndiko Secondary School where she was stationed to enable her take up the appointment.
- iii. After serving for barely two years, in the position of Deputy Principal, the Applicant requested the 1st Respondent vide a letter dated 25th September, 2015 to consider her for promotion to the position of Principal.
- iv. Consequently, the 1st Respondent's County Director, Kiambu County, invited the Applicant, alongside 118 other candidates to an interview on 16th March, 2017 where the Applicant was rated last.
- v. When the Principal of the School, Raphael Mwangi Kung'u retired at the end of June, 2018, the 1st Respondent's County Director, Kiambu County deployed the Applicant as Principal temporarily.
- vi. The Applicant's temporary appointment as Principal was confirmed to the Board of Management of the School at its meeting of 13th July, 2018 where the Applicant was the secretary.

vii. On 26th October, 2016, the 1st Respondent and the Kenya Union of Post Primary Education Teachers (KUPPET) signed a Collective Bargaining Agreement on terms and conditions of post-primary education teachers in the employment of the 1st Respondent.

viii. The CBA covers a four year period spanning 1st July, 2017 to 30th June, 2021 and came into effect from 1st July, 2017 when the 1st Respondent implemented phase one thereof.

ix. On 16th June, 2017, the 1st Respondent and KUPPET signed an addendum to the CBA to facilitate the implementation of the CBA. Based on the addendum, the Applicant was erroneously designated as Senior Master II on 1st July, 2017 on the payroll.

x. The Applicant sought to be re-designated as Deputy Principal. The 1st Respondent accordingly re-designated the Applicant as Deputy Principal IV as per the addendum to the CBA.

xi. Vide a letter dated 23rd January, 2019 the 1st Respondent transferred the 2nd Respondent to take over the administration of the School in the same capacity.

xii. On 30th January, 2019, the 2nd Respondent reported to the School and thereafter, Applicant wrote to the 1st Respondent informing it of the 2nd Respondent's visit.

xiii. Vide a letter dated 1st February, 2019, the deponent informed the Applicant to resume her duties as the Deputy Principal of the School and to hand over the School's administration to the 2nd Respondent as the incoming Principal.

xiv. Accordingly, the 2nd Respondent effectively took over the administration of the School effective 30th June, 2019. While acknowledging the taking over of the School administration by the 2nd Respondent, the Applicant duly filled and sent an entry & exit report in respect of the 2nd Respondent in accordance with the provisions of the **Code of Regulations for Teachers**.

xv. The true status quo *ante* and post the *ex parte* orders of 5th February, 2019 was that the 2nd Respondent was the Principal of the School. It is thus a misrepresentation of facts on the part of the Applicant that she was the Principal of the School as at the 5th of February, 2020 when she moved the Court.

xvi. In obtaining the *ex-parte* orders, the Applicant misled this Court through misrepresentation of facts and non-disclosure of material facts.

xvii. Further, the Applicant's prayer No. 4 for orders issued compelling the 1st Respondent to appoint the Applicant as Principal is not tenable in law as that would amount to the Court taking over the Constitutional mandate of the 1st Respondent under Article 237(2) (c) and (d).

On 19th March, 2019, the Applicant filed a second Notice of Motion Application dated 15th March, 2019 brought under Section 3A & 63 of the Civil Procedure Act and Section 5 of the Judicature Act. Therein, the Applicant sought inter alia the following orders:-

1. *This Court issues summons to Dr Nancy Macharia in her capacity as the Chief Executive Officer of the 1st Respondent and Mutuku Joseph Kyalo, the 2nd Respondent to show cause why they should not be punished by this Court for contempt of Court;*

2. *Dr Nancy Macharia and Mutuku Joseph Kyalo the above named Contemnors be cited for contempt of this Court for wilfully disobeying the Orders issued by the Court on 5th February, 2019;*

3. *Dr Nancy Macharia and Mutuku Joseph Kyalo the above named Contemnors be detained in prison for a period of Six (6) months or for such period as this Court shall deem necessary for being in disobedience of the Orders of this Court issued on 5th February, 2019;*

4. *In addition to or in lieu of such committal, the Court be pleased to order payment of a fine by the said Contemnors for disobedience and/or non- observance of the Order of this Court given on 5th February 2019; and*

5. *Dr Nancy Macharia and Mutuku Joseph Kyalo the Contemnors to bear the costs of this Application*

The Notice of Motion Application (hereinafter the **Contempt Application**) was based on the grounds on the face of the application and the Supporting Affidavit sworn by the Applicant on 15th March, 2019. Collectively, the Applicant pleaded in the Contempt Application and her Supporting Affidavit to the application that:-

i. Following issuance of the Court Orders of 5th February, 2019 (hereinafter the **Interim Orders**), a copy of the Orders together with the Originating Motion were served on the Respondents on 6th February, 2019.

ii. On 7th February, 2019, the Applicant was contacted by the 1st Respondent's offices in Kiambu to collect a letter. While the Applicant was out of school, the Board of Management Chairperson Dr Samuel M. Maina came to the School and called three more

members of the Board of Management and together with the 2nd Respondent, called the students for an assembly. During the assembly, the Chairperson introduced the 2nd Respondent as the new Principal of the School and informed them that the Applicant had been transferred.

iii. The Respondents have failed to maintain the status quo as ordered by this Court and the 2nd Respondent at the instruction of the 1st Respondent as taken charge as the Principal of the School.

iv. The Originating Motion was to come up for inter parties hearing on 20th February, 2019, yet the Contemnors have already disobeyed the Court Order requiring the status quo to be maintained pending the inter parties hearing of the said motion.

v. Unless the Contemnors are punished for their disobedience, they will continue to disobey the Court's Orders and directions thereby continuing to lower the dignity of the Court.

On 29th March, 2019, the Respondents filed a Replying Affidavit sworn by Dr Nancy Njeri Macharia, the 1st Respondent's Secretary/Chief Executive Officer on 29th March, 2019. Therein, in summary, she deposed that:-

i. It is not in dispute that the Interim Orders were issued served upon the Respondent together with the Originating Motion.

ii. The Respondents' understanding was that the Interim Orders were to last until 20th February, 2019 when the matter came up for inter parties hearing.

iii. When the matter came up for inter parties hearing on 20th February, 2019, it was not cause listed thus had to trace which Court the matter would be mentioned in. The Respondents' Counsel only found out that the matter had already been mentioned before Honourable Radido J. and fresh orders issued.

iv. From the Court Orders of 20th February, 2019, the interim orders of 5th February, 2019 had not been extended.

v. The deponent complied with all the orders issued ex-parte. Despite the averments of Regina Akinyi Opondo at paragraphs 21 to 28 of her Replying Affidavit, the 1st Respondent in collaboration with Ministry of Education, Kiambu County did not proceed with the statutory handing/take over exercise envisaged in Section 54(7)(o) and (8) of the Basic Education Act.

vi. The situation subsisting at the School is that the Applicant is indeed fully in charge of the administration of the School despite being advised otherwise vide the 1st Respondent's letter dated 1st February, 2019.

vii. Pending hearing and determination of the main suit, the 2nd Respondent has been discharging his teaching duties at the School as the Applicant fully administers the school in compliance with the Interim Orders.

viii. The deponent personally undertakes to transfer the 2nd Respondent from the School should the Court hold in favour of the Applicant in the main motion or issues direct interim orders in that regard.

ix. The alleged Contemnors and the Respondents have duly and diligently complied with the Interim Orders.

On 6th May 2019, the Applicant filed a Further Affidavit sworn on 3rd May 2019. Therein, the Applicant deposed to new developments in the matter that:-

i. On 20th March, 2019, the matter came up before Honourable Radido J. for the hearing of the Originating Motion but the Court directed that since the Applicant had filed the Contempt Application, the Contempt Application should be heard before the Court which had issued the orders.

ii. On 4th March, 2019, while the order for maintenance of status quo was still in force, the Respondent through its main office in Upper Hill, further in blatant disregard of the Orders of this Court posted one Mr Kimari Peter Mwangi vide a letter dated 20th February, 2019 to the School to replace the Applicant as the Deputy Principal of the School.

iii. Justice has already been miscarried as the Applicant has already been unfairly demoted from being a School Principal to a normal teacher even after the Orders issued by the Court pending hearing and determination of the Originating Motion.

Submissions

Pursuant to directions issued by Abuodha J. on 6th May, 2019, parties were directed to file written submissions with respect to both applications.

Applicant's Submissions

On 29th May, 2020, the Applicant filed written submissions dated 23rd May, 2020. The Applicant identified the following issues for determination by the Court:-

- i. Whether the Respondents disobeyed the court orders issued on 5th February 2019
- ii. Whether the Applicant was deployed as a full principal but on temporal basis to the School
- iii. Whether the applicant should be deployed to another School in the capacity of a Principal

On whether the Respondents disobeyed the Interim Orders the Applicant submitted that in addressing contempt of Court, the three issues that need to be satisfied are whether there exist valid Court Orders, whether the Orders were effectively served and finally whether the orders were disobeyed.

It was the Applicant's submission that the first two issues of the existence of valid court orders and service of the same are not in dispute as the Respondents have admitted to the same in the Replying Affidavit sworn by Dr Nancy Macharia Njeru. The Applicant submitted that it was evident that the Respondents were aware of the Court Orders and the remaining issue for determination with respect to the Contempt Application is whether the Interim Orders were disobeyed by the Respondents.

It was the Applicant's submission that the status quo that was to be maintained was for the Applicant to continue with the management of the School as the Principal until the final determination of the Application. The Court further ordered that such Interim Orders were to last until the final determination of the Originating Motion.

The Applicant submitted that Dr Nancy Njeri Macharia in paragraph 10 of her Replying Affidavit deponed that her understanding of the orders were that they were to last until 20th February 2019. It was the Applicant's submission that this is an attempt by the Respondents to interpret Court Orders in order to circumvent complying with them.

She submitted that the Courts have over time held that it is not in the sphere of a person served with Court Orders to interpret them. She relied on the case of **Republic v Kenya School of Law & 2 others Ex parte Juliet Wanjiru Njoroge & 5 others [2015] eKLR** where **Odunga J.** held as follows –

“In my considered view, Court orders are not made in vain and are meant to be complied with, if for any reason a party has difficulty in complying with court orders the thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal.”

The Applicant also relied on the case of **Wildlife Lodges Ltd v County Council of Narok and Another [2005] 2 FA 344 (HCK)** where the Court held:

“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment.... A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it... He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed... if there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding and this would have been the lawful course... Consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked.”

It was the Applicant's submission that despite the 1st Respondent alleging that they complied with the Interim Orders until the 20th February 2019 when purportedly the Interim Orders were to last, they had already disobeyed the Court Orders. This was when on the 7th February 2019 the 1st Respondent through its Kiambu office issued a letter dated 1st of February 2019 to the Applicant directing her to hand over the management of the School to the 2nd Respondent.

She submitted that she has since been demoted from school Principal to a normal teacher. The 1st Respondent has since posted Mr. Peter Kimari Mwangi as the Deputy Principal of the school through a letter dated 20th February 2019 thereby in effect demoting the Applicant to a normal teacher. It was her submission that the Respondents actions are in blatant disobedience of the Interim Orders as well as a breach of Article 10 of the Constitution on National Values requiring strict observance of the Rule of law. In support of this submission, she relied and cited the holding of Odunga J. in **Republic v Kenya School of Law & 2 others Ex parte Juliet Wanjiru Njoroge & 5 others** (supra) held as follows:

“Therefore it is my view and I so hold that those who disobey Court orders risk being declared by the Court to have breached Article 10 of the Constitution which prescribes national values and principles of governance with the attendant consequences among other appropriate sanctions. Therefore in order to maintain the rule of law and in order that the authority and the dignity of our Courts are upheld at all times and to stamp the authority of this Court and ensure the values and principles of governance enshrined in Article 10 of the Constitution are adhered.”

On whether the Applicant was deployed as a Principal but on temporal basis to the school, the Applicant submitted that through her letter dated 25th September 2015, she made an application to the 1st Respondent requesting for promotion as Principal and was invited to an interview vide a letter dated 7th March 2017. Since then, there has never been any communication by the 1st Respondent informing the Applicant that her application was unsuccessful.

The Applicant submitted that the merit list produced by the Respondents is a fabrication because some of the reasons given for the Applicant not having succeeded are contrary to the 1st Respondent's policy. That according to 1st Respondent policy on Identification, selection, appointment, deployment and training of head of post-primary institutions (this is the policy referred to at paragraph 7 of the Respondent's Repling Affidavit as "*the deployment policy*"). Clause 8.1 (b) of the policy provides the following to be a qualification for heads of institutions among others:

"Have a minimum of seven (7) years continuous post qualification experience, two of which must have been at the level of deputy head of an institution or head of a department."

She submitted that the 1st Respondent averred that the Applicant was unsuccessful because she had not served in the position of Deputy Principal for at least four years when the policy provides for two years. Further, that the same policy provides for interview score sheet. However, what the 1st Respondent has annexed as "Kiambu County Merit list for principals - March 2017" falls short of the expected format prescribed in the policy.

She submitted that even if this Court was to look into the current applicable guidelines for the 1st Respondent on Career Progression Guidelines for Teachers 2018, Clause 2.4.11 of Career Progression Guidelines for Teachers 2018 provide for the qualifications for appointment as a Principal to be among others:

"A teacher must have served as Deputy Principal II/Senior Master I T-Scale 12 for a minimum period of three years."

It was the Applicant's submission that she had served as a Deputy Principal for at least three years, a fact that is admitted by the 1st Respondent. That following the interview conducted by the 1st Respondent on 16th March 2017, the 1st Respondent issued the Applicant with a letter dated 4th July 2018 and with the subject as: *DEPLOYMENT AS PRINCIPAL*. Consequently, the Applicant took over the office as the Principal Githurai Mixed Secondary School until 23rd January 2019 when the 2nd Respondent showed up at Githurai Mixed Secondary School with a letter dated 23rd January, 2019, the subject being: *TRANSFER OF HEAD OF INSTITUTION*.

It was the Applicant's submission that the School previously did not have two Principals and thus it meant that the Applicant ought to have also received a transfer letter to allow the 2nd Respondent take over the leadership of the School. She submitted that from the 1st Respondent Policy on Identification, selection, appointment, deployment and training of head of post-primary institutions published on February 2007 at page 5, the word deployment is defined as:

"Deployment - The process of posting teachers to areas where they are best qualified to perform."

It was her submission that it is clear that if a teacher receives a

"DEPLOYMENT LETTER" the teacher is best qualified to perform in the job position he/she is posted.

It is the Applicant's submission that when the Applicant received the letter dated 4th July 2018 she was deployed as a principal of Githurai Mixed Secondary School because she was the best qualified to perform the task of a Principal. Consequently, the 1st Respondent could only transfer the Applicant to another school as a Principal if the 2nd Respondent is to take over as the Principal of Githurai Mixed Secondary School. Failure to do so, it would amount to unfair labour practice. The Applicant having been deployed as a Principal, re-deploying her back as a deputy principal would be a demotion and is contrary to fair labour practices.

In support of this submission, they relied on the case of **Joel Njoroge Wanyoike v Teachers Service Commission (TSC) & 2 others [2015] eKLR**.

The Applicant submitted that by a letter dated 4th July 2018, the Applicant was deployed by the 1st Respondent as Principal at the School. It was her submission that the letter expressly stated that the Applicant was deployed as a Principal but temporarily to the School. It was the Applicant's submission that this in effect means that she was deployed as Principal of the School until further notice. This, she submitted gave rise to a legitimate expectation that she shall continue to act as Principal until the 1st Respondent either finds another school for the Applicant or is confirmed as Principal on a permanent basis in the current school in which she acts temporarily as Principal.

In support of her submissions the Applicant relied on the text in **OLLARD, PARPWRTH AND HUGHES** writing at page 583 in the 4th edition of **CONSTITUTIONAL AND ADMINISTRATED LAW: TEXT WITH MATERIAL** where the learned authors posited as follows: -

"Legitimate expectation refers to the principle of good administration or administrative fairness that, if a public authority leads a person or body to expect that the public authority will, in the future, continue to act in a way either in which it has regularly (or even always) acted in the past or on the basis of a past promise or statement which represents how it proposes to act, then, prima facie, the public authority should not, without an overriding reason in the public interest, resale from that representation and unilaterally cancel the expectation of the person or body that the state of affairs will continue. This is of particular importance if an individual has acted on the representation to his or her detriment".

She also relied on the text in **HALSBURY'S LAWS OF ENGLAND 4th Edition, Vol. 1 (1) at page 151, paragraph 81** which outlines legitimate expectation follows:

"A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by authority, including an implied representation, or from consistent past practice".

It was thus the Applicant's submission that the action of the 1st Respondent gave rise to a legitimate expectation and therefore, the 1st Respondent was under a legal duty to post the Applicant to another school as Principal before deploying the 2nd Respondent as Principal at the School.

The Applicant submitted that despite the 1st Respondent claiming that they had maintained the Applicant as the Deputy Principal of the School after deployment of the new Principal, the 1st Respondent went ahead and posted Mr. Kimari Peter Mwangi to the School as Deputy Principal. This in effect meant that the Applicant was no longer the School's Principal or the Deputy.

It was the Applicant's submission that the actions of the 1st Respondent therefore amount to constructive demotion of the Applicant from a Principal to an ordinary teacher as demonstrated by the letter dated 20th February 2019 posting Mr. Kimari Peter Mwangi to the School as Deputy Principal.

The Applicant submitted that the 1st Respondent flouted the rules of natural justice as it ought to have posted her to another school as Principal before posting another Principal to take over from her. She submitted that the effect of the action of the 1st Respondent is that the Applicant has been left without a school to report to as Principal.

On whether the Applicant should be deployed to another school in the capacity of a Principal, the Applicant submitted that having established that she was deployed as a full Principal in the affirmative, it consequently follows that the Applicant should be posted to another school in the capacity of a Principal.

Respondents' Submissions

With respect to the substantive motion commenced by way of the Originating Motion, the Respondents submitted that there is no proper suit before the Court capable for determination. They submitted that **Rule 4** of the Employment and Labour Relations Court (Procedure) Rules 2016 provide for the manner of commencement of suits before this Court. The said Rule 4 (1) provides that a party who wishes to refer a dispute to the Court under any written law shall file a Statement of Claim setting out his case.

They submitted that similarly, **Rule 7** of the Employment Labour Relations Court (Procedure) Rules 2016 sets out institution of Petitions and Judicial Review proceedings. It provides that: -

a) A party who wishes to institute a petition shall do so in accordance with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2012.

b) A person who wishes to institute judicial review proceedings shall do so in accordance with section 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules.

It was the Respondents' submission that both **Rules 4** and **7** presume the existence of a substantive suit upon which an application may be filed. Accordingly, under **Rule 4 and 7** of Employment Labour Relations Court Rules and **Section 2** of the Civil Procedure Act, a Notice of Motion is not a pleading as per the law and is therefore not capable of forming the basis for a determination of any question/issue. They submitted that what is before the Court is neither a statement of Claim, Petition nor Judicial Review Proceedings. The purported suit is unknown to law and was instituted in contravention of the statute. The same is a nullity *ab initio* as the matter herein has been commenced through un-procedural means and is thus fatally defective.

They relied on the case *Nyahururu Civil Misc. App. No.31 of 2018: Samuel Chege Thiari & another v Eddah Wanjiru Wangari & 3 others [2018] eKLR* where the Court after evaluating the binding authorities of the Supreme Court in *Raila Odinga & others v IEBC (2013)* held that:

"In the end, I find that the applicant is not properly before this court as there is no suit upon which the Notice of Motion can stand. The court cannot invoke its inherent jurisdiction to cure that defect. There is no suit to amend and consolidate with Pet. 1/2018. For that reason, I strike out the Notice of Motion dated 16th July 2018 with costs to the 1st and 2nd respondents."

They also relied on the case of **Mombasa Misc. Civil Appt. No. 8 of 2014: Fidelity Bank Limited v John Joel Kanyali [2014]** where the Court held:

"Similarly as stated by the Court of Appeal, I say Notice of Motion is not a manner prescribed for instituting a suit. It cannot be a pleading as defined in Cap 21 and its Rules. Accordingly, there is no suit before Court which suit can sustain the Notice of Motion. I do therefore uphold the objection raised by the Respondent."

It was the Respondents' prayer in their submissions that the Court strikes out the present suit for being a nullity that cannot be rescued by the provisions of **Article 159**.

On whether the Applicant was appointed and posted as a Deputy Principal at the School, the Respondents submitted that the 1st Respondent has statutory mandate under the Constitution and the Act to recruit, transfer, promote and assign teachers to serve in public schools. This

mandate includes the power to appoint institutional Administrators (Head teachers and Principal) to supervise curriculum delivery and general administration of public institutions. They submitted that while undertaking this critical constitutional function, the Commission is bound by the provisions of **Article 232** of the Constitution and the National Values and Principles of Governance espoused at **Article 10** of the Constitution. These principles incorporate fair competition and merit as the basis for appointment into public offices.

It was the Respondents' submission that it was on the strict adherence to these principles that: -

- a) On 20th November, 2013, the 1st Respondent deployed/posted
the Applicant to the School to serve as the Deputy Principal of the School;
- b) Consequently, when the former Principal of the School, Raphael Mwangi Kung'u retired at the end of June 2018, the 1st Respondent vide letter dated 4th July 2018 deployed the Applicant who was at the material time the Deputy Principal at the school to act as a Principal "*until further notice.*"
- c) The content, tone and text of the said letter was succinct and clear. The Applicant was to act as Principal on temporary basis until a substantive Principal is deployed to the School as is the practice in public service.
- d) The fact that the Applicant was serving in an acting capacity was well known to her as:
 - i) She acknowledged the same in the BOM Meeting Minutes of 13th July 2018 authored by the Applicant herself in which she inscribed her designation as "*Acting Principal*";
 - ii) She understood it when her basic salary was adjusted on 7th June 2018 from the grade of Senior Master to Deputy Principal Status following the implementation of the CBA.
 - iii) She knew her position as Deputy Principal when she formally applied and attended for interviews for position of Principal. A fact she admits in her submissions.

The Respondents submitted that appointment as a Principal and indeed to all administrative positions are subject to vigorous, fair and transparent competition entailing advertisement of vacant positions, interview of shortlisted candidates, selection and formal appointment. The Applicant is yet to undergo this constitutionally underpinned process hence cannot allege to have been appointed Principal.

The Respondents admitted that the Applicant underwent a similar process in 2017. However she did not make it as she emerged last in the Merit List. They submitted that accordingly, the Respondents cannot evade the contractual and constitutional process to ascend to the high position through the back door as doing so will violate the tenets of good governance and principle of public service provided under the Constitution.

The Applicant submitted that the 1st Respondent having identified the substantive Principal to take over the School, it was incumbent upon the Applicant to resume her duties and substantive position as Deputy Principal until such a time that vacancies are advertised for positions of Principal.

On whether the Applicant should be deployed to another School in the capacity of a Principal, the Respondents submitted that **Regulation 69 Code of Regulations for Teachers** provides for the deployment of heads of institutions for purposes of administration of educational institutions by the 1st Respondent. The 1st Respondent therefore has discretion to deploy its teachers.

It was the Respondents' submission that **Regulation 70(1) of the Code of Regulations for Teachers** provides that the manner of identification of Institutional Administrators shall be done by the 1st Respondent through a competitive process in accordance with the deployment policy in place at the time. Further, **Regulation 73 of the Code of Regulations for Teachers** provides that the Commission shall in promoting a teacher consider the existing schemes of service and in particular:

- a) *Merit and ability as reflected in the teacher's work, performance and results.*
- b) *Seniority and experience as set out in the scheme of service.*
- c) *Existence of a vacancy.*
- d) *Academic and professional qualification.*
- e) *Any other criteria the Commission may consider relevant.*

It is the Respondents submission that the Applicant may be deployed to another School in the capacity of Principal but only through a competitive process subject to the availability of a vacancy. Promotion to the position of Principal is not automatic and due process must be followed.

They urged the Court in their submissions to restrain itself and allow the 1st Respondent to discharge its mandate as an employer and as

provided for in the Constitution.

The Respondents relied on the case of **Geoffrey Mworira v Water Resources Management Authority and 2 others [2015] eKLR** where it was stated that:-

“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 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.”

With respect to the Contempt Application, the Respondents submitted that a person is considered to have committed the offence of Contempt of Court if they wilfully and without lawful excuse disobey an order or directions of a superior or subordinate court in the course of the hearing of a proceeding.

They relied on the holding of **Koome J.** (as the then was) while in **Abdi Satarhaji & another v Omar Ahmed & another T20181 eKLR**:

“Contempt of court is constituted by conduct that denotes wilful defiance of or disrepute towards the court or that wilfully challenges or affronts the authority of the court or the supremacy of the law; whether her in civil or criminal proceedings.”

It was the Respondents’ submission that in determination of the offence of Contempt of Court, is crucial to establish that the disobedience of Court orders was wilful. They submitted that the 1st Respondent’s plain and honest understanding was that the Interim Orders were to last until the 20th February 2019 when the matter was to come up for inter-partes hearing. The decision of the 1st Respondent was therefore informed by this honest belief.

They relied on the case of **Republic v Ahmad Abolfathi Mohammed & Another [2018] eKLR** wherein the Court found that *“to cite the respondent for contempt, the Court must be satisfied that the impugned Order is clear and unambiguous.”*

Further, they relied on **Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & others [2015] eKLR** which cited the decision of the **Supreme Court of India** in **Ram Kishan v Sir Tarun Bajah & Others - Contempt Petition No. 336 of 2013** that *“in order to punish a contemnor it has to be established that disobedience of the order is wilful.”*

It was the Respondents’ submission that the situation subsisting at School is that the Applicant is indeed fully in-charge of the administration of the institution despite having been advised to revert to her substantive position as Deputy Principal of the School. They thus maintained the status quo of the administration of the School as per the Interim Orders.

They submitted that since the said orders were issued, the 2nd Respondent has been discharging teaching duties at the School as the Applicant fully administers the School in compliance with the Interim Orders.

It was the Respondents’ submission that the presence of the 2nd Respondent at Githurai Mixed Secondary School in the pendency of the main suit is in no way contempt of the ex parte orders in regard to *“maintenance of the status quo in relation to the management of Githurai Mixed Secondary School, which is, the Applicant herein to continue being the principal of the school, pending hearing and final determination of the Application herein.”*

Determination

I have looked at the pleadings filed by the parties and their extensive submissions on their respective positions. The Respondents have raised issue with the propriety of the Originating Motion, pleading and submitting that there is no proper suit before this Court for its determination. Indeed, as stated by the Respondent **Rule 4** of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides for the manner of commencement of suits by way of a Statement of Claim. **Rule 7(1)** on the other hand relates to the institution of Petitions under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2012 under which the Applicant has premised the Originating Motion, specifically **Rule 4. Rule 4 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules** provides as follows:-

(1) Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.....

Rule 10 goes ahead to provide:-

(1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.

A Notice of Motion is not recognized as an originating process within this Court. It is not envisioned within the Constitution or the Employment and Labour Relations Court Act and Rules. Generally, a Notice of Motion is not a proper manner of initiating a suit unless specifically provided for by the statute governing the subject matter of the dispute. I find credence in this view from the holding of **Gikonyo J ABDI ABDULLAHI SOMO V BEN CHIKAMAI & 2 others [2016] eKLR** where he pronounced himself thus:-

“In my life as a Judge I have in the past heard similar arguments being advanced that a Notice of Motion cannot commence substantive proceedings. But, it should be understood that as a matter of general principle, a notice of Motion is a competent way of initiating substantive proceedings in Court. It will all depend on the particular statute governing the particular proceeding in question. Therefore where the law provides for the manner of commencing a suit or proceedings in court then that procedure applies...”

At the starting point, it is clear that the suit is defective. However, it is now well settled law that central to the administration of justice under the Constitution, 2010, is the concept of determining the substantive merits of the matter. The parties have already argued the matter to its near end and guided by **Article 159** of the Constitution of Kenya I will move to consider the Originating Motion and the Contempt Application without the restraints of undue regard to procedural technicalities.

The Originating Motion principally seeks temporary orders for maintenance of the status quo as at the time of the filing of the motion, temporary orders of injunction restraining the transfer of the Applicant pending determination of the Application. The Applicant also seeks therein an order to compel the 1st Respondent to issue a standard letter of transfer to the Applicant communicating to her which is the next school she is to report to as Principal.

From my reading of the prayers in the Originating Motion, the only permanent order sought by the Applicant relates to the issuance of the order compelling the 1st Respondent to issue the Applicant with a standard letter of transfer as stated above. The Originating Motion is now at the stage of determination of the Application and there is therefore no need to consider the prayers for the temporary injunctions.

Thus leaves the prayer for issuance of the standard letter of transfer communicating which School the Applicant ought to report to as Principal. The Applicant's contention is that she applied for position of Principal to the 1st Respondent but did not receive any response on the outcome of her interview with the 1st Respondent. She contends that she next received a letter of deployment to the School. The 1st Respondent's contention is that the letter was issued following the retirement of the then Principal of the School where the Applicant was the Deputy Principal and was stated to be in an acting capacity. The Respondents relied on the minutes of the School's Board of Management, where the Applicant was the Secretary and wherein she acknowledged her role as the Acting Principal. They produced a merit list of the interviewees where the Applicant was ranked last. They also produced the re-designation sheet signed by the Applicant requesting a proper designation on her pay slip as Deputy Principal III filled by the Applicant in June 2018. The payslips for the month of December and 2018 and January 2019 also produced by the Respondents clarify the designation of the Applicant. I find that prayer 2 as framed in the Originating Motion is akin to this Court compelling the 1st Respondent to designate the Applicant as a Principal outside of the framework for career progression under which it operates. I find the granting of the prayer would amount to interference with the managerial prerogative of the employer. As held in the case of *Alfred Nyungu Kimungui V Bomas of Kenya (Industrial Court Cause No 620 of 2013)* Courts should not take over and exercise managerial prerogatives at the work place.

Contempt Application

On whether the Respondents are in contempt of this Court's Orders, it is important to establish the nature of the orders granted by this Court. From my reading of the Court record, my brother **Abuodha J.** issued orders on 5th February, 2020 ex-parte as follows:-

“The Application dated 5th February, 2019 is certified urgent. The same to be served upon the Respondents for inter parties hearing on 20th February, 2019. Prayer 2 granted to last until then” [Emphasis mine]

The Respondents have contended and submitted that their understanding of the said Orders was that the Orders were to last until the 20th February, 2019. Prayer 2 is framed to apply if granted, pending hearing and determination of the Originating Motion and the addition of the word 'until then' would create an ambiguity on whether the orders were to subsist until inter parties hearing on 20th February, 2019 or until hearing and determination of the Originating Motion. I am thus inclined to find the Respondents' submission plausible in their understanding of the Court's Orders in this regard.

It is trite law as has been cited in case law relied on by both the Applicant and the Respondents that in order for the Court to cite a party for contempt, the Court order must be clear and unambiguous, duly served on the party and there must be an act of wilful disobedience by the party. I have already found that there was some ambiguity in the Interim Orders and it would be sufficient to leave the matter at that. I note that service of the Interim Orders is not disputed by the Respondents. The core issue left is whether there was disobedience of the orders that was wilful. It is undisputed that the Interim Orders were served on the Respondents. They were intended to preserve the status quo on the management of the School and to preserve the Applicant as the Principal of the School. The prevailing status quo was that by 30th January, 2019, the 2nd Respondent had reported to the School as the Principal. The Applicant had also signed an entry and exit report dated 30th January, 2019 confirming the 2nd Respondent had reported to the School.

I find that the Respondents are not in contempt of this Court's orders which directed that status quo be maintained as the status quo prevailing. At the time the orders were served, on 6th February, 2019, the 2nd Respondent had reported to School on 30th January, 2019 and was therefore the substantive Principal. Further, the Applicant had already been advised by text on 4th February, 2019 (at Appendix **JWG-5** of the Applicant's Supporting Affidavit) to arrange to hand over. On the posting of a Deputy Principal, the 1st Respondent has explained that following the Interim Orders, they allowed the Applicant to continue to perform duties of the Principal and therefore posted Mr Kimari Peter Mwangi as Deputy Principal. **The upshot is that both applications are dismissed with costs.**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF JULY 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE