



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. 151 OF 2018

**IN THE MATTER OF ARTICLES 53(1) (B), 53 (2) 41 (1), (5),159 (1) & (2),
230 (4) & (5) AND 237 OF THE CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF THE LABOUR RELATIONS ACT (2007)

AND

IN THE MATTER OF THE TEACHERS SERVICE COMMISSION ACT, 2012

AND

IN THE MATTER OF THE CODE OF REGULATIONS FOR TEACHERS

AND IN THE MATTER OF THE COLLECTIVE AGREEMENT NO. 282 OF 2016

AND

IN THE MATTER OF THE NOTICE OF WITHDRAWAL OF LABOUR

BY KENYA NATIONAL UNION OF TEACHERS (KNUT)

W.E.F. 2ND JANUARY, 2019

BETWEEN

TEACHERS SERVICE COMMISSION.....APPLICANT/PETITIONER

-VERSUS-

KENYA NATIONAL UNION OF TEACHERS (KNUT).....RESPONDENT

AND

MINISTRY OF LABOUR & SOCIAL PROTECTION.....1ST INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Wednesday 2nd January, 2019)

RULING

The petitioner filed the petition on 31.12.2018 together with an urgent application by way of the notice of motion under a certificate of urgency. The matter was heard ex-parte on 31.12.2018 and interim orders made by the Court including the admitting of the application for hearing during the present Court Recess. The application was served and has proceeded for inter parties hearing on 2.01.2019 as was

scheduled.

The application filed through Oyuchio Advocate was under Articles 24, 41, 53, and 159 of the Constitution of Kenya 2010, sections 12(1) (b), 12 (3) (i), (ii), (iv) and (viii) of the Employment and Labour Relations Court Act, sections 77(1) (a) (b) and (3) and the 4th Schedule of the Labour Relations Act, rules 18 (4), (5), (6) and (19) of the Employment and Labour Relations Court (Procedure) Rules, 2016. The substantive prayers made are for orders:

- a. That a prohibitory injunction do issue restraining the respondent, its officials, members, employees, agents or any other person acting on its behalf from withdrawing labour and/or commencing or participating in the intended industrial action set to commence with effect from 2nd January 2019 or any other time thereafter pending the hearing and determination of the petition.
- b. That the Honourable Court be pleased to direct the respondent to resume the bi-partite negotiations which were adjourned by the applicant or petitioner and the respondent herein on 3rd October, 2018 on all the outstanding issues.
- c. That in the alternative the Honourable Court is pleased to direct the respondent herein to engage in conciliation proceedings initiated by the Interested Party in good faith with a view to resolving all the issues raised by the respondent.
- d. That the costs of the application be provided for.

The application was supported by the affidavit of the applicant's Secretary and Chief Executive Officer Nancy Njeri Macharia attached to the application and the exhibits thereto.

The grounds in support of the application are as follows:

- a. The respondent through its Secretary General Hon. Wilson Sossion has by the strike notice dated 19.12.2018 and reinforced by the circular dated 30.12.2018 asked its members being the applicant's employees to withdraw labour and to commence a strike effective 02.01.2019.
- b. The scheduled strike will paralyse learning and the industrial action will therefore violate the access to free and compulsory basic education in all public schools in Kenya in gross violation of Articles 43(1) (f) and Article 53(1) (b) and (2) of the Constitution.
- c. The strike notice is illegal because at all material times the parties were in negotiation and the parties have not exhausted the negotiations or conciliation procedures on grievance and dispute resolution as provided for in their respective recognition and collective agreements as well as the conciliation under the Labour Relations Act. Thus the strike notice was premature and uncalled for.
- d. The interested party has determined that the matters in dispute amount to a trade dispute and a conciliation committee has since been appointed and the parties should resolve the dispute per the conciliation procedure under the Labour Relations Act.
- e. Unless the strike notice and strike are stopped by the Court, the industrial action will cripple the provision of education services in public institutions countrywide and prejudice and violate the constitutional right to free and compulsory basic education of millions of innocent school going children contrary to the Constitution and the law.
- f. The orders as prayed for are granted in the best interest of the innocent school going children in the country and in the interest of justice, fairness, good governance and good labour practice.

The respondent has opposed the application by filing on 02.01.2019 the replying affidavit of the respondent's Secretary General Hon. Wilson Sossion and through SMS Advocates LLP. Learned Senior Counsel Paul Muite together with Mr. Sigei Advocate and Mr. Mbaluto Advocate urged the respondent's case. The application is opposed upon the following grounds:

- a. The respondent issued the strike notice to withdraw its members' labour in exercise of the union and its members' rights under Article 41 (1) and (2) (d) of the Constitution of Kenya. The Labour Relations Act, Part X Section 76(a), (b), (c) and clause 17 of the collective agreement between the parties. The notice allowed 14 days' notice whereas the law prescribes 7 days' notice so that it was more than adequate.
- b. The parties were in bipartite negotiations on the matters in dispute and the last meeting was in October 2018 and thereafter the applicant indefinitely cancelled, on two occasions, meetings convened for purposes of resolving the reported dispute. Clause 17 of the collective agreement provides for amicable resolution of disputes through alternative dispute resolution for sustained industrial peace apply and the dispute resolution mechanism must be exhausted prior to invoking industrial action. In February 2018 the applicant had condemned and dismissed conciliation processes as had been commenced by the Cabinet Secretary.
- c. Thus, the respondent was entitled to issue a strike notice as per clause 18 of the collective agreement and clause 17 thereof did not take away the right to industrial action.
- d. The parties have grievances on 4 issues.
- e. The grievance on teachers' promotion is that on 02.05.2018 the applicant issued circular No. 7 of 2018 being Ref. No. TSC/ADM/192A/VOL.IX/37 which purported to abolish and replace the three schemes of service in the teaching service with what

the applicant called Career Progression Guidelines which was not part of or a component of the 2017/2021 collective agreement. The guidelines as issued violate the CBA and the Code of Regulations for Teachers. The guidelines cannot be relied upon to abolish the regulations and they were introduced arbitrarily without involvement of the respondent.

f. On transfer of teachers also known as the grievance on “**delocalisation**”, the grievance is that the transfers are adverse to personal and family interests of some affected teachers. Further some branch officials have been transferred out of the territorial jurisdiction of their branches so that trade union activities will be seriously hampered. A general concern is that consultations were not carried out with the effect that some affected teachers feel bullied, harassed and intimidated to work in unfamiliar localities leading to lowered productivity and curriculum coverage.

g. Other concerns are on performance contracting where clause 11 of the collective agreement prescribes participation in development of relevant procedures. The respondent’s concern is that new performance instruments or tools have been unilaterally imposed by the applicant and they are cumbersome to be implemented by teachers who are required to spend considerable time and internet resources to make returns. The respondent submits that such instruments are not in place and will be developed in a participatory manner.

h. On teacher professional development clause 12 of the collective agreement provides for implementation of career progression in accordance with the Code of Regulations for Teachers. The respondent’s case is that the applicant has unilaterally developed the Teacher Professional Development Modules to be used in teacher career progression without involvement of the respondent and which will be relied upon to promote teachers in the place of the prevailing certificates, diplomas, degrees, master’s and doctorate qualifications in the relevant areas of study.

i. The issues in dispute should be handled in accordance with the provisions of the collective agreement and the regulations.

j. The respondent while willing to subject itself to conciliation, the applicant has rubbished the same as at 15.02.2018 conciliation process that the respondent had initiated.

k. The rights in Article 41 are not subservient to the rights in Article 53 of the Constitution.

l. The applicant is not sincere because it has refused or failed to cooperate in negotiations or conciliation proceedings.

The court has considered the parties’ respective positions. It is clear that parties have been in negotiation and conciliation proceedings on the four issues in dispute but without amicable resolution. At some stages of negotiation or conciliation, it is also clear that the parties have been reluctant to cooperate as expected and agreed upon in the recognition and collective agreements. Under section 78 (1) of the Labour Relations Act, 2007 a strike is prohibited if the trade dispute was not referred for conciliation in terms of the Act or collective agreement providing for conciliation. Section 77 of the Act is clear that a party who fails to attend a conciliation proceeding in good faith with a view of resolving the dispute cannot apply for a relief under the section.

The material before the Court shows that the applicant failed to cooperate at the conciliation initiated in February 2018 and the respondent failed to cooperate at the subsequent conciliation as per the letter of 22.12.2018. The respondent nevertheless submits that such refusal to attend conciliation was out of the respondent’s previous frustration of negotiations and conciliation. It is further submitted that the respondent is willing to go for conciliation but on a level playing ground. Further the respondent attended the conciliation meeting of 01.01.2019 in good faith but the applicant was absent. The applicant submits that the meeting of 01.01.2019 had not been scheduled but the applicant is ready for conciliation or negotiations. The record of proceedings of the conciliation committee of 01.01.2019 have not been filed but it has been submitted by the learned Counsel Ms. Odhiambo for the interested party that conciliation committee is ready to proceed towards resolving the disputes amicably.

Considering the history of the dispute and to balance justice the court returns that it will be just that the strike and the strike notice are stayed and parties given chance to undertake conciliation as per clause 17 of the collective agreement with the following further findings:

a. Section 35 (2) of the Teachers Service Commission Act, 2012 is clear that registered teachers will undertake career progression and professional development programmes as may be prescribed by regulations. The Court finds that the applicant must make the relevant regulations and in accordance with the provisions of clause 12 of the collective agreement.

b. The parties are in agreement that performance management and related instruments or tools, procedures, and processes must be participatory as per clause 11 of the collective agreement. The parties will therefore act accordingly and until the same is complied with, no tools will be implemented unilaterally by the applicant.

c. The applicant and respondent agree that transfers may affect union officials at branch level and further that there is no agreement on transfer of union officials consistent with the union management and activities. It is submitted for the applicant that there would be no immediate prejudice if union officials are transferred within the geographical limits of their respective branches. The Court returns that pending such agreement to govern transfer of union officials, the union officials will be transferable within the geographic limits of the branch they are elected to serve and the present transfer decisions outside such geographic limits are liable to being set aside. As there is no policy on time lines to decide appeals and requests for review of transfers, with respect to appeals and reviews against the present transfers, the applicant will make decision thereon by 15.02.2019 and no such affected teacher will be victimised, intimidated or harassed in that regard.

d. As parties have agreed that promotion guidelines must be by way of regulation, circular No. 7 of 2018 being Ref. No. TSC/ADM/192A/VOL.IX/37 of 02.05.2018 which purported to abolish and replace the three schemes of service in the teaching service with what the applicant called Career Progression Guidelines is amenable to being set aside or implementation stayed

accordingly.

In conclusion the application by the way of the notice of motion dated 31.12.2018 is hereby determined with orders as follows:

a. That pending the hearing and determination of the petition or further orders by the Court, there shall be stay of the taking effect of the strike and the strike notice issued by the respondent Ref. No.KNUT/LAB/52/59/2018 dated 19.12.2018 as reinforced by strike circular No. KNUT/CIRC/122/41/2018 dated 30.12.2018 or any strike notice on the 4 grievances or disputes as may subsequently issue with the effect that the respondent by itself, its officials, members, agents or any other person acting in that behalf is hereby restrained from implementing such strike notice or strike and the strike as scheduled effective 02.01.2019 or any date thereafter, as the case may be in that regard, is stayed, and the teachers affected by the notice shall continue on duty uninterrupted accordingly.

b. That pending the hearing and determination of the petition or further orders by the Court, the applicant and the respondent to attend the conciliation proceedings before the Conciliation Committee on 03.01.2019 at 9.00 O'clock in the forenoon at the Ministry of Labour and Social Protection, Nairobi; and for that purpose the applicant's Chairperson and Secretary, and, the respondent's Secretary General and Chairperson, to lead their teams respectively.

c. That pending the hearing and determination of the petition or further orders by the Court or resolution of the dispute through conciliation committee, whichever is earlier:

i. The applicant will determine appeal or application for review of transfer of any of the 3,094 teachers as currently transferred not later than 15.02.2019 and no teacher who so appeals or seeks a review will be victimised, harassed or intimidated in any manner.

ii. Pending an agreement on transfer of branch union officials beyond the geographic limits of the branch they are elected to serve, the decisions to transfer any of such union officials and as per the list in exhibit WS9 is hereby stayed as such transfer beyond the branch territory is set aside.

iii. There shall be stay of implementation of Career Progression Guidelines being circular No. 7 of 2018 being Ref. No. TSC/ADM/192A/VOL.IX/37 of 02.05.2018 and pending agreement in that regard and enactment.

iv. Promotional decisions to be made as per the collective agreement and the prevailing regulations or such other regulations that may be promulgated as per section 35 (2) of the Teachers Service Commission Act, 2012 on career progression and professional development programmes as may be prescribed by regulations.

v. As teacher professional development programme has not yet been implemented, parties to engage as per the clause 12 of the collective agreement towards appropriate Teachers Professional Development (TPD) Modules and policy.

vi. Parties to engage per clause 11 of the collective agreement towards tools, instruments, processes and procedures on performance management and the same be implemented only after such agreement and promulgation of the relevant regulatory provisions.

d. Mention on 17.01.2019 at 9.00 O'clock in the forenoon or soon thereafter to report on the progress of the conciliation proceedings and for further directions on the petition.

e. Costs of the application in the cause.

Signed, dated and delivered in court at Nairobi this Wednesday 2nd January, 2019.

BYRAM ONGAYA

JUDGE