



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 104 OF 2018

(Before Hon. Lady Justice Hellen S. Wasilwa on 30th April, 2019)

IN THE MATTER OF ARTICLES 1, 2, 3(1), 5, 23, 48, 50 (1) AND 258 (1) & (2) (c) OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF THE ALLEGED CONTRAVENTION AND VIOLATION OF ARTICLES 10, 19, 22 (1), 27, 32, 33, 41 (1) & (2), 47, 50 (1) AND 259 (1) OF THE CONSTITUTION

IN THE MATTER OF THE CONSTITUTIONAL VALIDITY OF THE PRESIDENT USURPING THE POWERS OF THE LEGISLATURE

IN THE MATTER OF THE AUTHORITATIVE INTERPRETATION OF ARTICLE 237 AS READ WITH ARTICLES 5, 6 (3), 10, 20, 27, 43 AND 53 OF THE CONSTITUTION

BETWEEN

KENYA HUMAN RIGHTS COMMISSION (KHRC)...1ST PETITIONER & 179 OTHERS

VERSUS

TEACHERS SERVICE COMMISSION.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

AND

KENYA NATIONAL UNION OF TEACHERS.....INTERESTED PARTY

RULING

1. The Application before this Honourable Court for determination is the one dated 18th February 2019, brought pursuant to Articles 156 (5) & (6), 163 (3) (d) of the Constitution; Section 6 (2) (a) of the Office of the Attorney General Act; the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2010 and all other enabling provisions of law.

2. The Applicant seeks the following orders:-

a. Spent.

b. THAT this Honourable Court do certify the instant Petition as raising substantial questions of law and that the same be referred to the Hon. Chief Justice to empanel an uneven number of judge (sic) in terms of Article 165 (4) of the Constitution.

c. THAT this Honourable Court do make such further order(s) and/or direction(s) as it may deem necessary in the circumstances.

d. There be no costs of this Application.

3. The Application is based on the grounds set out below.

4. The Petitioners/Respondents filed the Amended Petition dated 15th October 2018 seeking the following reliefs:-

- a. ***Declaration be issued that the Petitioners are entitled to protection under the Constitution,***
- b. ***A declaration be issued that the Petitioners' enjoyment of their rights and fundamental freedoms secured in the Bill of Rights under Article 41 of the Constitution has been violated by the Respondents by failing, neglecting and refusing to transfer the Petitioners from the non- conducive work environment,***
- c. ***A declaration that the human rights and fundamental freedoms of teachers have been violated,***
- d. ***An order to issue restraining the 1st Respondent from reposting the affected teachers without giving them a hearing,***
- e. ***An order to issue directing the 2nd Respondent to investigate complicity of public and civil servants in addressing the plight of teachers,***
- f. ***An order to issue directing the 2nd Respondent to initiate affirmative action programmes, including incorporating the said programmes into the education curriculum, to address religious and cultural intolerance, and to foster religious and cultural reception and accommodation,***
- g. ***The Interested Party and the 2nd Respondent be directed to give records and statistics of Muslim teachers and teachers of Somali origin working in Kenya and their place of work,***
- h. ***A declaration that where a teacher is required to seek health care from Nairobi or any other local requiring travelling for a return journey of a period of more than 3 days, the number of days spent travelling should not count in computing leave days,***
- i. ***A declaration that the teachers' right to a fair administrative action guaranteed under Article 47 of the Constitution has been violated,***
- j. ***A declaration that it is an unfair labour practice and unsafe working environment, where an employee has to practice a religion and culture not of his choice, in order to ward off threats to his or her life,***
- k. ***The teachers are entitled to salary for the months of school holidays, during which holidays they are not required to attend school,***
- l. ***A declaration that, the Respondents' conduct, acts and/or omissions are unlawful, illegal and/unfair and the same violates Articles 28, 29, 40, and 41 of the Constitution and section 5 of the Labour Act 2007,***
- m. ***An order compelling the Respondents to reinstate the Petitioners unconditionally,***
- n. ***An order compelling the Respondents to pay all outstanding salary and any payments and/or expenditure allocations property due and owing to the Petitioners,***
- o. ***That the Respondents be compelled to pay costs of this petition; and***
- p. ***Any other order and or directions that this court may deem fit to grant.***

5. It is the Applicant's position that the instant Petition raises *inter alia* the following substantial issues:-

- a. The interpretation of inter alia Articles 237, as read together with Articles 5, 6(3), 10, 20, 27, 41, 43 and 53 of the Constitution;
- b. The independence and constitutional mandate of the Teachers Service Commission under Article 237 of the Constitution,
- c. The constitutionality of the Teachers Service Commission Act in light of the prayers sought by the Petitioners,
- d. The question as to whether the Honourable Court is clothed with jurisdiction to engage and interfere in administrative functions of the Teachers Service Commission under Article 237 and the Teachers Service Commission Act including the deployment and transfer of teachers,
- e. The question as to adverse implications negative precedent the court orders are likely to set in the country touching on deployment of public officers to work in any part of the country,
- f. The question as to whether the framers of the Constitution anticipated a one united Country where every Kenyan can work anywhere in the Country and the right to freedom of movement is assured under Article 39 of the Constitution.
- g. The question as to whether the unitary architecture of the State shall be enhanced if segregating/ ethnic profiling certain regions of the country is allowed where such orders have never been issued before;

h. Directions as to the consolidation/directions of this Petition with Nairobi High Court Constitutional Petition No. 358 of 2015 between Haki Na Sheria Initiative & 6 Others -v- Teachers Service Commission & 2 Others which seeks inter alia orders to prohibit Teachers Service Commission from transferring any teacher outside North Eastern region as doing so will infringe on the provisions of Articles 43, 53 and 56(b) of the Constitution. Both Petitions raise substantial issues of law as regards the interpretation of the Constitution.

6. The Applicant avers that the issues raised in the Petition go beyond the Petitioners as individuals as there are greater public interest considerations attached to them. Further, the issues raised in the Petition form classical descriptions of substantial questions of law. It is the Applicant's position that the issues raised meet the criteria and definition of a substantial question of law as set out in the cases of:-

a. Eric Gitari vs. Attorney General & Another [2016] eKLR where the Court relied on the case of Chunilal V. Mehta & Sons Limited vs. Century Spinning and Manufacturing Company Limited to define a substantial question of law as:

“...one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court ... or which is not free from difficulty or which calls for discussion of alternative views.

b. Okiya Omtatah Okoiiti & Another vs. Attorney-General & 3 Others vs. the Attorney General & 3 Others [2016] eKLR where the observed that the Constitution does not define the term “substantial question of law” and it was upon the individual judge to satisfy themselves that the matter is substantial to the extent that it warrants reference to the Chief Justice to appoint an uneven number of judges, not being less than three to determine a matter. The Court relied on the case of Community Advocacy Awareness Trust & Others vs. The Attorney General High Court Petition No. 243 of 2011 where the Court observed that:-

“...every question concerning our Constitution ... would be a substantial question of law. Each case that deals with the interpretation of the Constitution ... would be a substantial question of law as it is a matter of public interest, affects the rights of the parties, is fairly novel and has not been the subject of pronouncement by the highest Court.”

7. The Applicant avers that the subject matter herein is complex as the effect of the prayers sought in the Petition are so monumental. As such, it is in the interest of justice that the Application be allowed and the Petition be referred to the Hon. Chief Justice pursuant to Article 165 (4) of the Constitution.

8. The Applicant maintains that no prejudice will be occasioned to the parties herein if the orders sought are granted. Further, the Application has been made expeditiously and without unreasonable delay in line with Attorney General's constitutional and statutory obligation to promote, protect and uphold the rule of law and defend the public interest.

9. The Application is opposed by the Petitioners vide the Replying Affidavit of George Kegoro, sworn on 21st February 2019. They aver that the instant Application has been made in bad faith and is intended to further delay the hearing and determination of the Petition thus negating the principle encapsulated under Article 159 (2) (d) of the Constitution.

10. It is the Petitioners' case that Petitions filed to enforce the provisions of the Constitution are generally of public interest and in considering the empanelment, public interest may be considered but is not necessarily the decisive factor. It is their position that a certification under Article 165 (4) of the Constitution is a discretionary power exercised judiciously to ensure that there is carriage of real and substantive justice.

11. The Petitioners aver that a substantial question of law is a question to be determined on a case by case basis considering the merits of each case. They further aver that the Respondents maintained that the Petition was simple and direct and can be justly disposed of by way of written submissions. Additionally, the 2nd Respondent has admitted that the Petition herein does not raise substantive issues thus does not require substantive determination as set out in their grounds of opposition. It is their position that judicial resources are scarce and as such certification should only be allowed in very exceptional cases, which is not the position in this case. They further posit that:

a. A novel factual question is not a basis for constituting an expanded bench. The Applicant must demonstrate a substantial question/issue of law. Further, the novel issues of facts shall be resolved by applying the law applicable and the evidence available.

b. The fact that the Petition may have interested the public is not a basis for constituting an expanded bench.

c. None of the parties have sought the interpretation of construction of any provisions of the Constitution or any law.

d. A feeling that the Court may grant “adverse orders, precedents or findings” is not a ground for constituting an enlarged bench as it amounts to forum shopping.

12. It is averred that the impact of the Court's order is not one of the factors of consideration in the empanelment of a bench as the Court may still suspend the implementation of orders for a given time to allow for smooth implementation.

13. It is further averred that the sitting judge is already well versed with all matters pertaining to the Petition and empaneling a bench would invariably lead to delays in determining the Petition. The Petitioners have suffered delay by the Teachers Service Commission in addressing their plight and they continue to suffer delay as the matter remains unsolved and it is in the interest of the public that there be a quick and timely dispensation of justice. A continued delay would be a continuance of the violation of the Petitioners' rights and fundamental freedoms

as enshrined in Articles 27, 28, 30, 32, 33, 41, 47, 48 and 50 of the Constitution.

14. The Applicant concludes by an averment where he states that the Advocate on record is not amenable to the consolidation of the instant Petition together with **Nairobi Petition No. 358 of 2015: Haki na Sheria Initiative & 6 Others vs. TSC & Others** because he is not privy to it.

15. The 1st Respondent responded to the Application vide the Replying Affidavit of Calvin Anyuor sworn on 22nd February 2019. The 1st Respondent avers that it will let the Court exercise its judicial discretion in the matter as it has full confidence that the interest of justice shall prevail whether the Petition is heard by a single judge or a three-judge bench.

Submissions by the Parties

16. The only submissions on record regarding the Application are the Applicant's Skeleton Submissions filed on 25th February 2019. Some of the arguments raised by the Applicant in the submissions and the cases relied upon therein, are identical to those in the instant Application. Nevertheless, the Applicant also relies on the case of **Hon. Philomena Mbete Mwilu vs. The Director of Public Prosecution & 4 Others [2018] eKLR:-**

“What is however dear from the constitutional text. Is that the issue must be one that falls either under douse 3 (b) or (d) of Article 165 of the constitution. Clause 3(b) confers jurisdiction on the court to hear and determine the question whether a right or fundamental freedom In the Bill of rights has been denied, violated, infringed or threatened: while clause 3 (d) gives the court jurisdiction to hear any question respecting interpretation of the constitution, in that context, the issue must either be one of violation or infringement of fundamental rights or interpretation of the constitution or even both

What emerges from these decisions is that a question of law would be a substantial question of law if it directly or indirectly affects the rights of parties: there is some doubt or difference of opinion on the issues raised and that the issue is capable of generating different interpretations.

I appreciate that the constitution confers discretion on the Court considering the application for certification to decide whether or not to certify a particular matter for purposes of empaneling a bench. At the same time we have to bear in mind that the constitution itself recognizes that there may be cases that would

17. The Applicant submits that Petition raises substantial questions of law which necessitates empaneling a bench of an uneven number of judges to hear it; the 1st Respondent's mandate is constitutional and statutory to assign teachers employed by the it for service to any public school and to promote and transfer teachers.

18. The Petition seeks several reliefs which have severe implication on the 1st Respondent's powers, and the determination of the Petition will have an implication on the performance of respective constitutional mandate of the 1st Respondent, will severely impact on the unity and architecture of the State, will trigger other public, state and displayed employees in other sectors to storm out of the North Eastern region hence paralyzing the service delivery and the economy of the country at large.

19. Further, since the issues raised in the Petition and the broad implications the reliefs will cause not only to teachers but to other public, state, and security officers from other parts of the country perceived to be insecure and the fact that the law is not settled by the Supreme Court, is a prima facie case for the Petition to be certified as raising a substantial question of law.

20. I have considered the averments of both parties in this application. The Petition before me was filed under Certificate of Urgency in October 2018 and therefore over 6 months have lapsed since without a comprehensive solution being arrived at on the plight of teachers and students in the Northern part of Kenya.

21. The current application has been filed in February 2019 and this was 4 months after the Petition had been filed. The impact of this application, if allowed would be to take the Parties further behind as the situation remains the same with the life of the children and their teachers hanging on the balance.

23. Rule 3(3) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, hereafter referred to as the Constitutional rules envisage that in determining a Petition, the same should be done in a timely and cost affordable manner.

23. In dealing with the timely disposal of any envisaged constitutional petition, Rule 15 sets timelines within which a reply must be made by the Attorney General being 14 days and any other Respondent within 7 days.

24. This clearly shows that time is of essence in determining any constitutional petition.

25. Other than time, as submitted by the Applicant, in determining whether an even number of Judges must be empaneled to hear the Petition, it must be established that the matter is of general public importance on which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court or which is not free from difficulty or which calls for discussions of alternative views.

26. I must however say that every question concerning the interpretation of the constitutional and constitutional rights of individuals is of great importance and raises substantial questions of law.

27. It is my view that the current Petition is not far from a Petition that raises substantial question of law and it is the duty of the Court to interpret such issues.

28. The issues raised in this Petition without delving into details contain employee rights and duties of the employer. In my view, these are not complex issues that would warrant an empaneling of an uneven number of Judges coupled with the need to dispose of this Petition without undue delay, I find the application has no merit and I dismiss it accordingly.

29. Costs in the cause.

Dated and delivered in open Court this 30th day of April, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Odukenya for 2nd Respondent – Present

Wesonga holding brief Mwangi for Petitioner – Present