



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO. 20 OF 2018**

*(Before Hon. Lady Justice Maureen Onyango)*

**IN THE MATTER OF: ARTICLE 10, 22, 23, 28, 41, 47, 50, 73 AND 237 OF THE CONSTITUTION OF KENYA**

**-AND-**

**IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015 AND TEACHERS SERVICE COMMISSION ACT NO. 20 OF 2012**

**-AND-**

**IN THE MATTER OF: VIOLATION OF ARTICLES 10, 22, 23, 28, 41, 47, 50, 73 AND 237 OF THE CONSTITUTION BY THE TEACHERS SERVICE COMMISSION**

**-AND-**

**IN THE MATTER OF: VIOLATION OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015, TEACHERS SERVICE COMMISSION NO. 20 OF 2012 & THE TEACHERS SERVICE COMMISSION CODE OF REGULATIONS FOR TEACHERS, 2015 AND ALL OTHER ENABLING PROVISIONS OF THE LAW BY THE TEACHERS SERVICE COMMISSION**

**-AND-**

**IN THE MATTER OF: UNLAWFUL INTERDICTION AND SUSPENSION OF THE PETITIONER'S EMPLOYMENT BY THE TEACHERS SERVICE COMMISSION**

**-BETWEEN-**

**PETER NDEGWA MUTURI.....PETITIONER/APPLICANT**

**VERSUS**

**TEACHERS SERVICE COMMISSION.....RESPONDENT**

**RULING**

By Notice of Motion Application filed under Certificate of Urgency dated 2<sup>nd</sup> August, 2018 and filed in Court on 3<sup>rd</sup> August, 2018, the applicant Peter Ndegwa Muturi, who is the Petitioner in the main Petition seeks the following orders that:-

1. This Application be certified as urgent
2. Pending hearing and determination of this Application the Court be pleased to grant an order of stay of proceedings in Disc. Case No. 0166/12/2017/2018/11 held at Teachers Service Commission
3. Pending hearing and determination of the Petition dated 14<sup>th</sup> March, 2018, the Court be pleased to grant an order of stay of proceedings in Disc Case No. 0166/12/2017/2018/11 held at Teachers Service Commission.

4. The cost of this Application be provided for.

This Application is premised on the grounds that:-

1. The Petitioner herein filed a Petition dated 14<sup>th</sup> March 2018, on the 15<sup>th</sup> March, 2018 against decisions made by the Teachers Service Commission in TSC/DISC/ NO. 0578/12/2016/2017/11, suspending him from the service without pay at Karumandi Boys Secondary School with effect from February 2017, and thereafter an interdiction with effect from 21<sup>st</sup> November, 2017, for allegedly failing to report to Kamuiru Boys Secondary School for assignment of duties as directed vide letter of reference: TSC/364877/154 dated 23<sup>rd</sup> May, 2017.

2. On the 16<sup>th</sup> March 2018: the said Petition was served upon the Respondent herein, where after the Respondent filed their response to the Petition on 2<sup>nd</sup> May 2018 and the same was served upon the advocate on record for the Petitioner on the same day.

3. The Petitioner filed a Further Affidavit on the 21<sup>st</sup> June 2018 and the same was served upon the Respondent on the same day.

4. Surprisingly, the Respondent purports to determine this matter by according the Petitioner a hearing before the Teachers Service Commission. Indeed the Respondent invited the Petitioner for hearing of the dispute herein in Disc. Case No. 0166/12/2017/2018/11 at the Teachers Service Commission on 27<sup>th</sup> June 2018.

5. The aforesaid intended proceedings in Disc. Case No. 0166/12/2017/2018/11 at the Teachers Service Commission are malicious for the following reasons:

a) As the matter is already before the Court the Respondent ought to give the Court a chance to determine this matter.

b) That in the response filed by the Respondent the Respondent states that it terminated the Petitioner from employment in full compliance with the law. As such, there would be absolutely no basis upon which the Respondent would refer the dispute herein to the Teachers Service Commission for resolution.

c) The Respondent is trying to patch up its case since one of the Petitioner's complaints in the Petition filed herein is that he was not granted a chance to be heard by the Respondent.

6. On 21<sup>st</sup> June 2018, the Advocates on record for the Petitioner forwarded a letter dated 20<sup>th</sup> June 2018 to the Respondent indicating that the Petition herein had been filed and that the aforesaid proceedings ought to be stayed. Indeed, on the 27<sup>th</sup> June, 2018, the Petitioner herein informed the Teachers Service Commission regarding the aforesaid letter. However, the Petitioner was informed that the said proceedings would only be stayed only with an order of the Court.

7. The Petitioner herein has been served with a letter dated 5<sup>th</sup> July 2018 indicating he will be served with a hearing notice for Disc Case No. 0166/12/2017/2018/11 before the Teachers Service Commission as soon as possible. As such, it is in the interest of justice that this Application be heard on urgent basis and in the interim orders sought be granted.

8. The Respondent will not be prejudiced if this Application is granted.

The Application is supported by the Affidavit of **PETER NDEGWA MUTURI** sworn on 2<sup>nd</sup> August, 2018 and on the grounds on the face of the motion.

The Application is filed under Section 6, 1A, 1B and 3A of the Civil Procedure Act, Article 159 of the Constitution of Kenya, 2010 and all enabling provisions of the Law and the Inherent Jurisdiction of the Court.

The Respondent opposed the Application and filed a Replying Affidavit sworn on 29<sup>th</sup> August, 2018 and filed in Court on 30<sup>th</sup> August, 2018 by **LOISE NYASEDA**, the Acting Senior Deputy Director in charge of Discipline at the Teachers Service Commission headquarters in Nairobi, in which she avers that the Respondent has a broad constitutional and statutory mandate that includes the exercise of disciplinary power over teachers who breach provisions of the Code of Regulations.

She further avers that the petitioner herein filed the Petition following his suspension for a period of 4 months and after the lapse of the said period the Petitioner in blatant disregard failed to report to his posting as per the posting letter issued to him prompting the disciplinary process against him vide Disc Case No. 0166/12/2017/2018/11.

She contends that the Respondent set down the disciplinary case for hearing and the Petitioner failed to appear. She further contends that the disciplinary case against the Petitioner is distinct from the instant Petition before the Court.

It is the Respondent's assertion that the instant Application is frivolous and vexatious and is only meant to delay its disciplinary process and that the Respondent is in full compliance with the provisions of Regulations 146 and 147 of the CORT.

The Respondent contends that it is in the interest of good order that the Court allows public bodies to perform their administrative duties without undue interference.

In conclusion the Respondent contends that the Petitioner's Application has not met the threshold for grant of conservatory orders and that the same ought to be dismissed with costs to the Respondent.

The Application was argued on 30<sup>th</sup> January 2019.

### **Petitioner's/Applicant's Submissions**

The Petitioner/Applicant reiterated the averments made in the Notice of Motion Application as well as the Supporting Affidavit thereto.

The Petitioner/Applicant contended that on 27<sup>th</sup> June 2018 he was summoned for a disciplinary hearing at the Respondent's head office in Nairobi. It is his contention that the said hearing is malicious and ought to be stayed as the matter is now pending before this Court thus prompting him to file the instant Application for stay of the disciplinary proceedings pending hearing and determination of the Petition filed herein.

It is submitted by the Petitioner that he will be greatly prejudiced if the Court does not allow the instant Application and stay the proceedings of the disciplinary case No. 0166/12/2017/2018/11.

It is further submitted that if the orders sought in the instant Application are not granted then the Petition filed herein shall be overtaken by events. The Petitioner further contends that the Respondent stands not to suffer any prejudice should the Orders sought be granted by this Court.

The Petitioner to fortify his submissions made reference and relied on the Authorities of *Victoria Ipomai Vs Sanlam Kenya PLC (2018) eKLR* and *Aviation and Allied Workers Union Vs Kenya Airways Limited (2013) eKLR*.

### **Respondent's Submissions**

Ms. Ruto present for the Respondent submitted that the Application was opposed by the Respondent vide the Replying Affidavit sworn by **LOISE NYASEDA**. She reiterated the averments as contained in the affidavits.

Ms. Ruto submitted that the Respondent has been granted its constitutional mandate under Article 237 (1) to exercise disciplinary proceedings against teachers in its service. She further submitted that these disciplinary proceedings are governed by the Code of Regulations, the Teachers Service Commission Act and the Code of Conduct for Teachers.

The Respondent further submitted that it has so far adhered to all the steps as set out in the legal frameworks.

It is further submitted that the disciplinary proceedings are separate and distinct and if this Court were to stay the disciplinary proceedings without any justifiable reason, the Court would be directing the Respondent in the regulation of its employees. To fortify this submission the Respondent relied on the Authority of *Alfred Nyungu Kimungui Vs Bomas of Kenya (2013) eKLR*.

The Respondent further cited Authorities of *Victoria Ipomai Vs Sanlam Kenya PLC (2018) eKLR* and *Aviation and Allied Workers Union Vs Kenya Airways Limited (2013) eKLR* both cited by the Applicant. In these cases the Court explained that the Courts should be very reluctant in staying disciplinary proceedings where the same have been constituted in terms of their policies and regulations.

The Respondent contends that given that the Petitioner is still under its employment the granting of the Orders sought in the instant Application will render the Respondent unable to exercise its mandate as the Petitioner will continue working for the Respondent while under interdiction and earning a salary for no services rendered which will leave the Respondent greatly prejudiced.

The Respondent further contends that the Petitioner was given an opportunity to respond to the disciplinary letter and was further given several opportunities to appear before the disciplinary committee which he failed to do opting to file the instant Application to stay the disciplinary proceedings.

In conclusion the Respondent urged the Court to dismiss the instant Application with costs to the Respondent to allow it proceed with the disciplinary proceedings, that at the tail end of the process the Petitioner will be able to appeal should he be dissatisfied with the decision or better still, approach the Court to challenge the same.

### **Petitioner's/Applicant's Further Submissions.**

The Petitioner in response to the Respondent's Submissions submitted that he is not under the Respondent's employment as alleged. It is further his contention that he is undergoing disciplinary proceedings as he failed to report for duty.

It is the Petitioner's submission that he be granted the right to be heard under Article 50 of the Constitution of Kenya, 2010. It is further submitted that the disciplinary proceedings by the Respondent can be stayed pending hearing and determination of the Petition filed herein.

In conclusion the Petitioner urged the Court to allow the instant Application with Costs.

### **Determination**

After considering the parties' arguments and the evidence adduced, there is only one issue for determination being whether or not the Notice of Motion Application dated 2<sup>nd</sup> August, 2018 is merited.

The question arising while determining the merits of the instant Application, is whether or not this Court ought to intervene in a disciplinary process that is pending before an employer as against its employees.

There is an abundance of jurisprudence for the courts that have extensively discussed this issue. It is now trite law that the Court ought not to intervene with the disciplinary process. The Petitioner has not raised an exceptional reason to justify this Court's intervention in the pending process.

The Respondent in instituting the disciplinary process has complied with its Code of Regulations, the TSC Act, the Teachers' Code of Conduct that regulate the employee-employer relation between the Petitioner and the Respondent herein.

*In the case of Rebecca Ann Maina & 2 Ors v Jomo Kenyatta University of Agriculture and Technology (2014) eKLR*, where Ndolo J held that the

*“Court should not take over and exercise managerial prerogative at the working place unless the process was marred with irregularities, but Court could not intervene to stop the process, but only put things right.”*

Similarly, in *Booyesen v The Minister of Safety and Security and OR (2011) 1 BLLR 83 (LAC)*, that the Court's intervention to interdict disciplinary action before it is concluded should be exercised in exceptional circumstances. This is mirrored in the approach of the Kenyan Courts.

In the circumstances the Application dated 2<sup>nd</sup> August 2018 is hereby dismissed. Costs of the Application shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20<sup>TH</sup> DAY OF MAY 2019**

**MAUREEN ONYANGO**

**JUDGE**