



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**PETITION 61 OF 2018**

**ROBA ANDREW DUBA.....1<sup>ST</sup> PETITIONER**  
**ABDUB GUYO HALAKE.....2<sup>ND</sup> PETITIONER**  
**WOTO BAGAJA BARAKO.....3<sup>RD</sup> PETITIONER**  
**LOKORCHERIA SAMMY EKWAM.....4<sup>TH</sup> PETITIONER**  
**BOYA PAUL HALAKE.....5<sup>TH</sup> PETITIONER**  
**TURA JARSO DALLA.....6<sup>TH</sup> PETITIONER**

**VERSUS**

**TEACHERS SERVICE COMMISSION.....1<sup>ST</sup> RESPONDENT**  
**THE SECRETARY, TEACHERS SERVICE COMMISSION....4<sup>TH</sup> RESPONDENT**

**RULING**

1. By a motion dated 26<sup>th</sup> June, 2018 the petitions sought orders among others that:

- a. *That* pending the hearing and determination of the application herein inter - partes this Honourable court be pleased to issue an order staying all the letters dated 22<sup>nd</sup> of May 2018 and 14<sup>th</sup> of June 2018 and/or the intended disciplinary proceedings contained therein.
- b. That pending the inter-parties hearing and determination of this application , this Honourable court be pleased to issue a conservatory order by way of injunction restraining and/or prohibiting the Respondents, their officers, staff, agents, servants, and/or any other persons acting at their behest howsoever from subjecting the petitioners to any disciplinary proceeding.
- c. That pending the hearing and determination of the substantive petition, this Honourable court be pleased to issue an order staying all the letters interdicting the petitioners and/or the intended disciplinary proceedings by the respondents.
- d. That pending the hearing and determination of the substantive petition filed herewith, this Honourable court be pleased to issue a conservatory order restraining and/or prohibiting the Respondents, their officers, staff, agents, servants, and/or any other persons acting at their behest howsoever from subjecting the petitioners to any disciplinary proceedings.

2. The application was based on the grounds among others that:

- a. The respondents vide letters dated 22<sup>nd</sup> May 2018 and 14<sup>th</sup> June 2018 have interdicted the petitioners herein and have demanded them to respond to allegations contained in the said letters within 21 days and to present any evidence they shall intend to rely on during hearing of their cases, which dates are yet to be communicated.
- b. The ground on which the petitioners have been interdicted is the cancellation of the 2017 KCSE examination results for Chalbi Boys Secondary School but which cancellation was exceedingly contested before the high court of Kenya at Marsabit through

Petition No. 1 of 2018 and which petition is due for judgment on 2<sup>nd</sup> of July 2018.

c. The alleged collusion of the petitioners with the supervisors and/or centre manager of Chalbi Boys secondary school during the 2017 KCSE Examination that has led to cancellation of the results of 70 candidates is unfounded, not based on any evidence and as can be discerned from the letters of interdiction, there is no material ground on which the allegations are premised.

d. The petitioners have been condemned without being accorded any form of hearing and without any plausible reason.

e. The intended process and mode of the disciplinary proceedings against the petitioners herein constitute gross violation by the respondents of the hallowed constitutional right to fair labour practices, right to fair administrative action and the right to fair hearing.

f. The petitioners are apprehensive that unless this honourable court urgently determines this application and the main petition filed herewith the respondents may at any time move to unfairly terminate and/or dismiss them following the unfounded intended disciplinary proceedings.

3. The application was further supported by the affidavit of one Boya Paul Halake who deponed on the main that:

a. That I am a teacher registered by the Teachers Service Commission on TSC No. 332687.

b. That I am the current principal of Chalby Boys Secondary School.

c. That *my co-petitioners successfully applied to be invigilators at Chalbi Boys Secondary school during the November 2017 Kenya Certificate of Secondary Education (KCSE) examinations which duty they carried out diligently and satisfactorily to the end of the examination period.*

d. That *the KCSE 2017 examination results were released by the Kenya National Examination Council on the 20<sup>th</sup> of December 2017 and while releasing the results, the former Cabinet secretary for education, Dr. Fred Matiang'i, made unfounded and grubby remarks against unnamed schools on examination irregularities but through the media there were conjectures that Chalbi Boys secondary school, where I am the principal and where my co-petitioners were posted as examination invigilators, was among the schools that engaged in exam irregularities.*

e. That contrary to the conjectures, the results for students of Chalbi Boys secondary School were released and students were able to access their results through sending a short message service and also on the Kenya national examination council's website.

f. That, Chalbi Boys High School received a letter dated 20 December, 2017 suggesting that the school's 2017 KCSE results had been withheld till the 18<sup>th</sup> of January 2018 to allow for investigation on an alleged malpractice.

g. That the results of the 70 candidates from Chalbi Boys Secondary schools were subsequently cancelled by Kenya national examination council in consultation with the then Cabinet secretary for the ministry of Education Science and Technology.

h. That no report on the outcome of the purported investigations on the alleged malpractice has been availed to the school.

i. That the school, through its board of management, the chairman of the Parents Teachers Association and the area Member of the County Assembly challenged the cancellation of the results before the High Court of Kenya at Marsabit vide High court Petition No. 1 of 2018.

j. That *vide separated letters dated 22<sup>nd</sup> of May 2018 and 14\* of June 2018 addressed to us, the petitioners herein, the respondents herein with all ill-intent and malice interdicted us for allegedly colluding and allowing unauthorized materials and persons in the examination rooms to assist the candidates during*

4. The respondent opposed the application and filed a replying affidavit through one Loice Nyaseda who deponed on the main that:

a. That I am the Senior Deputy Director in charge of Discipline Division at the Teachers Service Commission, the 1<sup>st</sup> Respondent in this matter and I am by virtue of my said position conversant with the matters and circumstances relating to this petition; hence competent and duly authorized to make and swear this affidavit on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

b. That the Petitioners herein are employees of the Commission serving in different public institutions and have individual contracts of employment with the Commission.

c. That Regulation 17 of the Code of Regulations for Teachers titled

***‘Performance of duty’*** provides that:

- A teacher shall perform such teaching, administrative and supervisory duties in the teaching: service, and any other related duties assigned or approved by the Commission to promote education and the Teaching Service:
- A teacher shall perform assigned duties in paragraph (1) unless the teacher has leave to be absent from such duties in accordance with regulations in Part X of this Code:
- A teacher shall be required, to obey the directions given by the Commission, its agents, the head of institution or any other version under whose supervision the teacher is by placed the Commission.
- A teacher shall be required at all times to perform his duties and to conduct himself in a responsible and professional manner at the place of work and in his relationship with fellow teachers, pupils and members of the public.

d. That as part of their professional duty, in 2017, the Petitioners were appointed as Invigilators, Supervisors and Center Manager respectively to manage and administer the conduct of 2017 examinations at **Chalbi Boys Secondary school**.

e. That the 5<sup>th</sup> Petitioner being the Center Manager of the Examination Center had a duty to perform inter alia the following roles:-

- Ensure that the Examination Center is secure and all unauthorized persons are not allowed at the center;
- Be at the distribution center at the time prescribed by the Council to pick the examinations materials and witness the opening of examination containers at the distribution center every day of the examination;
- Collect question pavers as prescribed by the Council from the distribution center and ensure security of the same when on transit to the examination center.
- Ensure the examination starts on the prescribed time and ends at the prescribed time;
- While the examination is in progress, ensure that examination question payers are not tampered with:
- Witness the opening of the examinations question paver racket in front of the candidates and ensure at least one of the candidates countersigns the envelope as evidence of witnessing the opening;
- Take responsibility for overall management of the examinations at the examination center and ensure that all candidates strictly adhere to the examination irregularities;
- Where instances of massive examination irregularities occur, the Head of institution/Center Manager shall take personal responsibility:
- Receive from the supervisor and return every candidates ' answer scripts securely to the distribution center after each day of the examination and sign the relevant accountability documents:
- Submit to the officer managing the distribution center answer scripts of candidates taking examinations under special circumstances in a special envelope separately:
- Take action as per the act, other written law, the council rules and regulations and report the matter to the council when he observes any examination irregularity or malpractice.

f. That from the above duties, the Petitioners were under legal duty jointly and severally to ensure that the conduct of examinations at *Chalbi Boys Secondary Examination Center* was carried out in a transparent and accountable manner free of irregularities and any form of malpractice.

g. That the Petitioners were jointly and severally expected to remain vigilant and safeguard the integrity of the exams as per the national and international best practices.

h. That owing to the nature of the assignment, the compelling public interest attached to national examinations and overriding need to secure the integrity of national examinations, the Petitioners had a paramount duty to deter, detect, prevent, and report any form of examination malpractice in the center and maintain the reliability of the examination process.

i. That upon release of the **2017** Kenya Certificate of Secondary Examination (KCSE) Results by the Kenya National Examination Council (KNEC) it was established by KNEC that there was massive examination irregularities at Chalbi Boys Secondary School which led to the cancellation of results of all the 2017 KCSE Candidates who were 70 in Number.

j. That it was further established that the nature of the irregularities pointed to the negligence and/or collusion on the part of the Petitioners who were jointly and severally in charge of the integrity of the exams at the Center.

k. That considering the gravity of the irregularities, and guided by the provisions of the CORT, the Commission made a decision to look into the matter and confirm if any of its employees had violated the terms of service as per by law provided.

l. That accordingly and in strict adherence to its attendant Regulations and before taking any adverse action against the Petitioners, the Commission commenced independent investigations to confirm whether the Petitioners violated their terms of employment with regard to how they conducted the 2017 KCSE examinations at Chalbi Boys Examinations Center.

m. That to this end, on 7<sup>th</sup> February, 2018, the Commission issued a Show Cause letter to the 5<sup>th</sup> Petitioner in his capacity as the Center Manager to explain the circumstances that led to the massive irregularities at his Center.

n. That the 5<sup>th</sup> Petitioner, tendered a detailed response to the letter detailing how the examinations were conducted in the center and exonerating all the Petitioners from any wrong doing. His response was duly considered by the Commission.

o. That upon receipt of the 5<sup>th</sup> Petitioner's explanation, the Commission constituted a team to investigate the matter in detail and confirm any breach of Regulations that warrant an administrative active if any.

p. That the investigating team accorded the Petitioners an opportunity to give their respective responses on the matter. At that preliminary stage, the team received written statements from the Petitioners and other relevant witnesses.

q. That the Commission analyzed the said Report together with the attendant rules and regulations governing the teaching service and made an independent decision to interdict the Petitioners as a preliminary step towards the impartial hearing and determination of their case.

r. That the preliminary evidence collected by the Commission raised substantial grounds to believe that the Petitioners were involved in acts amounting to professional misconduct that called for a preliminary action in form of Interdiction to initiate the process leading to the final determination of the case hence the action of the Commission was justified, fair and lawful.

s. That the allegations set out in the Letters of Interdiction are contrary to the regulations governing the teaching profession to wit: Code of Regulation for Teachers, Code of Conduct and Ethics and KNEC regulations, public policy and interest.

t. That an interdiction in itself does not amount to termination of employment but the only practical step on how discipline proceedings of teachers are commenced. So far, the Petitioners have been accorded the right to respond to the allegations in writing and have been informed that they will be given an opportunity to be heard in person.

u. That the Petitioners will not suffer any prejudice merely because they have been temporarily stopped from working pending the determination of their discipline case as they have been retained on half basic salary and full allowances.

v. That the Petitioners' attempt to invoke the jurisdiction of this Court at this juncture is premature, untimely and irrational since the Commission is yet to make any determination on the allegations raised against them. Accordingly we pray that the Petition and the Application be dismissed

*That the Petitioners' attempt to invoke the jurisdiction of this Court at this juncture is premature, untimely and irrational since the Commission is yet to make any determination on the allegations raised against them. Accordingly we pray that the Petition and the Application be dismissed.*

5. In his submissions, Mr Nanda for the petitioner submitted that the respondent's actions against the petitioners offended the rule of law and principle of natural justice. The intended disciplinary hearing was actuated by malice and contrary to provisions of the law. According to counsel, the petitioners were supposed to be heard before the interdiction.

6. The court should therefore find that the petitioner's right to fair hearing was violated by the respondents. Counsel further submitted that the petitioners were never supplied with sufficient details on the allegations and evidence to be relied on by the respondents during the disciplinary proceedings to enable them prepare well their defences. Mr Anymor for the respondent submitted that the respondent as an employer has both constitutional, statutory and regulatory mandate to exercise disciplinary control over teachers. This power is drawn from article 237(2) (e) of the Constitution and Section 11(f) of the TSC Act. In the premises, it would be against public policy and interest for the court to deter an employer from execution its mandate. In support of the submission, Counsel relied on the case of **Alfred Nyingu Kimungui Vs Bomas of Kenya (2013) eKLR**.

7. Counsel further submitted that an interdiction in itself is not a punishment but a preliminary stage to initiate the disciplinary process. To this end Counsel relied on the case of **Hezron Mukoko Vs TSC [2014] eKLR** Counsel therefore submitted that the petition has been filed prematurely with the sole intention of insulating the applicants from undergoing a lawful disciplinary process.

8. The decisions emanating from this court some of which have been relied on by the respondent seem to suggest that the court should steer clear of managerial discretion when dealing with disciplinary matters in the work place. The court can only interfere where it is clearly demonstrated that action being taken is contrary to law and being taken in bad faith. There were allegations of examination malpractice against the petitioners they have been interdicted pursuant to the respondent's code of regulations. The interdiction is to pave way for investigations. They have further been called upon to respond to the allegations against them, which they have done.

9. As was observed by my brother Justice Rika in the Bomas of Kenya case relied on by the respondent the court should be cautious in exercising jurisdiction so as not to appear to take over managerial prerogative at workplaces. Interim orders that have the effect of limiting genuine exercise by management of its rights at the work place should be avoided. Further as observed by Radido J in the case of Hezron Mukoko Silunya above, interdiction is envisaged and provided for in the terms and conditions of service for teachers hence the interdiction of the petitioners was proper.

10. The disciplinary process should therefore continue to its logical conclusion and should the petitioners be dissatisfied with the outcome they can then move the court for appropriate orders. In the matter before me the petitioners have not demonstrated any misuse or malicious invocation of the respondent's disciplinary mechanism to warrant interference by the court.

11. The application is therefore found without merit and is hereby dismissed with costs.

12. It is ordered.

**Dated at Nairobi this 28<sup>th</sup> day of June, 2019**

**Abuodha J. N.**

**Judge**

**Delivered this 28<sup>th</sup> day of June, 2019**

**Hellen Wasilwa**

**Judge**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.