



**REPUBLIC OF KENYA**

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

**AT NAIROBI**

**PETITION NO. 79 OF 2019**

**IN THE MATTER OF CONTRAVENTION OF ARTICLES 3, 10(1) (2), 19, 20, 21(1), 22(2), 24, 25(c), 28, 36(1), 37, 41(2) (c & d), 47(1), 232, 258 (d) and 260 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF SECTION 4 AND 5 OF THE LABOUR RELATIONS ACT NO. 14 OF 2007**

**AND**

**IN THE MATTER OF ALLEGED VIOLATION OF SECTION 46 OF THE EMPLOYMENT ACT NO.11 OF 2007**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLE 3(1) AND (2) OF THE CONVENTION NO.87 – FREEDOM OF ASSOCIATION AND PROTECTION OF THE RIGHT TO ORGANIZE CONVENTION (1948) AS READ WITH ARTICLE 2 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLE 21 OF INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AS READ WITH ARTICLE 2 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLE 81 OF THE INTERNATIONAL COVENANT ECONOMIC, SOCIAL AND CULTURAL RIGHTS AS READ WITH ARTICLE 2 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**THE KENYA NATIONAL UNION OF TEACHERS MWINGI BRANCH...CLAIMANT**

**VERSUS**

**THE TEACHERS SERVICE COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**AND**

**JOSEPH KYALO KITANGU.....1<sup>ST</sup> INTERESTED PARTY**

**MUSYIMI ITUNDUU.....2<sup>ND</sup> INTERESTED PARTY**

**ELIZABETH KAVUTHA MUSYIMI.....3<sup>RD</sup> INTERESTED PARTY**

PAUL MULE MBALUKA.....	4 <sup>TH</sup> INTERESTED PARTY
ALEXANDER PETER NGULUTU.....	5 <sup>TH</sup> INTERESTED PARTY
THOMAS MUNEENI MUTHENGI.....	6 <sup>TH</sup> INTERESTED PARTY
MICHAEL MBUTU.....	7 <sup>TH</sup> INTERESTED PARTY
IRENE MWATHI KIVUNZI.....	8 <sup>TH</sup> INTERESTED PARTY
SARAH MWIKALI KATHEKU.....	9 <sup>TH</sup> INTERESTED PARTY
EUNICE KELI WAMBUA.....	10 <sup>TH</sup> INTERESTED PARTY
ONESMUS KIMANZI NZAU.....	11 <sup>TH</sup> INTERESTED PARTY
EMMANUEL SAVULI.....	12 <sup>TH</sup> INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Wednesday 31<sup>st</sup> July, 2019)

### RULING

The Court gave orders on 15.05.2019 thus:

- 1) That the parties directed to engage in accordance with the dispute resolution mechanism as per the recognition and collective agreement in place pending further orders or directions.
- 2) That pending the hearing of the preliminary objection and the application or resolution of the dispute in accordance with the agreed dispute resolution mechanism, there be stay of disciplinary proceedings against the affected teachers in issue in the dispute.
- 3) That the parties to file submissions on the preliminary objection and the replying affidavits to the application as may be appropriate and by mention date or in lieu file a consent.
- 4) That mention on 30.05.19 at 9.00am for further directions on the application and preliminary objection of for recording a compromise or settlement as appropriate.
- 5) That today's costs in the cause.

The 1<sup>st</sup> respondent had filed the notice of preliminary objection on 15.05.2019 through Oyucho Timon against the petition and the petitioner's application dated 13.05.2019 upon the following grounds:

- 1) The petitioner (applicant) is not a proper party before the Court and hence lacks *locus standi* to commence the proceedings herein.
- 2) The petitioner has commenced the proceedings herein contrary to the provisions of section 21(b) (i) of the Labour Relations Act No.14 of 2007.
- 3) The petitioner has commenced the proceedings herein contrary to the provisions of section 74 of the Labour relations Act, No. 14 of 2007.
- 4) The petitioner has commenced the proceedings herein contrary to the provisions of clause 17 of the 2017 -2012 CBA between the Kenya National Union of Teachers and the 1<sup>st</sup> respondent, the Teachers Service Commission.
- 5) The proceedings herein offend Article 237 (2) (d) of the Constitution.
- 6) The Honourable Court lacks jurisdiction to entertain the application and petition dated 13.05.2019.

On 21.06.2019 the petitioner filed an application by way of a notice of motion dated 20.06.2019 through M.M. Kimuli & Company Advocates. The application was under sections 1A, 1A(3), 1B, 3A, and 63 (e) of the Civil Procedure Act (Cap.21); Order 40(3) (1) of the Civil Procedure Rules 2010; section 3, 4(1) (a), 5(a), (b) and 28 (1) & (6) of the Contempt of Court Act, 2016; section 3(1) (a) of the Judicature Act (Cap.8); Article 162(2) of the Constitution of Kenya, 2010 and all enabling provisions of the law. The application was based on the supporting affidavit of Jonathan Kimanzi Mutambu, the Executive Secretary of the petitioner. The application was for prayers:

- 1) That the application be certified urgent and be heard ex-parte in the first instance.

2) That the Honourable Court be pleased to find and hold that the 1<sup>st</sup> respondent's Chief Executive Officer, Nancy Macharia, and the 1<sup>st</sup> respondent's county director for Kitui, Fredrick Ng'ang'a are jointly and severally in contempt of Court for disobeying of the orders of the Court issued on 15.05.2019.

3) The Honourable Court be pleased to issue summons to the 1<sup>st</sup> respondent's Chief Executive Officer, Nancy Macharia, and the 1<sup>st</sup> respondent's county director for Kitui, Fredrick Ng'ang'a to personally appear before the Court to show cause why they should not be held responsible and punished for the disobedience of the Court Orders of 15.05.2019 on a date and time to be specified by the Court.

4) That, upon grant of prayer (2) above the Court does impose against the 1<sup>st</sup> respondent such penalty as may be deemed commensurate to the aggravated breach of the Court Orders of 15.05.2019.

5) That upon grant of prayer 2 above the Court do issue an order that the 1<sup>st</sup> respondent's Chief Executive Officer, Nancy Macharia, and the 1<sup>st</sup> respondent's county director for Kitui, Fredrick Ng'ang'a be committed to civil jail for a period of 6 months or for any other period as the Court may deem appropriate.

6) That pending the hearing and determination of the application, the Honourable Court be pleased to issue an order requiring the 1<sup>st</sup> respondent to purge the contempt by paying the interested parties their outstanding salaries for the month of May 2019, subsequent salaries and wages and benefits lawfully due to them, and to forthwith desist from any other or further acts of commission or omission that amount to breach of the orders geared towards protecting the dignity and authority of the Court.

7) That the costs of the application be provided for.

The application was based upon the following grounds:

1) The interim order of 15.05.2019 was that there should be a stay of disciplinary proceedings against the interested parties pending the resolution of the dispute either through the Court or through the dispute resolution mechanism.

2) The orders were extracted and served upon the 1<sup>st</sup> respondent and its agents and representatives. On the date the orders were made the 1<sup>st</sup> respondent's representative was present in Court.

3) The 1<sup>st</sup> respondent through its County Director for Kitui has knowingly, deliberately and wilfully disobeyed or disregarded or thwarted and undermined the effect and purpose of the orders and has failed to take any step to ensure that the orders are obeyed.

4) The interested parties had reported back to their schools of deployment but the 1<sup>st</sup> respondent and its agent have made it difficult for them to work. They have not been paid salaries for the months of May 2019; they have not been assigned duties; some have been issued with fresh interdiction letters. The 1<sup>st</sup> respondent intends to deploy the interested parties out of their current schools of deployment so that they lose their elective positions in the trade union.

5) The interested parties have continued to suffer immense loss and damage, anxiety, psychological and emotional distress and they are completely unable to work normally unless the Court intervenes as prayed for.

6) The officers carrying out the 1<sup>st</sup> respondent's breach of the Court orders are the 1<sup>st</sup> respondent's Chief Executive Officer, Nancy Macharia, and the 1<sup>st</sup> respondent's county director for Kitui, Fredrick Ng'ang'a and thus orders as prayed against them.

7) The Court orders must be respected and obeyed and the Court has jurisdiction to firmly deal with the contemnors. It is fair and just that the orders as prayed for are granted.

The petitioners filed on 10.07.2019 the supplementary affidavit of Jonathan Kimanzi Mutambu.

The 1<sup>st</sup> respondent filed on 08.07.2019 and on 24.07.2019 the replying affidavit of Dr.Nancy Njeri Macharia to oppose the contempt application. The opposition was urged upon the following grounds:

1) The orders given on 15.05.2019 were served upon the 1<sup>st</sup> respondent on 16.06.2019 at 10.00am.

2) To the extent that order 1 as given was that the parties were to engage per dispute resolution mechanisms in the collective and recognition agreement, clause 13 of the recognition agreement provides that the dispute is referred to the trade union's Secretary General by the petitioner and also as per clause 17 of the collective agreement.

3) Order 2 stayed the disciplinary proceedings but did not lift the interdiction or set the interdiction aside. The order stopped the 1<sup>st</sup> interested party from moving forward with the disciplinary process from the point it had reached being the interdiction stage. There was no order that the interdicted teachers resume duty. Further there was no order that the 1<sup>st</sup> respondent pays the affected teachers' salaries while they were on interdiction. Thus the 1<sup>st</sup> respondent had fully complied with the orders given on 15.05.2019.

4) Letters issued on 15.05.2019 amending the interdiction letters for 2<sup>nd</sup> and 11<sup>th</sup> interested parties were not fresh but only

amendments and never moved forward the disciplinary case. Further the interdiction letters of 15.05.2019 were issued on the same date as the Court orders in issue.

5) The letters of 03.07.2019 similarly amended the initial interdiction letters of 03.05.2019.

The interested parties appointed Mati, Mati & Mati Advocates to act in the matter and they made submissions supporting the petitioner's case. The parties filed submissions and made further oral submissions on the contempt application and the preliminary objection. The Court has considered the parties' respective submissions and material on record and determines the matters in dispute as follows.

**First**, the terms of the orders given on 15.05.2019 are rather straightforward. As submitted for the respondent, the order did not set aside the interdictions or order that the interested parties who had been interdicted should resume work on full or other pay and benefits. The orders were that the disciplinary process was stayed so that it could not progress to the next step or process as per the Code of Regulations of Teachers (CORT) and the individual contracts of service for the affected teachers in that regard. The applicant was therefore misconceived that the interested parties, by reason of the orders staying the disciplinary proceedings, were thereby entitled to resume duty on full pay. The Court further returns that the stay orders did not mean that the interested parties would be assigned duty because there was no order that the interdiction had been lifted or varied in any manner. The stay order was that the interdicted teachers would remain on interdiction upon the applicable terms of interdiction and the disciplinary procedure would not move beyond the interdiction stage. While it is clear that the 1<sup>st</sup> respondent issued amended interdiction letters on 15.05.2019 and on 03.07.2019 the letters were clear that they were amending the earlier letters of interdiction dated 03.05.2019, thus "...which still stands." The Court finds that the amended letters were merely corrective of the previous letters which were expressly upheld in the amendment letters without any intention to move the disciplinary process forward – they were corrective information and therefore not amounting to moving the disciplinary process forward. The Court finds that it has not been shown that the 1<sup>st</sup> respondent by itself or by its Chief Executive Officer or by its County Director for Kitui did anything to move the disciplinary process beyond the interdiction stage. The disciplinary process remained stayed at the interdiction stage. Thus, there was no violation of the terms of the order staying the disciplinary process as had been given by the Court.

**Second**, the main issue in the preliminary objection is whether the petitioner is a person in law and therefore capable of suing as done in the present case. At paragraph 1 of the petition the petitioner describes itself as a body Corporate registered under the Trade Unions Act (Cap. 233) as a branch of the Kenya National union of Teachers. The paragraph further states that the petitioner brings the petition under Articles 3, 22(2), 258 and 22 (2) (d) of the Constitution of Kenya.

It is submitted for the 1<sup>st</sup> respondent that the petitioner is a branch of the Kenya National Union of Teachers (KNUT) registered under section 25 of the Labour Relations Act, 2007. As a branch of the KNUT the petitioner is not a body corporate and could not sue or be sued in its own name as it is not a person in law. It was KNUT that was a valid body corporate as duly registered trade union as per section 21 of the Act and not its 110 branches. The Court returns that it is clear that the petitioner is a registered branch of the KNUT. It is therefore a registered structural establishment of the KNUT falling short of a person in law. As was held in Apex Finance International Limited & Another –Versus- Kenya Anti-Corruption Commission [2012]eKLR, one of the mandatory precondition for a court to competently assume jurisdiction in a dispute is that there must be proper parties before the Court. The Court returns that indeed, as a registered structural entity or establishment, the petitioner fell short of the meaning of "Person" in Article 260 of the Constitution of Kenya, 2010 thus, "**includes a company, association or other body of persons whether incorporated or unincorporated.**" The petition would validly be filed in the individual names of the branch officials on behalf of the members of the branch but as filed, the Court considers that the branch on its own was not a person in law. Thus section 25(5) of the Act is elaborate in stating that no person shall act as an official of a branch of a trade union if that branch is not registered or has had its registration cancelled – so that the Mwingi Branch of KNUT being registered, the legitimate action was to bring the suit in the names of the officials of the branch but which was not done and no application was made to amend accordingly. The branch not being a person in law, orders that may issue against it will present a major difficulty in compliance and enforcement so that the petition was defective as filed.

It was submitted for the petitioner and the interested parties that evidence would be necessary to establish if the petitioner was a person. The Court returns that looking at the misleading description of the petitioner it was clear that it was not a corporate body as the branch was not duly registered as a trade union which would be such body corporate under section 21 of the Labour Relations Act, 2007. The Court has considered the provisions of Article 159 (2) (d) on exercise of judicial authority upon the principle that justice shall be administered without undue regard to procedural technicalities. In the present case, the Court returns that the absence of a proper petitioner was not a mere technicality but a matter which went to the jurisdiction of the Court. It could be that the petition would be salvaged by making appropriate amendments to introduce the proper person as petitioner but despite parties being encouraged to compromise the issue, the purported petitioner failed to apply for amendment or to compromise accordingly.

In the circumstances, the preliminary objection will be upheld and the petition is liable to being struck out with no orders to costs because the petitioner does not exist and it would be impossible to enforce an order of costs against a non-existent person.

In conclusion the preliminary objection and the application for contempt are hereby determined with orders:

- 1) That the petitioner does not exist as a person in law.
- 2) The contempt application is dismissed.
- 3) That the petition is hereby struck out.
- 4) There shall be no orders on costs.

**Signed, dated and delivered** in court at Nairobi this **Wednesday 31<sup>st</sup> July, 2019.**

**BYRAM ONGAYA**

**JUDGE**