



**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. 2<sup>ND</sup> JANUARY, 2019**

**BETWEEN**

**TEACHERS SERVICE COMMISSION .....APPLICANT/PETITIONER**

**-VERSUS-**

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

**AND**

**MINISTRY OF LABOUR & SOCIAL PROTECTION..... INTERESTED PARTY**

**(Before Hon. Justice Byram Ongaya on Friday 26<sup>th</sup> July, 2019)**

**RULING**

The Court delivered the judgment on 12.07.2019 on the petition with orders as follows:

- a) The petitioner shall undertake transfer of teachers being members but non-officials of the respondent in accordance with the provisions of the Code of Regulations of Teachers (CORT).

b) The teachers being non-institutional administrators and being the respondent's officials shall be transferred within respective geographical areas they are elected as such to represent.

c) The institutional administrators or heads of institutions (principals or head-teachers) or teachers performing roles of a head of institution one way or the other are unionisable employees under the recognition agreement in place and are entitled to participate as candidates or voters and to be elected and appointed as trade union officials in accordance with the respondent's constitution and the relevant provisions of the Labour Relations Act, 2007; and where they are so elected or appointed and serving as respondent's officials, they will therefore be liable to be transferred only within respective geographical areas they are elected as such to represent.

d) The petitioner will undertake teacher promotion in accordance with the relevant provisions of the CORT and the schemes of service with respect to all unionisable teachers eligible to join the respondent trade union; and parties may within the CBA and recognition agreement consider reviewing the prevailing schemes of service with a view of bringing them into alignment with the prevailing CBA pay structure and related matters as will be necessary and without derogating from the provisions of the CORT on teacher promotion – as the policy circular of 02.05.2018 on Career Progression Guidelines and purporting to abolish and replace the prevailing three schemes of service will not apply accordingly.

e) The petitioner shall convene validation meetings for finalising the performance measurement tools by 01.12.2019 for a roll out in January 2020; and the petitioner shall institute administrative steps for availing the tools to the individual teachers at their respective stations of deployment and returns of completed tools being made at the petitioner's resources.

f) The Teacher Professional Development (TPD) modules in dispute shall not be implemented as they fall short of professional development programmes as may be prescribed by the petitioner by regulation and pursuant to section 35 (2) (a) of the Teachers Service Commission Act, 2012; and in prescribing the career progression and professional development programmes by way of regulation under section 35(2) (a) of the Act, the petitioner shall comply with the provisions of the Statutory Instruments Act, 2013.

g) The dispute at hand having been resolved by way of the conciliation proceedings, the bipartite negotiations, the parties' points of agreement in the joint memorandum filed on 08.04.2019 and the findings in this judgment, a declaration is hereby issued that the Notice of Withdrawal of Labour by teachers in the public service dated 19.12.2018 is set aside or spent.

h) Each party shall bear own costs of the petition.

The petitioner has filed on 17.07.2019 an application by way of a notice of motion through Oyucho Timon Advocate. The applicant has invoked section 12(3) of the Employment and Labour Relations Court Act 2011 and Rule 17 of the Employment and Labour Relations (Procedure) Rules 2016. The applicant prays for orders:

a) The application herein be certified as urgent and heard ex-parte in the first instance.

b) The Honourable Court be pleased to order stay of execution of the judgment and all consequential orders of the Honourable Court delivered on 12.07.2019 pending the hearing and determination of the application.

c) The Honourable Court be pleased to order stay of execution of the judgment and all consequential orders of the Honourable Court delivered on 12.07.2019 pending the lodgement, hearing and determination of the intended appeal.

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

The application is based on the annexed supporting affidavit by the applicant's Secretary and Chief Executive Officer one Dr. Nancy Njeri Macharia and upon the following grounds:

a) The applicant is desirous of appealing against the judgment delivered herein and as per section 17 of the Employment and Labour Relations Court Act and Article 163 (4) of the Constitution.

b) The applicant has filed a notice of appeal and also requested for typed and certified copies of the proceedings.

c) If stay orders are not granted the applicant is likely to suffer irreparable loss and damage which will not be recoverable if the appeal is successful.

d) It is in the interest of justice that the orders prayed for are granted and the respondent will not suffer prejudice if orders are granted as prayed for.

e) The orders of stay if not granted will practically paralyze the operations of the applicant herein and debar the applicant from exercising its constitutional mandate provided under Article 237 of the Constitution of Kenya.

f) Order (c) does not balance parties' interests because it institutionalises conflict of interest that has existed in the teaching service on performance of duties by institutional administrators and it interferes with the respondent's constitutional mandate to transfer such institutional heads.

g) Order (d) directs parties to review schemes of service and also promotions be done in accordance with the schemes of service. Promotions per schemes of service cripple implementation of the CBA to the detriment of the teachers.

h) Order (d) quashing Career Progression Guidelines used to implement CBA from 30.06.2017 sends into disarray the implementation of the CBA and promotions will be in abeyance until 01.07.2020 when all teachers will attain 3 years after promotion effective 01.07.2017 when the 1<sup>st</sup> phase of CBA was implemented as per schemes of service. Further institutional administrators already promoted will be demoted and the applicant will be unable to perform its functions per the CBA. Vacancies in the institutional administrators' positions that are vacant will not be filled.

i) Order (e) cripples the applicant's capacity to supervise performance of teachers for year 2019 and the teachers will be paid without such supervision of their performance. The learners' right to quality education is therefore in jeopardy and an affront to Article 53(2).

j) Order (f) suspending teacher professional development (TPD) is based on misdirection in law by the Court as the applicant has instituted regulations for implementation of TPD as per section 35 (2) of the Teachers Service Commission Act, 2012 and the.

k) Order (g) on the strike notice dated 19.12.2018 as set aside or spent amounts to condemning the applicant unheard.

l) The orders have the effect of stripping the applicant of its constitutional powers and therefore amount to amending the Constitution outside Article 255.

m) It is in the public interest that the stay orders are granted.

The respondent opposed the application by filing on 19.07.2019 the replying affidavit of Henry Collins Oyuu, the respondent's 1<sup>st</sup> National Vice Chairman. The respondent opposed the application upon the following grounds:

a) The orders in the judgment are not amenable to execution in the legal sense and the application is therefore otiose.

b) Suspending the judgment means that the underlying dispute remains unresolved inviting restitution of the *status quo ante*, being industrial unrest including strike action.

c) The grounds supporting the application are frivolous and are bent on ensuring the applicant continues to disregard the provisions of the law and the collective bargaining agreement (CBA) governing the parties' duties and obligations under the CBA.

d) The applicant has not demonstrated loss it stands to suffer in event the application is not allowed as prayed for. On the other hand the respondent is entitled to full enjoyment of the orders in the judgment.

e) The balance of convenience tilts in favour of the respondent rather than the applicant in the circumstances of the case.

f) The judgment does not invent or create anything new because all members of the trade union have all along participated in the union elections.

g) There is no evidence of imminent intent to execute the judgment occasioning irreparable effects likely to negate the very essential core of the applicant's constitutional mandate. To the contrary the judgment buttressed the very core role the applicant is obligated in law to perform, that of protecting the interests of employees as members of the respondent.

h) It is trite law that a party seeking for stay of execution establishes the substantial loss due to it unless the stay is granted and the applicant has failed to show any possible loss or any loss at all that would render the intended appeal nugatory.

i) The respondent continues to suffer loss because its branch officials have not been rerouted back to the branch territories after transfers in issue; the applicant desires to continue applying irregularly established policies, circulars, tools, and programs to the detriment of the respondent's members.

j) The stay orders seek to extent the applicant's breach and disregard of the binding nature of the CBA which is in place.

k) The reversion to impugned career progression guidelines to the system prior to 02.05.2018 which had been utilised in the implementation of the CBA in 2017 to 2018 means further implementation is not in jeopardy.

l) The validation of the tool will enrich the tool for implementation beginning 2020 and a stay order means holding on a deficient tool.

m) The application is not merited.

The interested party did not file a replying affidavit and they did not oppose the application.

The Court has considered the supporting affidavit, the replying affidavit, and the submissions made for the parties and makes findings as follows.

**First**, the applicant seeks a blanket stay of the orders in the judgment including orders (a) and (b) in the judgment which essentially the parties had voluntarily agreed upon and consented to. Similarly parties had partially agreed to order (d) to the extent that the promotions

would be as per the Code of Regulations for Teachers (CORT) and the schemes of service and the only dispute was whether that agreement would apply to only the respondent's members or all unionisable employees. The Court returns that in view of the cited parties' agreement and consents as recorded in Court, it would be unjustified for the Court to grant a blanket stay of execution as prayed for and in total disregard of the parties' own agreement and recorded consent in that regard. The Court returns that in such circumstances it would be unreasonable to grant stay orders as prayed for and to reopen disputes between the parties as it will be inconsistent with the parties' own agreement on record and the findings by the Court as per the judgment.

**Second**, the Court has considered the grounds in support of the application as stated and as urged for the applicant. The string that flows throughout the grounds is that the applicant is dissatisfied with the findings of the Court as set out in the judgment. The Court returns that it will not sit on appeal against its own findings and the legitimate action is for the applicant to move the Court of Appeal as will be appropriate. The Court returns that by nature of the findings and the orders made, they are to the effect that the applicant is to proceed and discharge its constitutional and statutory powers and functions but in accordance with the law – and the Court considers that such discharge of constitutional and statutory mandate by the applicant in accordance with the law is a continuous undertaking which should not be subject to suspension or stay by this Court one way or the other.

**Third**, the Court has considered the applicant's concern that validation of the performance measurement tools by 01.12.2019 and for roll out by January 2020 as per order (e) in the judgment imposes timelines that unnecessarily curtails the applicant from undertaking the validation and subsequent measurement of the performance of teachers. The Court considers that the timelines had been imposed by the Court to ensure effective and efficient validation and roll out by providing for sufficient time and resources as may be necessary to accomplish the assignment. It has been submitted for the applicant that the timelines as imposed will unduly delay the teacher performance measurement. The respondent has not submitted against expeditious realisation of order (e) as may be possibly so and as urged for the applicant. Thus the Court returns that the applicant is entitled to a stay of only the timelines in order (e) with orders that despite the timelines imposed in the order, the applicant is entitled to undertake the validation sooner than is ordered and thereafter, to forthwith roll out the implementation of the performance measurement tools sooner than is ordered therein.

**Fourth**, the Court returns that order (g) declaring the notice of withdrawal of labour by teachers in the public service dated 19.12.2018 as set aside or spent was a necessary order in view of the finding that the disputes between the parties that had occasioned the notice had been resolved and conclusively so. The Court considers that the declaration was necessary to bring the matters in issue at rest and to conclusively define that the parties were to uphold industrial rest and normalcy accordingly. In the interest of continued industrial peace and teaching service delivery, the Court will not stay the order as there is no established reason to stay the order which in any event is declaratory and therefore not subject to execution in the strict sense.

**Fifth**, the applicant raised issues about difficulty in the implementation of the CBA in view of the orders in the judgment. The Court finds that such difficulty was not disclosed and if any, it would not, in the opinion of the Court, be addressed in an application such as the present one. It could be that such would amount to a new cause of action and therefore outside the purview of the present petition or proceedings. The Court finds as much especially that the judgment partly flowed from the parties' consent on the matters in dispute and which the Court was invited to decide upon and the difficulty as urged for the applicant was not one such matter that was agreed upon by the parties for determination by the Court under the judgment on record.

**Sixth**, in furtherance of good and harmonious industrial relationship between the parties and looking at the margins of success, parties will bear own costs of the application.

In conclusion, the application dated 16.07.2019 and filed on 17.07.2019 for the petitioner herein is hereby determined with orders:

- a) That pending the hearing and determination of the intended appeal there shall be a stay of order (e) of the judgment but only to the extent that despite the timelines imposed in the order, the applicant is entitled to undertake the validation of the teacher performance measurement tools sooner than is ordered therein and thereafter, to forthwith roll out the implementation of the teacher performance measurement tools sooner than is ordered therein.
- b) Each party to bear own costs of the application.

**Signed, dated and delivered in court at Nairobi this Friday 26<sup>th</sup> July, 2019.**

**BYRAM ONGAYA**

**JUDGE**