



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 288 OF 2018 CONSOLIDATED WITH KISUMU ELRC

PETITION NO. 83 OF 2018

[Formerly Nairobi 1266 of 2018]

(BEFORE HON. JUSTICE MATHEWS N. NDUMA)

KOKEYO CAROLYNE ADHIAMBO..1ST CLAIMANT/APPLICANT

OJWANG O. KENNETH.....2ND CLAIMANT/APPLICANT

WINGA NANCY ANYANGO.....3RD CLAIMANT/APPLICANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

AS CONSOLIDATED WITH

NAIROBI ELRC PETITION NO. 83 OF 2018

NYAGWA MESHACK ONINDO.....1ST PETITIONER

ASIAGO RICHARD OGONCHO.....2ND PETITIONER

MOUKO NELSON MUOGO.....3RD PETITIONER

VERSUS

TEACHERS SERVICE COMMISSION.....1ST RESPONDENT

MARYCLARE INDIRE, CHIEF PRINCIPAL, MIGORI TEACHERS

TRAINING COLLEGE.....2ND RESPONDENT

TSC COUNTY DIRECTOR MIGORI COUNTY....3RD RESPONDENT

RULING

1. The applicants are high school teachers. They filed suit against their employer Teachers Service Commission on 30th July 2018 seeking a declaration that their transfer is unlawful and unfair and an order cancelling, lifting and or reversing the transfers of the petitioners. They also sought damages for discrimination.

2. The suit was filed together with an urgent Application dated 30th July 2018 seeking interim orders. The application was heard Exparte at Nairobi by Radido J. on 30th July 2018. The judge did not issue interim orders in the matter and set down the Application for directions on

7th August 2018. On 7th August 2018 the matter was before Abuodha J. who transferred it to Kisumu ELRC to be mentioned on 20th September 2018. The judge ordered:

“Meanwhile the transfer letters dated 13th July 2018 are hereby suspended until then or further orders of the court”.

3. On 20th September 2018 matter was mentioned before me. Mr. Sitima appeared for the respondent. The claimants were absent. The court set interpartes hearing on 2nd October 2018 and directed the respondent to serve the hearing notice.

4. On 2nd October 2018 M/S Olieyo appeared for the claimants and M/S Ruto for the respondents. M/S Olieyo informed court that she was holding brief for Mr. Aoko who was not ready to proceed with the matter. M/S Ruto was ready to proceed with interpartes hearing. M/S Ruto opposed the adjournment stating that it was the second time she was appearing in court and the Applicants were not ready to proceed yet they enjoyed interim orders and they had brought the application on a certificate of urgency. M/S Olieyo insisted that she was not ready to proceed. The court refused the Application dated 30th July 2018 for want of prosecution and interim orders were discharged.

5. The Applicants filed another application dated 12th October 2018 and filed on the even date seeking interim orders to stay execution of the re-routing letters dated 9th October 2018 pending the hearing and determination of the application. I certified the matter urgent and set it for interpartes hearing on 25th October 2018.

6. On 25th October 2018, M/S Wafula for the petitioners/Applicants told the court that they were ready to prosecute applications dated 3rd October 2018 and 12th October 2018 and had agreed to file written submissions. Mr. Okello holding brief for M/S Ruto confirmed that they were to proceed by way of written submissions on both Applications. The two applications dated 3rd October 2018 and 12th October 2018 were similar and sought same orders. Directions to file written submissions within 21 days were given by the court and mention date set for 23rd January 2019.

7. Meanwhile, other teachers had filed at Nairobi Petition Number 83 of 2018 together with a certificate of urgency. The matter was placed before duty judge at Nairobi, Ongaya J. who gave directions on the matter to be heard on 30th August 2018. Matter was adjourned to 31st August 2018 when both parties appeared. Matter did not proceed for hearing interpartes however the judge granted interim orders pending the hearing and determination of application and the petition in terms of prayers (b) and (C) of the application.

8. On 6th September 2018, the hearing of the application was before Maureen Onyango J. The respondents were not ready to proceed and the application for adjournment was granted and hearing of application fixed for 11th October 2018. Directions on filing of replying affidavit and written submissions were given.

9. On 11th October 2018, matter was listed for hearing before M. Onyango J. Mr. Sitima appeared for Mr. Ngare for respondent and Mr. Ochiel appeared for the petitioners. Mr. Ochiel also held brief for proposed interested party represented by Mr. Lempaa.

10. The petitioners and interested party had filed written submissions. However, Sitima stated that there were two applications before court dated 27th August 2018 and 9th October 2018 respectively and the subject matter was the same. Mr. Sitima said he was not ready to proceed since they had not filed their response to the applications. Mr. Ochiel informed the court that there was a similar matter at Kisumu being Kisumu ELRC 288 of 2018 which was formerly Nairobi ELRC 1266/2018. Mr. Ochiel sought consolidation of the matters and to have 83/2018 as the lead file.

11. The judge transferred Petition 83 of 2018 to Kisumu to be heard together with Kisumu ELRC Number 288 of 2018. The court issued status quo orders pending further orders in Kisumu. The respondent was granted leave to file responses to the two (2) pending applications within 14 days. Mention of the matter at Kisumu was set for 29th October 2018.

12. On 29th October 2018, Mr. Ochiel appeared for petitioners in petition number 83 of 2018 and held brief for Mr. Lempaa for intended interested party. Mr. Sitima appeared for the respondent. Mr. Ochiel applied for the two matters to be consolidated and directions given. Mr. Sitima informed court that interim orders were discharged in cause number 288 of 2018 and that in petition number 83 of 2018 there were interim orders. Mr. Ochiel withdrew Application dated 9th October 2018 and requested for consolidation of the matters and that the application for injunction in petition 83 of 2018 be heard. The court granted an order for consolidation of petition number 83 of 2018 and cause number 288 of 2018 and extended the interim orders made on 23rd January 2019 at Nairobi.

13. On the same date at 10.30 am, Mr. Ochiel and Mr. Sitima appeared before me again. Mr. Ochiel requested the court to confirm the orders in petition number 83 of 2018 and order parties to file written submissions on the main cause and give a mention date to expedite the process. Mr. Sitima stated that they had not agreed on the way forward and that he is applying for the discharge of the interim orders.

14. Mr. Ochiel responded to Mr. Sitima stating that they had dispensed with interlocutory applications and wished to proceed with the consolidated cause and petition by way of written submissions. The court then gave directions on the filing of written submissions on the petition within 14 days and Respondent within 14 days of service and matter to be mentioned on 23rd January 2019. On 23rd January 2019, Mr. Ochiel appeared for the petitioners and Mr. Okello held brief for Stella Ruto for the respondents.

15. Mr. Ochiel stated that they had dispensed with interlocutory applications and would proceed with the main cause and petition 83 of 2018 and that they had already filed written submissions in that regard. That the two matters had been consolidated. That they would highlight submissions.

16. Mr. Okello confirmed the position stated by Mr. Ochiel that parties had dispensed with interlocutory applications and would file submissions and highlight the same.

17. The court gave directions on the consolidated suit and set 31st July 2019 as date for highlighting of submissions. Interim orders were still in place.

18. On 14th February 2019, Mr. Sitima appeared before me in open court and stated that there was a pending ruling in cause number 288 of 2018 and petition 83 of 2018 which were consolidated on 28th January 2019. That the matter is due for hearing on 31st July 2018. Mr. Sitima requested that the file be brought to court and a mention date be allocated to deal with the issue of the pending ruling in the presence of other parties. The court made an order to the effect;

“Mention on 25th February 2019 on the issue of Ruling meant to have been delivered on 23rd January 2019”.

19. On 25th February 2019, Mr. Ochiel appeared for the petitioners and Mr. Anyuor appeared for the Respondent.

20. Mr. Anyuor informed court that the purpose of the mention was to deal with a pending ruling in petition number 83 of 2018 that was consolidated with cause number 288 of 2018. Mr. Anyuor informed the court that parties had filed submissions on the Application. Mr. Ochiel informed the court that Justice Ongaya had granted prayers (b) and (c) at Nairobi and so there was no ruling pending. Mr. Ochiel said that the interim orders were granted pending the hearing and determination of the consolidated petition. Mr. Anyuor confirmed that they had perused the file that morning and confirmed that Justice Ongaya had indeed granted final orders. Mr. Anyuor stated that he wished to file submissions on the consolidated petition within 14 days. The court then directed that the respondent to file written submissions within 14 days and submissions to be highlighted on 16th April 2019.

21. All this time, Mr. Ochiel had not raised any issue with the court regarding the way the matter had proceeded thus far. An application for recusal coupled by a letter of complaint to the Judicial Service Commission that the judge was biased in this matter came as a great surprise to the court.

22. The contents of the said letter to Judicial Service Commission and the grounds in support of the application for recusal are pure falsehoods unsupported by the record of the proceedings thus far. This court does not know the petitioners and has dealt with many matters against Teachers Service Commission in which varying decisions in favour or against Teachers Service Commission have been delivered. My judgments in the Kenya Law Reports bear me out in this regard.

23. The suspicion that the file was brought to court improperly on 4th February 2019 has no basis at all. There was need to clarify the issue raised by Mr. Sitima in open court to confirm whether or not there was a pending Ruling in the file number 83 of 2018 which was handled by judge Ongaya and then transferred to Kisumu. As it turned out both counsel for the petitioners and for respondent perused the file on the date of the requested mention being 25th February 2019 and confirmed the correct position that indeed Justice Ongaya had issued interim orders pending the hearing and determination of the petition. The two counsel agreed that there was no ruling pending on the applications which had already been dispensed with by the parties before this court. The court then proceeded to give directions on highlighting of final submissions on 16th April 2019. The petitioners continue to enjoy the interim orders granted by Hon. Justice Ongaya in Nairobi.

Grounds of opposition

24. The respondents filed grounds of opposition to the application for recusal dated 24th April 2019 as follows:

- a. The Application is misconceived, mischievous, frivolous, vexatious and an abuse of the process of this Honourable Court.
- b. The Application is a gimmick on the part of the Applicants to delay the hearing of this cause.
- c. The Application for recusal has been brought at the last minute when parties have put in their submissions and what's remaining is highlighting of the same.
- d. The Application seeks to scuttle the hearing slated for 16th April, 2019 given that there are subsisting interim orders in favour of three of the Applicants in the main cause.
- e. The Application is a ploy to facilitate the Applicants to continue enjoying the subsisting interim orders at the expense of Respondent's execution of its constitutional and statutory mandate.
- f. The Application is a scheme on the part of the Applicants to forum shop and to further delay the just and prompt determination of this matter.
- g. The Application has not met the test for recusal of judicial officers requiring that, **“a fair-minded and informed observer, having considered the facts, would conclude that there is a possibility that the Presiding Judge will not be impartial or fair or will be biased”**.
- h. That Respondent is likely to suffer irreparable loss, damage and injustice should the Application be granted.

25. The respondent also filed a list of authorities for consideration by the court. The respondent pray that the application be dismissed with costs.

Determination

26. The issues for determination are:

a. Whether the applicants have satisfied the requirements for recusal.

27. Section 50(1) provides:

“Every person has the right to have any dispute that can be resolved by the application of law be decided in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal or body”.

Article 25 on the other hand provides:

“Despite any other provision in this constitution, the following rights and fundamental freedoms shall not be limited:

“the right to a fair trial.....”

28. On the facts before the court, the applicants have made allegations against the judge which are not borne out of the court record and in my own considered view are falsehoods because I did not do or say the things alleged to have been said by myself.

29. Firstly it is clear there was a justification for Mr. Sitima to request the file for mention before court in the presence of all parties to establish if there was a pending ruling in petition number 83 of 2018 which had just been transferred from Nairobi. In fact the request by Mr. Sitima was made on 14th February 2019 in open court and the file was summoned by the court to allocate a mention date for that purpose when both parties would be before court.

30. The mention date was set for 25th February 2019 when Mr. Ochiel for the petitioners and Mr. Anyuor for the respondents appeared before me and took time to peruse the file to determine what had transpired before Ongaya J. in Nairobi on 31st August 2018. It was after that exercise when both parties confirmed to the court that Ongaya J. had issued final orders at the exparte stage and therefore the only matter pending was determination of the petition on the merits. This innocent exercise has now been used by the applicants and their counsel to cast aspersions on the impartiality of the court. The applicants have gone ahead to craft statements allegedly made by myself which do not have an iota of truth.

31. The applicants do not say on what date the court advised counsel for the respondents not to call witnesses. Indeed, by the time the matter was mentioned on 25th February 2019 the petitioner had already filed final submissions and Mr. Anyuor for the respondent indicated to the court that they wished to call witnesses in addition to filing written submissions.

32. The court observed that petitions are normally disposed of by way of Affidavits and written submissions and if a party wished to call witnesses they needed to state so at the earliest instance, and file witness statements in good time to avoid delaying the matter. At this time the petitioners had already filed their final submissions hence my concern. Mr. Anyuor then decided to rely on written submissions only and not call any witnesses. This sort of decision is normal and quite appropriate during pretrial sessions. It is unfortunate that such was misconstrued by the applicants to be giving advice to the respondents and an indication of bias.

33. Instead of calling for the matter to be mentioned in chambers to raise their concerns in the best traditions of our court practice, the petitioners, with assistance of their advocate, Mr. Ochiel crafted a complaint to Judicial Service Commission and attached it to an urgent Application dated 8th April 2019 and filed on 9th April 2019 calling upon the judge to recuse himself on grounds of bias. By this time the respondents had filed written submissions on 20th March 2019 and the submissions by both parties were to be highlighted on 16th April 2019.

34. The applicants demanded that the matter be sent to the Principal Judge in Nairobi for allocation before any other judge for determination.

35. Whereas it is clear in the mind of the judge that the allegations made against the court are not factual at all, the conflict of interest created by filing a complaint to Judicial Service Commission against the judge becomes by itself a barrier for the judge to continue hearing the matter. This stops the proceedings before me in their tracks despite my considered believe that the plot is aimed at forum shopping as submitted by counsel for the respondents and a ploy by the applicants to continue enjoying final orders granted to them at Nairobi on 31st August 2018 when respondents were directed to file replying affidavits on 3rd September 2018 and the applicants to file supplementary affidavits by 5th September 2018.

36. The judge had then granted orders in terms of prayer (b) and (c) in the Notice of Motion and that the petitioners to continue serving at Migori Teachers Training College. This is the confusion that had caused the need for clarification in the first place. This court none the less did not interfere with these final orders but proceeded to give directions on the hearing and determination of the petition.

37. The test in *R-VS-Gough* which was subsequently adjusted by the *House of Lords in Porter vs Magill (2003) I AllER 465* when the house of Lords opined that the words ‘a real danger’ in the test served no useful purpose and accordingly held that:

“The question is whether the fair minded and informed observer, having considered the facts would conclude that there was a real possibility that the tribunal was biased” **see Philip K. Tunoi and another vs Judicial Service Commission and another [2016] eKLR** in which the Court of Appeal applied the test in Porter vs Magill [2002] [supra] and stated thus:

“In conclusion and applying the test in Porter vs Magill [2002] [supra], no fair minded and informed observer, having considered the facts, would conclude that there is a possibility that the presiding judge or this court will not be impartial or fair or will be biased”.

38. I have no doubt that the grounds upon which the application is based do not satisfy the test in the Porter –vs- Magill case, but the conflict of interest, deliberately created by a complaint to Judicial Service commission based on falsehoods and misconception of court processes, creates a bar to this court to proceed any further in hearing this matter.

39. Filing flimsy and unfounded complaints against judicial officers has become a weapon of choice in recent times by parties who have lost their cases instead of filing an Appeal to the next court in hierarchy and those bent on stopping proceedings for extraneous reasons including forum shopping and causing delay to the conclusion of the suit where the applicants are enjoying a perceived advantage over the other party as in this case.

40. If this trend is not stopped in its tracks, I see it as the greatest threat to the independence of the judiciary and fair and just resolution of disputes in this country. Intimidation and instilling fear in the minds of judges by robing in Judicial Service Commission is a vice that must stop. However, judges must at all times be accountable, and above all brave on the face of these threats to fair administration of justice. For these reasons, attention of this ruling be drawn to the Council of the Law Society of Kenya for noting and any further action they may wish to take to protect fair judicial processes in Kenya.

41. Regrettably, in this matter and for the reasons canvassed in the ruling, it is no longer tenable for this court to continue hearing the consolidated suit to finally.

42. Accordingly the court makes the following orders:

- a. This court recuses itself from handling the consolidated suit any further.
- b. The consolidated suit be referred to the Principal Judge, Employment and Labour Relations court to allocate the matter to another judge, preferably one who has not previously dealt with the matter at interlocutory stage.
- c. The Deputy Registrar Kisumu, ELRC to act on the transfer to Nairobi, ELRC for mention before the Principal Judge for directions.

Ruling Dated, Signed and delivered this 9th day of July, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Ochiel for claimants

Mr. Anyuor for Respondents

Chrispo – Court Clerk