



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 91 OF 2017

RODA MOGAKA

CLAIMANT

V

NAOMI N. MWANGI

1ST RESPONDENT

BOARD OF MANAGEMENT, NGATA SECONDARY SCHOOL 2ND RESPONDENT

TEACHERS SERVICE COMMISSION

3RD RESPONDENT

RULING

1. For ruling is a motion dated 27 February 2017 seeking

1.

2. That pending the hearing and determination of this application *inter partes* this Honourable court be pleased to issue orders of injunction restraining the respondents from proceeding with the hearing slated for 3rd March 2017 against the claimant.

3. That pending the hearing and determination of this suit this Honourable court be pleased to issue orders of injunction restraining the respondents from proceeding with any hearing against the claimant.

4. That costs of this application be provided for.

2. When the application was placed before the Court on 28 February 2017, the Court declined to grant any restraining order and directed that it be served for *inter partes* hearing on 3 March 2017.

3. On 3 March 2017, the hearing of the application could not proceed because there was no evidence that it had been served upon the Respondents. The hearing was rescheduled to 7 March 2017.

4. On 7 March 2017, the 1st Respondent and members of the 2nd Respondent appeared in person and requested for time to instruct an advocate.

5. After hearing brief oral addresses from both sides, the Court allowed the Respondents time to instruct an advocate and also granted temporary restraining orders in terms of proposed order 3 pending *inter partes* hearing on 28 March 2017.

6. On 10 March 2017, the Claimant moved Court again through a certificate of urgency seeking

amendment of the Court order, and the Court directed service to be effected (the Court notes that there was no motion filed with this certificate of urgency and that renders the purported application incompetent).

7. On 15 March 2017, the Respondents through Allan M. Sitima Advocate moved Court seeking

1.

2. **THAT**, the Court be pleased to set aside the Orders/Ruling issued on 7th March, 2017 and all subsequent Orders/Directions.

3. **THAT**, the Applicant be granted leave to respond to the Application and defend the Claim.

4.

8. The Court directed that this latter application be served and scheduled directions/hearing for 28 March 2017.

9. On 28 March 2017, the Court directed the parties to discuss how to deal with the 2 substantive applications on record (Claimant's motion of 27 February 2017 and Respondents motion of 13 March 2017), but the parties could not reach agreement. The Court therefore directed that the Claimant's motion be urged first.

10. The reason the Court wanted the parties to agree on the way forward was because if the Respondents application were to be treated as grounds of opposition, the Court would have saved time by considering whether to confirm the orders of 7 March 2017 and/or vacate the same.

Claimant's case

11. The Claimant's case as set out on the papers and oral submissions was that the Respondents lacked the power/jurisdiction to hear the allegations against her; that the 1st Respondent as the complainant should not have sat to consider the allegations against her and that she had not been supplied with the documents to be used during the hearing.

12. On the applicable law, the Claimant submitted that section 59 of the Basic Education Act which provided for the functions of a Board of Management did not clothe the Board with disciplinary control over teachers and that there was nothing to suggest that the Teachers Service Commission, being the employer of the Claimant had appointed the 2nd Respondent in writing as a delegate in terms of Regulation 15(1)(a) of the Code of Regulations for Teachers as read with Regulation 14 thereof.

Respondents' contentions

13. Ms. Mambo for the Respondents opposed the motion and urged that the Teachers Service Commission Act as read with Regulation 14 of the Code of Regulations for Teachers granted the Commission the authority to delegate some of its functions and that in that regard, the Commission had delegated to Boards of Management the power of disciplinary control of teachers.

14. The Respondents also urged that pursuant to Regulations 146 and 147 of the Code of Regulations for Teachers, a Board of Management had the mandate to carry out investigations and interdict a teacher pending a disciplinary hearing.

15. The Respondents further assailed the Court order of 7 March 2017 on the ground that the Claimant failed to disclose that she had already been interdicted by the time she moved to Court.

Evaluation

The law on interlocutory restraining relief

16. The legal principles applicable to interlocutory restraining orders were set out in the case of *Giella v Cassman Brown & Co. Ltd.* (1973) EA 338. It was stated in that case that *the conditions for the grant of an interlocutory injunction are now, I think, well settled in E.A. **First**, an applicant must show a prima facie case with a probability of success. **Secondly**, an interlocutory injunction will not be granted unless the applicant might otherwise suffer irreparable injury, which would not be compensated by an award of damages **Thirdly**, if the court is in doubt, it will decide an application on the balance of convenience.*

17. On the *prima facie* limb of the principles, there is nothing placed before Court to show that the Teachers Service Commission had appointed the 2nd Respondent to act as its agent in exercising disciplinary control over teachers (Claimant) in terms of Regulations 14 and 15(1)(a) of the Code of Regulations for Teachers, either generally or in particular.

18. Further, Regulation 146 of the Code of Regulations for Teachers envisage a Board of Management or the membership thereof constituting an *Investigations Panel* at the first instance, and on the material before Court at this stage, it is not clear whether the 2nd Respondent was acting as an *Investigations Panel* under the aegis of Regulation 146(6) or as the *Board of Management* by dint of Regulation 147 of the Code of Regulations for Teachers.

19. Regulations 146 and 147 of the Code of Regulations for Teachers appear to suggest different roles for the *Investigations Panel* composed of members of the Board of Management and the *Board of Management qua Board of Management*.

20. As regards irreparable harm and balance of convenience, the Court notes from the material made available that during interdiction, a teacher is not only expected to vacate the school but is only entitled to half salary in certain cases.

Conclusion and Orders

21. In the view of the Court, the statutory/regulatory breaches alleged by the Claimant would require an examination on the merit and in this regard, the Court forms the opinion that the Claimant has satisfied the legal test for grant of the interlocutory order of injunction pending hearing and determination of the Cause.

22. But conscious of the legal imperative that Courts ought not to interfere in a disciplinary process except in the most exceptional of cases, the Court would direct and order that

(a) Pending the hearing and determination of the Cause herein, an order of injunction do issue restraining and or staying the Respondents from proceeding with any disciplinary case against the Claimant including the decision to interdict.

(d) The Respondents do file and serve their Responses, documents and witness statements on or before 10 May 2017.

(c) The Claimant file any Reply thereto if necessary before 20 May 2017.

(d) Agreed Issues be filed on or before 15 June 2017.

(e) Cause to be heard on the merits on 26 July 2017.

(f) Directions on Respondents application dated 15 March 2017 to be agreed immediately hereinafter.

23. Costs in the Cause.

Delivered, dated and signed in Nakuru on this 28th day of April 2017.

Radido Stephen

Judge

Appearances

For Claimant Mr. Nyagaka/Ms. Kerubo instructed by Nyagaka S.M. & Co. Advocates

For Respondents Ms. Mambo instructed by Allan M. Sitima Advocates

Court Assistant Nixon