



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO.125 OF 2016

KENYA UNION OF PRE-PRIMARY EDUCATION

TEACHERS.....CLAIMANT

VERSUS

STEPHEN MWANGI IRERI.....1ST RESPONDENT

AND

BOARD OF MANAGEMENT OF MURUAI

PRIMARY SCHOOL.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Wednesday, 31st May, 2017)

JUDGMENT

The claimant filed the memorandum of claim on 03.06.2016 alleging the unfair termination of one Madam Anne Wanjui Kuria. The amended statement of claim was filed on 06.10.2013. The claimant prayed for judgment against the respondents for:

- a) A declaration that the termination was wrongful and unfair.
- b) A finding that the termination was unprocedural and the court to enforce a penalty against the respondents pursuant to section 81 of the Employment Act, 2007.
- c) The court to order reinstatement of the grievant Madam Anne Wanjui Kuria as such under section 49 of the Employment Act, 2007.
- d) The court to protect the grievant's wages by restraining the respondents from in anyway handling levies paid by parents of the ECDE children in observance of the separation of powers as supported by the decision by Ngugi J. in **Elimu Yetu Coalition –Versus- Teachers Service Commission and 2 Others, High Court Petition No. 131 of 2015 at Nairobi.**
- e) The court to find it just to regularise the terms of service for the grievant.
- f) The respondent to provide costs of the suit.

The memorandum of response was filed on 13.07.2016 through F.O.Makori, Litigation Counsel, for the

Attorney General. The amended memorandum of claim was filed on 25.10.2016.

The grievant is a member of the claimant trade union. She is an early childhood education teacher and serves in the sector represented by the claimant. The 1st respondent is the head teacher of Muruai Primary School which is managed by the 2nd respondent.

The 1st respondent issued the letter dated 17.07.2015 addressed to the grievant. The letter stated as follows:

“To Madam Ann,

REF: TERMINATION OF DUTIES FROM WORK

Due to a lot of complains from both nursery committee and SMC committee brought to them by nursery parents, it has been decided that we relieve you the duties attached to you.

This will save the nursery parents not transfer their pupils as most especially the middle class have planned to do if no action has been taken by the office. The office thanks you for the service rendered by you in Muruai nursery since your deployment some years back

Yours faithfully,

Signed, H/T

17.07.2015”

The claimant’s case is that the respondents lacked authority to initiate and issue the grievant’s dismissal because under section 55(1) of the Basic Education Act, 2013, there shall be a Board of Management for every public pre-primary institution; primary school; secondary school; adult and continuing education centre; multipurpose development training institute; or middle level institutions of basic education. Further, under section 59 of the Act, the respective Board of Management of a basic education institution shall be to, under section 59(o) receive, collect and account for any funds accruing to the institution; and under section 59(p), recruit, employ, and remunerate such number of non-teaching staff as may be required by the institution in accordance with the Act.

The claimant’s case is therefore that the dismissal as conveyed in the letter of 17.07.2015 was unlawful as it was unfair as the respondents lacked authority to make the decision. The claimant further relies on the letter dated 03.03.2016 addressed to the claimant by one Leah K. Rotich (Mrs), MBS of the Ministry of Education, Science and Technology confirming that the Constitution of Kenya, 2010 under the 4th schedule devolved the function of pre-primary education and childcare facilities to the county government. On that basis, the claimant submitted that the respondents clearly lacked powers or authority of an employer over the grievant serving as a pre-primary teacher and the respondents served and were staff or agents or institutions of the national government. The letter of 03.03.2016 stated as follows:

“RE: GOVERNANCE & MANAGEMENT OF ECDE CENTRES

This office is in receipt of your letter to the Cabinet Secretary dated 8th Feb, 2016 (Ref KUNOPPET / MIN.ED/8/2/16).

Please note that the constitution of Kenya 2010 (4th schedule) devolved the function of pre-primary education and childcare facilities to the county governments.

Consequently, formation of ECDE Management Committees (SMC) is the responsibility of the County government, with guidance from County Education Board (CEB).

You are therefore advised to liaise with concerned County government in as far as the formation of ECDE School Management Committees and running of pre-primary centres are concerned, and with respective CDEs to handle individual cases where primary school head teachers interfere with the running of ECDE centres.

Signed

Leah K. Rotich (Mrs), MBS

DIRECTOR GENERAL”

The claimant submitted that the respondents had therefore acted *ultra vires* in pretending to terminate the claimant’s employment and acting as such in total disregard of the safeguards as provided for in the Employment Act, 2007.

The respondents were given an opportunity to file and serve final submissions but failed to do so as counsel opted not to file the final submissions.

The 1st respondent was the only witness for the respondents (RW). He testified that he became the 2nd respondent’s secretary and head teacher effective January 2013 and he found the grievant in service as the pre-primary school teacher employed by the parents whose children attended the nursery school. The claimant’s salary was paid out of the levies paid by the parents of the said children. RW testified that the parents initially paid the levies directly to the pre-primary teachers but in his tenure and for better management the parents started paying the levies to RW, the 1st respondent. The 1st respondent kept the receipt books and he denied terminating the grievant’s employment. He testified that it was the 2nd respondent who decided to terminate the grievant’s employment. He confirmed that his employer, the Teachers Service Commission, had not instructed him or assigned him duties to handle or oversee the pre-primary school teachers. He confirmed that he was not the grievant’s employer. RW further confirmed that the relevant ECDE School Management Committee was in place.

The court has considered the material on record and makes findings as follows:

a) As submitted for the claimant, the respondents lacked authority to initiate and issue the grievant’s dismissal because under section 55(1) of the Basic Education Act, 2013, there shall be a Board of Management for every public pre-primary institution; primary school; secondary school; adult and continuing education centre; multipurpose development training institute; or middle level institutions of basic education. The relevant Board of Management for the pre-primary school was responsible for managing the pre-primary school in issue and the respondents acted *ultra vires* in purporting to manage affairs of the pre-primary school including purporting to dismiss the grievant from employment of a public pre-primary school.

b) Further and as submitted for the claimant, the court holds that under section 59 of the Basic Education Act, the respective Board of Management of a basic education institution, under section 59(o), discharges the function to receive, collect and account for any funds accruing to the institution; and under section 59(p), to recruit, employ, and remunerate such number of non-teaching staff as may be required by the institution in accordance with the Act. Thus, the court finds that the 1st respondent could not receipt and manage the funds or levies paid by the pre-primary school’s parents as such function was vested in the relevant Board and not the respondents. Thus, the court returns that the 1st respondent acted unlawfully in meddling in the financial matters of the pre-primary school in issue. In that regard the court follows the holding by Ngugi J. in **Elimu Yetu Coalition –Versus- Teachers Service Commission and 2 Others, High Court Petition No. 131 of 2015 at Nairobi** . The court, in the cited case, considered sections 55, 56, 59, and 62 of the Basic Education Act, 2013; section 2 of the Teachers Service Commission Act on definition of head teacher and principal; Article 237 of the Constitution on the mandate of the Commission, and the court stated, thus, **“52. It seems to me that the effect of the above provisions is to ensure that**

the Boards of Management, in which the head teachers and principals sit as secretary, play a major role in promoting the best interest of learning institutions while ensuring their development. It is the Boards of Management, that are in charge of administration and management of resources of the institutions. It is my view therefore that the administration and management of resources in learning institutions is carried out by the Boards of Management.”

c) The parties did not plead, offer evidence or make submissions on the person or authority in law responsible for employing and carrying out human resource functions over the teachers in the public pre-primary schools in Kenya. It could be that the teachers are employed by and subject to the human resource powers and functions of the county public service board under Article 235 of the Constitution as read with the provisions of the County Governments Act, or, employed by and subject to the human resource powers and functions of the Teachers Service Commission under Article 237 of the Constitution as read with the provisions of the Teachers Service Commission Act – an issue which was not argued in this case and therefore does not fall for determination by the court. Nevertheless, what was clear, and in view of the material on record, is that the pre-primary school function is constitutionally devolved and the respondents did not employ the grievant and they lacked managerial and employer’s powers over the grievant. Thus the court returns that the termination was unfair as it was unlawful.

Accordingly and in absence of opposing submissions on the part of the respondents, the court returns that the claimant is entitled to the remedies as prayed for except as found otherwise or elaborated by the court in this judgment and hereafter.

As the respondents were not the grievant’s employers and as the proceedings were civil and not criminal, the court will not impose against the respondents a conviction and sentence under section 81 of the Employment Act, 2007 and as was prayed for.

As the 1st respondent admitted to have handled the funds for payment of the grievant’s wages, the court returns that the 1st respondent will pay all the accruing grievant’s salaries or wages from the date of dismissal, 17.07.2015, to the end of May 2017 being a day after this judgment, and thereafter the regular payment by the relevant person or authority will recommence.

The court has found that the 1st respondent unlawfully meddled with the funds of the pre-primary school in contravention of his official duties. The court finds that such meddling was not in furtherance of lawful governmental or public interest or duty and it was in clear contravention of the 1st respondent’s established and lawful duties; and by 1st respondent’s own evidence, he knew such meddling was unlawful. Thus, the court considers that if, as at time of this judgment, the 1st respondent will not be in possession of the money he unlawfully collected from the pre-primary school’s parents, he will satisfy the judgment out of his private funds. While making the finding, the court has well been guided by the opinion in the judgment in Mundia Njeru Gateria –Versus- Embu County Government and 5 Others [2015] eKLR thus, **“The material before the court show that the 2nd responded failed to act as per the advice and instead allowed the petitioner’s lamentations about the violations of his rights to persist. The court finds that in the circumstances of the case the petitioner is entitled to compensation by the 2nd respondent for the violation and continued violation of the rights beyond the clear advice that the 2nd respondent was given by the Transitional Authority. As submitted for the petitioner, the 2nd respondent continued to violate the petitioner’s rights after receiving the advice and the court finds that taking all the circumstances into account, the 2nd respondent’s violation of the petitioner’s rights was not in pursuit of justified or genuine governmental purpose. It is the opinion of the court that it would be unjustified to burden the tax payer to meet the compensation for violation of the rights in this case whereby the 2nd respondent engaged in the illegalities and his actions were clearly in violation of the law and were advanced in clear disregard of the advice given by the relevant government agency. The 2nd respondent and not the tax payer is therefore found liable for the paying the compensation for the violation of the fundamental rights**

and freedoms.”

In conclusion judgment is hereby entered for the claimant against the respondents for:

- 1) The declaration that the termination of the grievant’s employment by the respondents per the letter dated 17.07.2015 was unlawful and unfair.
- 2) The grievant, Madam Anne Wanjui Kuria, is hereby reinstated in her employment effective 17.07.2015 with full accruing monthly wages and remunerative benefits(from 17.07.2015 to 31.05.2017) payable by the 1st respondent out of monies the 1st respondent collected unlawfully from the pre-primary school’s parents and held as at the date of this judgment and in absence of such money, payable by the 1st respondent out of the 1st respondent’s private funds; and for that purpose, the claimant to compute the payment for filing and service in 7 days and for recording quantum on a convenient mention date.
- 3) Consequential to the reinstatement, the grievant to report on duty and to continue in employment without interference whatsoever from the respondents and to serve in accordance with the law not later than Monday 05.06.2017 at 8.00 O’clock in the forenoon.
- 4) The permanent injunction hereby issued restraining the respondents by themselves or by their agents or employees or servants from collecting, receipting, receiving, managing, spending, or in anyway handling levies paid by parents of the ECDE children in the pre-primary school in issue.
- 5) The declaration that the grievant is entitled to regularisation of her terms and conditions of service and in accordance with the law.
- 6) The respondents to pay the costs of the suit fixed at **Kshs. 50,000.00**.
- 7) The payments due under this judgment to be effected by 01.08.2017 failing interest to be payable at court rates from the date of the judgment till full and final payment.

Signed, dated and delivered in court at Nyeri this Wednesday, 31st May, 2017.

BYRAM ONGAYA

JUDGE