



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU
CAUSE NO. 340 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

HERMAN MUSAMBI.....CLAIMANT

VRS

THE SECRETARY TEACHERS SERVICE COMMISSION.....RESPONDENT

RULING

On 7th March, 2015 the Respondent filed a Preliminary Objection seeking the striking out of the Claim herein on the following grounds;

1. The suit herein raises no reasonable cause of action against the Respondent since the promotion whose cancellation is the subject of the suit herein was awarded to the Claimant by the Ministry of Education, Science and Technology and not the Respondent herein.
2. The cancellation of the said Promotion was effected pursuant to the directions from the Ministry of Education Science and Technology who have not been joined in the suit.
3. The said Ministry of Education, Science and Technology is a distinct and separate legal entity from the Respondent.

When the application came up for hearing on 8th March, 2015 I directed parties to canvass the application by way of written submissions. The parties subsequently filed and exchanged written submissions.

The Respondent submitted that the Claimant was employed on 1st May, 1979 as a P2 teacher on permanent and pensionable terms of service. On 25th January, 1982 the Claimant applied to the Ministry of Basic Education for promotion from P2 to P1 teacher. By letter dated 25th February, 1982 the Director of Basic Education directed the Respondent to upgrade the Claimant accordingly and the Respondent complied.

On 7th December, 1996 the Respondent received a certified copy of a letter dated 22nd December, 1994 from E.N. Njoka, Director of Education in the Ministry of Education directing the Respondent to promote the Claimant from P1 to S1 grade with effect from 1st January, 1995 and the Respondent again complied.

In 2003 the Ministry of Education, Science and Technology unearthed a scandal in which some teachers colluded with some unscrupulous staff of the ministry to issue fake letters of promotion. The Ministry as a consequence set up a verification committee with members drawn from the Ministry and Teachers Service Commission.

In its report the Committee found that six hundred and seventeen (617) promotion letters including the Claimant's were not genuine and a total of Shs. 391,261,068 had been paid out as a consequence of the irregular promotions. The Committee recommended the reversal of the irregular promotions and recovery of salary overpaid as a consequence thereof.

Pursuant to the findings of the Committee the Ministry of Education and the Vetting Committee directed that the Claimant's Promotion from P1 to S1 and all subsequent promotions based on the letter dated 22nd December, 1994 be cancelled and payments based on the said letter be reversed and overpayments recovered.

The Respondent issued a three months notice to the Claimant on the intention to reverse and recover all salaries paid to him as a consequence of the irregular promotion. The Claimant was aggrieved by the action and commenced his suit to contest the reversal of his promotion from P1 to S1 and the recovery of overpayments made consequent thereto.

It is the Respondents contention that the Claimant's suit raises no reasonable cause of action against it as the promotion of teachers was a function of the Ministry of Education Science and Technology and not the Respondent. The Respondent relies on section 5(2) of the Teachers Service Commission Act (TSC Act) (now repealed) as read together with Regulation 40(2) and 41(2) of the Code of Regulations for Teachers (Revised 1989) now repealed.

The above position is based on Section 5(2) of the TCS Act Cap 21 (now repealed) read together with Regulation 40(2) and 41 (2) of the Code of Regulation for Teachers Revised 1986(repealed).

Section 5(2) of the TSC Act states:"*The Minister may make Regulations prescribing the grades into which the teachers' service shall be divided, and the qualifications for appointment into such grades.*"

Regulation 40(2) of the Code of Regulations for Teachers (1986) provides: "*A teacher may also be promoted to other professional grades such as P3, P2, P1 or Approved Teacher next above his present grade in accordance with Regulations for promotion of teachers laid down by the Ministry of Education.*"

Regulation 41(2) states: "*Any teacher who wishes to be considered for promotion should apply to the Ministry of Education for promotion to the grades referred in Regulation 40(2) in the manner prescribed in schedules XXI,XXII,XXIII,XXIV and XXV as required in the Ministry of Education Regulations for Promotion, 1975.*"

The effect of the above preposition is that all promotions of teachers to grades P3,P2,P1,S1 and Approved Teacher status was a statutory function of the Minister for Education and not the Respondent herein. Any dispute emanating from any matter related to promotion to the above grades, cancellation or reversal falls within the exclusive mandate of the Ministry of Education and not the Respondent herein. The Respondent submitted that in the circumstances, the Claimant has sued a wrong party who has no legal mandate and/or capacity to deal with any issue touching on the said promotion.

The Respondent submitted that the Claimant's suit raises no reasonable cause of action since his promotion to the S1 grade was cancelled and/or reversed by the Ministry of Education Science and Technology pursuant to their statutory mandate and not by the Respondent herein.

The Respondents further submits that the Claimant's promotion to the grade of S1 was cancelled by the Ministry of Education who had the Statutory mandate to award and reverse such promotions, that the vetting committee was convened by the Ministry and this suit ought to have been filed against the Ministry and not the Respondent. The Respondent further submits that it is now a Statutory Commission with distinct personality with power to sue and be sued in its own corporate personality separate from the Ministry and that it is not liable for acts, or omissions of the Ministry.

The Respondent relied on the case of George Orito Okuya -vs- Vegi Vegi Restaurant [2013] eKLR in which the court dismissed the claim on grounds that the Respondent was wrongly sued.

The Claimant filed a brief rejoinder in which he states that the cancellation of his promotion and deduction of his salary was done without giving him a hearing and was effected by the Respondent and not the Ministry of Education Science and Technology. The Claimant further submitted that there was no direct link between him and the Ministry. The Claimant further submitted that the case of George Orito Okuya is not relevant to his case as the authority was in respect of unlawful termination of employment.

The Claimant prayed that the Preliminary objection be dismissed and the case be allowed to proceed to full hearing so that issues can be determined on merit.

Having considered the submissions by the parties it is my opinion that the first issue that I should determine is whether this is a proper issue for determination by way of Preliminary Objection.

In the case celebrated of Mukisa Biscuit Manufacturing Company Ltd -vs- West End Distributors Ltd [1969] E.A 696 Law, JA defined a Preliminary Objection as

"A point of law which has been pleaded, or which arises in the course of the pleadings and which, it argued as a preliminary point, may dispose of the suit."

Sir Charles Newbold, the President of the Court elaborated this point as follows:-

"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but necessarily increase costs and, on occasion, confuse the issue. The improper practice should stop."

From the definition above, I do not think that the issues raised in the Preliminary Objection filed by the Respondent qualify to be so raised. The objection is that the case raises no cause of action against the Respondent as the cancellation of the Claimant's promotion was by the Ministry of Education, Science and Technology who is not a Respondent in this suit. I do not find this a ground for a Preliminary Objection. It is a matter of evidence. It is also not contested that it is the Respondent who is the employer of the Claimant and the one who took the action complained of by the Claimant.

The Respondent can therefore not run away from liability for the action complained of by the Claimant it acted at the behest of another person. The options open to the Respondent are to enjoin that other person is a Respondent or apply for third party notice to issue against the Ministry of Education, Science and Technology.

The foregoing being the case I find no merit in the Preliminary Objection filed by the Respondent and dismiss the same.

Costs shall be in the cause.

Dated, signed and delivered this 21st January, 2016

MAUREEN ONYANGO

JUDGE