



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 597 OF 2014

FRANCIS KARIUKI GATU APPLICANT

VERSUS

TEACHERS SERVICE COMMISSION RESPONDENT

Mr. Gisore for the claimant / applicant

M/S. Zipporah Mambo for the respondent

RULING

1. The claimant / applicant filed this application on a certificate of urgency on 9th April 2014 seeking for orders:
2. That this honourable Court be and is hereby pleased to issue an order of injunction preventing the respondent from interdicting, dismissing, victimizing and / or howsoever manner taking any drastic disciplinary action against the applicant pending the hearing and determination of the claim filed forthwith.
3. Interim orders pending the *interpartes* hearing of the application were granted by Hon. Lady Justice Ndolo on 10th April 2014.
4. The respondent filed a replying affidavit to the application and defence to the statement of claim on 12th May 2014.
5. The application is premised on the grounds set out in the notice of motion in paragraph 4(a) to (g) which may be summarized as follows;

The respondent on / or about 26th March 2014, transferred the applicant to Dr. Godana Memorial Secondary School in Marsabit county.

The decision was made notwithstanding an earlier appeal against the respondent's decision to transfer the applicant to Marsabit Boys High School in Marsabit county, which the applicant declined to take up due to reasonable fear of his life having received threats whilst at a school in Garrisa county for having taken a bold decision to report irregularities in the 2012 K.S.C.E. Examinations at Imam Secondary School

whereat he was an invigilator.

6. That the applicant wished to be transferred to a school outside north eastern Kenya for fear of his own life. That the applicant was in genuine fear of interdiction and / or drastic disciplinary measures taken against him pending the hearing and determination of this suit.

7. In the response and written submissions, the respondent states that the applicant was interdicted for desertion of duty after failing to take up a transfer in Marsabit Boys Secondary School.

8. That, the respondent honoured the applicant's request to be transferred to a school outside the north eastern province.

9. That Marsabit Boys Secondary School is situate in eastern province and the present Marsabit county. The School is also in Marsabit township considered by the respondent to have adequate security.

10. The applicant chose to be transferred to Laikipia west Narok county or Nyanza and the respondent received a letter from the Principal Tandere Secondary School in Laikipia county requesting that the applicant be transferred to the said school.

11. The respondent considered this an attempt by the applicant to Canvass and collude with the principal as to the School he was to be transferred to. This in respondent's view was an attempt to undermine the independence of the commission.

12. The applicant was summoned to a disciplinary hearing where he was given opportunity to defend himself and was found guilty of desertion and given a warning letter and subsequently transferred to Dr. Godana Memorial Secondary School in Marsabit county vide a letter dated 26th March 2014. The applicant has neglected to take up the transfer despite the fact that he risked being interdicted for a second time on account of desertion.

13. The applicant appealed further against the said transfer by a letter dated 26th March 2014. The applicant subsequently moved to Court on 9th April 2014.

14. The respondent prays that the application be dismissed with costs for lack of merit.

Determination

15. The parties agreed to proceed by way of written submissions on 4th June 2014 the applicant failed to file his written submissions as directed by the Court.

16. On 17th July 2014, the applicant being in default of filing written submissions, and upon application by counsel for the respondent the *ex parte* interim orders were vacated by the Court.

17. The applicant was granted seven (7) more days to file written submissions but has not complied todate.

18. It is the Court's finding that the applicant has not met the requirements for grant of an injunction pending the hearing and determination of the suit, in that, the applicant applied to be transferred to a school outside north eastern province and the respondent duly complied to transfer him to eastern province (in Marsabit county) hundreds of Kilometres from Garrissa where the applicant was previously situated. To this extent, the applicant has not established a *prima facie* case with a probability of success to warrant grant of an injunction from the Court.

19. To the contrary the applicant has demonstrated disregard of the authority of his employer inspite of having been given consideration to safeguard his security following threats received by him while teaching in Garissa.

20. The respondent has both constitutional and statutory mandate to mete disciplinary action on the applicant on grounds of insubordination, neglect of duty and / or desertion of duty.

21. The applicant will have only himself to blame if he suffers such consequences due to his own misconduct.

22. The balance of convenience is clearly in favour of disallowing this application (see **Gella Vs. Cassman Brown Co. Limited**) [1973] E.A. 358.

23. Accordingly, the application is dismissed with costs to the respondent.

Dated and Delivered at Nairobi this 15th day of January 2016.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE