



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO 599 OF 2013**  
**BAXTON A. ASWANI.....CLAIMANT**  
**VS**  
**TEACHERS SERVICE COMMISSION.....1<sup>ST</sup> RESPONDENT**  
**CITY COUNCIL OF NAIROBI.....2<sup>ND</sup> RESPONDENT**  
**JUDGMENT**

**Introduction**

1. Baxton A. Aswani is a teacher in the employment of the Teachers Service Commission, the 1<sup>st</sup> Respondent herein. Arising from an audit conducted by the 2<sup>nd</sup> Respondent at Visa Oshwal Primary School where the Claimant served as Head Teacher, the Claimant was interdicted and later suspended.
2. It is the disciplinary action taken against the Claimant by the 1<sup>st</sup> Respondent which is the subject of the dispute now before the Court.
3. The Claimant's claim is contained in a Memorandum of Claim dated 26<sup>th</sup> April 2013 and filed in Court on 29<sup>th</sup> April 2013. The 1<sup>st</sup> Respondent filed a Statement of Defence on 25<sup>th</sup> November 2013 and the 2<sup>nd</sup> Respondent filed a Reply on 20<sup>th</sup> February 2014.
4. At the hearing, the Claimant testified on his own behalf and also called Milan Mirembo Nyota. Stephen Maina Gathogo testified for the 1<sup>st</sup> Respondent and Geoffrey Wachira Kamore for the 2<sup>nd</sup> Respondent.

**The Claimant's Case**

5. The Claimant was employed as a primary school teacher in 1981. He taught in various schools and in 2008 he was appointed Head Teacher of Visa Oshwal Primary School. He states that the School was run and managed by a School Management Committee on behalf of the 2<sup>nd</sup> Respondent.
6. The Claimant further states that during his tenure as Head Teacher at Visa Oshwal Primary School, it was the duty of the 2<sup>nd</sup> Respondent to supervise him on behalf of the 1<sup>st</sup> Respondent.
7. It is the Claimant's case that the audit carried out by the 2<sup>nd</sup> Respondent which led to disciplinary

action being taken against him by the 1<sup>st</sup> Respondent was irregular and unprocedural for the following reasons:

- a. The School Management Committee was not given time to prepare and present the books of account for auditing;
- b. The audit was conducted by unqualified persons.

8. The Claimant seeks the following reliefs:

- a. A declaration that the procedure adopted by the Respondents in dealing with his case was unlawful;
- b. Special damages being unpaid salaries and allowances for period between March 2009 and February 2010 together with interest;
- c. General damages;
- d. Costs of the claim.

### **The 1<sup>st</sup> Respondent's Case**

9. In its Statement of Defence filed on 25<sup>th</sup> November 2013, the 1<sup>st</sup> Respondent states that the Claimant was employed as a trained P1 teacher on 1<sup>st</sup> May 1987.

10. On 23<sup>rd</sup> January 2006, the Claimant was transferred to Visa Oshwal Primary School in the position of Deputy Head Teacher. He was later appointed Acting Head Teacher effective 1<sup>st</sup> September 2007 and was confirmed as substantive Head Teacher on 14<sup>th</sup> January 2008.

11. On 20<sup>th</sup> August 2008, the 1<sup>st</sup> Respondent through its agent, the Director of City Education received information from concerned parents that the Claimant was mismanaging school funds and resources and was charging exorbitant and illegal fees from parents without following the guidelines for levying extra fees from parents.

12. The 1<sup>st</sup> Respondent also received complaints from five teachers accusing the Claimant of poor administration, tribalism and discrimination.

13. The 1<sup>st</sup> Respondent through its agent, the Director of City Education conducted preliminary investigations to determine the veracity of the allegations.

14. The 1<sup>st</sup> Respondent contends that several meetings were held between the Claimant and the 1<sup>st</sup> Respondent's agent with a view to resolving the issues at Visa Oshwal. The Claimant was invited to respond to the allegations by letter dated 15<sup>th</sup> December 2008.

15. The 1<sup>st</sup> Respondent further states that it received an audit report for the School for the years ended 31<sup>st</sup> December 2007 and 31<sup>st</sup> December 2008 which revealed that the Claimant had made unauthorised payments amounting to Kshs. 6,157,182.

16. Further, the 1<sup>st</sup> Respondent received a letter dated 5<sup>th</sup> June 2009 from the Permanent Secretary, Ministry of Education confirming that the Claimant had made unauthorized payments amounting to Kshs. 6,157,182. The letter also confirmed that the Claimant had failed to sign the audited accounts despite being called severally to do so.

17. The 1<sup>st</sup> Respondent avers that despite several invitations to the Claimant to attend to audit queries and sign the audited accounts, he failed to do so without any lawful justification.
18. The Claimant was therefore interdicted for making unauthorised payments totaling to Kshs. 6,157,182 and failing to sign the audited accounts as instructed vide letter dated 3<sup>rd</sup> March 2009.
19. The Claimant was served with an interdiction notice and given an opportunity to present his defence pursuant to which he wrote a statement of defence which was duly considered by the 1<sup>st</sup> Respondent.
20. The 1<sup>st</sup> Respondent convened its Disciplinary Panel on 9<sup>th</sup> November 2009 where the Claimant was summoned to make his representations. A number of witnesses drawn from the School, the Ministry of Education and the Directorate of City Education appeared before the Disciplinary Panel.
21. The Disciplinary Panel interrogated all the witnesses, evaluated both the written and oral evidence presented before it and considered the Claimant's statement of defence and arrived at the conclusion that the Claimant was guilty of breach of the Code of Regulations.
22. The Disciplinary Panel recommended that the Claimant be suspended from duty for two (2) months and this decision was communicated to the Claimant in good time.
23. It is the 1<sup>st</sup> Respondent's case that the acts of the Claimant amounted to breach of the Code of Regulations for Teachers and the Teachers Service Code of Conduct and Ethics. The 1<sup>st</sup> Respondent also maintains that the disciplinary process leading to the Claimant's suspension adhered to the provisions of the Code of Regulations for Teachers and the rules of natural justice.
24. According to the 1<sup>st</sup> Respondent, the Claimant was suspended on his own plea of guilt.

### **The 2<sup>nd</sup> Respondent's Case**

25. In its Reply dated 19<sup>th</sup> February 2014, the 2<sup>nd</sup> Respondent states that the relief sought by the Claimant as against it is not clear. While admitting ownership of Visa Oshwal Primary School, the 2<sup>nd</sup> Respondent states that the supervision of all aspects of its management was vested in the 1<sup>st</sup> Respondent as was any disciplinary measures on any teaching staff at the School.
26. The 2<sup>nd</sup> Respondent further states that the power to run the School was exercised by the 1<sup>st</sup> Respondent without any reference to the 2<sup>nd</sup> Respondent. Additionally, the person who audited the books was an employee of the 1<sup>st</sup> Respondent and the audit was not done at the request or under the supervision of the 2<sup>nd</sup> Respondent. Any grievances should therefore be directed at the 1<sup>st</sup> Respondent.
27. In defining its role in the School, the 2<sup>nd</sup> Respondent states that it only owns the facilities but any issue concerning learning at the School was at the sole discretion and control of the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> Respondent avers that it relies on the 1<sup>st</sup> Respondent to advise it on the bona fide users of its premises and facilities.

### **Findings and Determination**

28. There are three issues for determination in this case:
  - a. Whether the 2<sup>nd</sup> Respondent is properly joined in these proceedings;
  - b. Whether the Claimant's interdiction and suspension were lawful and fair;
  - c. Whether the Claimant is entitled to the remedies sought.

## **Joiner of the 2<sup>nd</sup> Respondent**

29. In its reply dated 19<sup>th</sup> February 2014 and filed in Court on 20<sup>th</sup> February 2014, the 2<sup>nd</sup> Respondent states that it is not properly joined in these proceedings as it played no role in the management of the School.

30. The 2<sup>nd</sup> Respondent denies any role in the disciplinary process initiated against the Claimant and the pursuant disciplinary action taken.

31. In determining this issue, the Court perused the documents filed by the 2<sup>nd</sup> Respondent on 30<sup>th</sup> January 2014 and noted extensive correspondence between the Claimant and the 2<sup>nd</sup> Respondent on the subject matter of this dispute.

32. Specifically, on 16<sup>th</sup> March 2009, the 2<sup>nd</sup> Respondent wrote to the Claimant as follows:

“RE: INVITATION TO APPEAR BEFORE THE CITY EDUCATION DISCIPLINE COMMITTEE

*You are hereby given an official invitation to appear before the above committee in the Director’s office on 9<sup>th</sup> floor, City Hall Annex on 18/3/09 at 3.00 pm.*

*Please be punctual.*

*D.M. KISYANG’A*

*D.H.R.O-TSC UNIT*

FOR: DIRECTOR OF CITY EDUCATION

*cc.The Municipal Education Officer – Nairobi West District*

33. Additionally, the Claimant’s letter of interdiction dated 19<sup>th</sup> March 2009 was copied to the Director of City Education who by letter dated 23<sup>rd</sup> March 2009 instructed the Claimant to hand over to the Deputy Head Teacher, Faith W. Mbugua.

34. From this correspondence, the Court formed the opinion that the 2<sup>nd</sup> Respondent was centrally involved in the events leading to the case before the Court and is therefore properly joined in these proceedings.

## **The Interdiction and Suspension**

35. The Claimant complains that both his interdiction and suspension were unlawful. The letter of interdiction dated 19<sup>th</sup> March 2009 states as follows:

“LETTER OF INTERDICTION

*I am directed by the Teachers Service Commission to say that it is alleged that you should have your name removed from the register of teachers.*

*The allegation(s) made against you are as follows:-*

*1. You breached the Teachers Service Commission Act Cap 212 Section 7(3) of the Laws of Kenya and Regulation 66(2)(f) of the Code of Regulations for Teachers in that, while you were headteacher Visa Oshwal Primary School (Nairobi), you made unauthorised payments totaling to Kshs. 6,157,182 in the years 2007 and 2008.*

2. You breached the Teachers Service Commission Act Cap 212 Section 7(3) of the Laws of Kenya Regulation 65(1 and)(b) of the Code of Regulations for Teachers in that, you failed to report to the Director City Education's office to sign the Audit report as instructed vide a letter Ref. NS/316/VOL.1/179.

Before the Commission proceeds to investigate, consider and determine your case, you are invited to make a statement to the Commission in writing, which should be received by the Commission within 21 days of the date of this letter. Before your case is determined, you will be given an opportunity of being heard by the Commission in person.

L.J.O SPIRA

FOR: SECRETARY

TEACHERS SERVICE COMMISSION

36. The Claimant made a written statement on 23<sup>rd</sup> March 2009 and on 9<sup>th</sup> November 2009, he appeared before the 1<sup>st</sup> Respondent's Disciplinary Panel.

37. Gauging from the letter of interdiction and the proceedings before the Disciplinary Panel, the Claimant faced two charges; first, making unauthorised payments to the tune of Kshs. 6,157,182 and second, failing to sign the audit report.

38. At the end of the disciplinary process, the Claimant was suspended for two (2) months for insubordination and surcharged the sum of Kshs. 757,968. The 1<sup>st</sup> Respondent's witness, Stephen Maina Gathogo who previously worked as Senior Internal Auditor told the Court that the charge of insubordination had to do with the Claimant's refusal to sign the audit report.

39. In his written statement, the Claimant stated that he declined to sign the audit report because he was not allowed to peruse it. Further, the audit process had ignored the laid down procedure and the audit covered some period in the year 2007 when he was not the Head Teacher at the School.

40. From the evidence adduced before the Court, the audit process leading to the report which led to disciplinary action being taken against the Claimant was somewhat acrimonious. The Claimant told the Court that on 31<sup>st</sup> December 2008, he received a letter dated 19<sup>th</sup> December 2008 requiring him to present the books of account at City Hall on 5<sup>th</sup> January 2009. However, on 2<sup>nd</sup> January 2009, the Auditor, Geoffrey Wachira Kamore went to the School and took the books by force. The Claimant testified that the School Management Committee had not yet prepared the books for audit.

41. On his part, Kamore who testified for the 2<sup>nd</sup> Respondent told the Court that this particular audit was necessitated by complaints received from stakeholders at the School. He added that since it coincided with the end of the year, it was also a final audit.

42. The Court found no credible explanation for embedding an investigative audit into an annual audit. I say so because an investigative audit inquiries into some wrong suspected to have been committed by specific persons while a routine audit is aimed at confirming the financial position generally.

43. That said, I have reached conclusion that by carting away the books of account on 2<sup>nd</sup> January 2009, before the official submission date, the Auditor not only compromised the quality of the annual audit but also put the Claimant's defence in jeopardy by denying him access to crucial documents.

In *Wilberforce Ojiambo Oundo v Regent Management Limited [2013] eKLR* this Court held that denying an employee facing disciplinary action access to documents necessary for their defence renders the process unlawful and unfair.

44. At any rate, at the end of the day only one report was produced and there was no evidence of any forensic audit report on the specific areas of suspected misappropriation of funds. The 1<sup>st</sup> Respondent's witness, Stephen Maina Gathogo told the Court that it was open to the Claimant to decline to sign the audit report for good cause. In light of the unprocedural manner in which the audit was undertaken as set out above, the Court finds that the Claimant had a justifiable reason to decline to sign the audit report. The charge for insubordination therefore collapses.

45. I will now deal with the charge for making unauthorised payments initially pegged at Kshs. 6,157,182 at the interdiction stage and reduced to Kshs. 757,968 at the end of the disciplinary process. Kamore told the Court that he was not aware that the figure had in fact come down. He however admitted that the schedule for suspended payments had some errors which he deemed immaterial.

46. No explanation was given as to how the figure came down so dramatically and since the audit report remains unsigned to this day, the Court was unable to find a basis for the charge of making unauthorised payments. The attendant surcharge must therefore give way.

### **Remedies**

47. For the foregoing reasons I enter judgment in favour of the Claimant as follows:

a. The Claimant's interdiction and suspension are hereby nullified and the 1<sup>st</sup> Respondent is directed to officially withdraw all letters issued on this account within the next thirty (30) days from the date of this judgment ;

b. The 1<sup>st</sup> Respondent is directed to tabulate and pay to the Claimant all salary payments withheld on account of the said interdiction and suspension within the next thirty (30) days from the date of this judgment;

c. The surcharge of Kshs. 757,968 imposed on the Claimant is hereby reversed and the 1<sup>st</sup> Respondent is directed to refund all monies recovered from the Claimant on account of the said surcharge within the next thirty (30) days from the date of this judgment ;

48. The Respondents will pay the costs of this case.

49. These are the orders of the Court.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 23<sup>RD</sup> DAY OF SEPTEMBER 2016**

**LINNET NDOLO**

**JUDGE**

### **Appearance:**

Mr. Mariaria for the Claimant

Mr. Sitima for the 1<sup>st</sup> Respondent

Mr. Mwalimu for the 2<sup>nd</sup> Respondent