



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

PETITION NO. 26 OF 2014

DAVID KYALO MUNGUTI.....PETITIONER/APPLICANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

Mr. Gachura for the Petitioner/Applicant

Mr. Ruto for the Respondent

RULING

1. The Applicant David Kyalo Munguti the Petitioner/Applicant moved this Application against his employer, the Teachers Service Commission seeking an interim order as follows;

That pending the hearing and determination of this application, this honourable court do issue a conservatory order restraining the Respondent, either by itself or through its agents and/or servants from implementing the decision contained in the Respondent's letter of 16th April, 2014 transferring the Petitioner herein from his present station to serve as a teacher and/or vary his present terms of service.

2. The Application is supported by the grounds set out on the face of the Application and the Supporting Affidavit of the Applicant.

3. The brief facts of the case are that, the Applicant was employed as a Graduate Teacher on permanent terms in 1992. He was promoted to Senior Graduate Teacher in 2004.

4. In 2008, following an advertisement for the position of Staffing Officer at the Respondent's Secretariat, the Claimant applied and was recruited in the position of District Staffing Officer and posted to Tharaka Teachers Service Commission Unit.

5. He was transferred to various stations and elevated to the position of Deputy Provincial Staffing Officer in 2009.

6. In 2010, upon promulgation of the new Constitution he was promoted to Narok Sub-County as a Staffing Officer.

7. He served there until he received a letter on 25th April, 2014 dated 16th April, 2014 informing him

that he had been posted to Coast Institute of Technology to teach French/Secretarial with effect from 1st May, 2014.

8. It is the Applicant's case, that he ceased being a teacher the moment he was recruited to the Teachers Service Commission Secretariat as a Staffing Officer.

9. That upon that appointment he joined Teachers Service Commission Staff Pension and that his free pension (as a teacher) was frozen until he attains retirement age or until the existing pension policy is changed.

10. For this reason, the Applicant states that he cannot be reverted into the teaching service by a mere transfer because he is no longer a teacher.

11. **Response**

The Respondent filed a Replying Affidavit on 11th July, 2014 deposed to by Rotich Mary, Senior Deputy Director in charge of Teacher Management Post Primary Schools, in the Teachers Service Commission.

12. She states inter alia that, Teachers Service Commission is an independent commission established under Article 237(1) of the Constitution, 2010.

13. That one of its mandates thereof is to

i.

ii.

iii. Assisting teachers employed by the Commission for service in any public school or institution

iv. Promote and transfer teachers

14. That Teachers Service Commission is also governed by the Teachers Service Commission Act No. 20 of 2012 and has established a Code of Regulation for teachers under S.47(2) thereof.

15. That the deployment of the Applicant to the position of staffing officer did not invalidate the fact that the Applicant remains a teacher under the employment of Teachers Service Commission. The Commission has unfettered prerogative to transfer him to a teaching position where his services were most needed.

16. That the transfer was without reduction of salary or loss of benefits whatsoever as alleged by the Applicant.

17. **Determination**

The interim relief, was granted ex parte, and the Applicant seeks confirmation of the order pending the hearing and determination of the main suit.

18. In the High Court at Nairobi, Constitution and Human Rights Division, Petition No. 213 of 2014 between the Law Society of Kenya V. The Cabinet Secretary, Treasury & Another, D.S. Majanja cited with approval the decision of the Supreme Court in the case of Gitiran Peter Munya V. Dickson Mwenda Githinji & 2 Others S.C.K. Petition No. 2 of 2013 as follows;

“Conservatory Orders” bear a more decided public law connotation; for these are orders to facilitate ordered functioning with public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not unlike interlocutory injunctions, linked to such private party issues “the prospects of irreparable harm” occurring during the pendency of a case or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case

bearing in mind the public interest, the constitutional value, and the proportionate magnitude and priority levels attributable to the relevant causes.”

19. The Supreme Court’s decision therefore obliges the court to consider public interest as a requirement in granting of conservatory orders in addition to consideration of the merits of the case.

20. Determination

In the present matter, Teachers Service Commission states that a teacher remains a teacher even upon being recruited into the Teachers Service Commission Secretariat cadre which cadre is the ‘employer’ of the teachers and performs management and supervisory role.

21. No statutory or constitutional provision expressly deals with the situation but it is submitted that these are general principles that appertain within the teaching service.

22. It is the court’s considered view that, it is in public interest that Teachers Service Commission is able to deploy its staff in the best suitable manner to maximize the benefit to the public derived from its staff.

23. To the extent that the terms and conditions of service of the Applicant have not been negatively impacted by the deployment as a teacher in an institution of higher learning, it is the court’s considered view, that public interest demands that Teachers Service Commission is able to within the context of the law deploy a teacher as, when and where required.

24. To this end, though the Applicant has an arguable case the balance of convenience tilts on the side of public interest and this court declines to grant the conservatory orders sought pending the hearing and determination of the main suit.

25. The matter will take its normal course.

26. Costs in the cause.

Dated and Delivered at Nairobi this 4th day of February, 2015.

MATHEWS N. NDUMA

PRINCIPAL JUDGE