



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

MISCELLANEOUS CAUSE NO. 9 OF 2013

**THE BOARD OF MANAGEMENT, KAGUMO TEACHERS TRAINING
COLLEGE.....CLAIMANT**

-VERSUS-

**KENYA UNION OF DOMESTIC, HOTELS,
EDUCATION**

**INSTITUTIONS & HOSPITAL WORKERS (KUDHEIHA WORKERS).....
RESPONDENT**

(Before Hon. Justice Byram Ongaya on Wednesday 8th April, 2015)

RULING

The claimant filed a notice of motion on 24.02.2015 under Order XLV Rule 1 and 2 of the Civil Procedure Rules, Section 3A, 94 AND 63 (e) of the Civil Procedure Act, and all other enabling provisions of law. The substantive prayers in the application were for review and stated as follows:

1.
2.
3. That this honourable court be pleased to review the court order issued on 25.03.2014 in view of the express provisions of legal notice No. 262 of 1993 issued under the Basic Education Act Cap. 211 now repealed by:
 - a. Ordering that only the professional cadre employed by the board of management of Kagumo Teachers Training College shall be entitled to terms and conditions similar to their counterparts in civil service as provided in clause No. 4 of the legal notice No. 262 of 1993.
 - b. The non-professional cadre shall be employed on such terms and conditions as shall be determined by the board of management in accordance with clause No. 5 of the legal notice No. 262 of 1993 on such terms and conditions as shall be determined by the board of management.
4. Such other or further orders as the honourable court may deem fit to issue.
5. That cost of the application be provided for.

The grounds supporting the application were as follows:

- a. That at the hearing the court was not informed that the legal notice distinguishes professional and non-professional cadres and if that had been done, the court would have arrived at a different finding with respect to the non-professional cadre.
- b. In view of the provisions of the legal notice 262 of 1993, it is in the interest of justice that the

honourable court is given an opportunity to reconsider its findings and come up with findings as it deems appropriate.

- c. The application was made after some delay due to parties' engagement in negotiations the last of such meeting being on 23.01.2015. Thus the orders of 25.01.2014 should be reviewed accordingly.

The respondent filed on 09.03.2015 the memorandum of response to oppose the application. The grounds of opposition as urged for the respondent are as follows.

- a. The legal notice No. 262 of 1993 in issue is based on provisions of section 33 of the Education Act which empowers the Minister to make regulations. In the court's opinion leading to the orders of 25.01.2014, it was clear that the court considered the section and found that the claimant had conceded that the circulars and regulations applied and the only issue was whether the claimant had the necessary funds to pay as claimed by the employees. Thus, it was submitted that there was no error to be corrected in the instant application.
- b. The claimant's counsel had conceded at the hearing that the only issue for determination was availability of funds to meet the payment and the court should not allow the applicant, the claimant, to go back on that defined issue at trial and which was the only issue for determination by the court.
- c. The respondent submitted that the claimant failed to move the court for review under the relevant rules of the court and while excusing that failure, the claimant had failed to establish any of the grounds for review under Order 45 namely, there was no discovery of new evidence after exercising due diligence; there was no mistake or error apparent on the face of the record; and there was no other sufficient reason for review to be allowed.
- d. In **Kudheha –Versus- B.O.G Ngaru Girls Secondary School Cause No. 56B of 2013**, the court (Abuodha J.) found that relying on the legal notice No. 262 of 1993, the civil service terms and conditions of employment applied to the members of the claimant serving in public schools and educational institutions like the claimant. Accordingly, it was submitted for the respondent that the court should not deviate from that settled finding by the court.

The court has considered the rival submissions and finds that the claimant has failed to establish any of the prescribed grounds for review. The court further finds that the respondent has urged valid grounds to oppose the application.

The court in arriving at the orders subject to the review application clearly considered section 33 of the Basic Education Act, the parent legislation for legal notice No. 262 of 1993 in issue. The court finds that at the hearing the claimant clearly conceded to the issue for determination being not whether the legal notice applied but, whether there were funds to meet the employees' demands. Opening up the issue of provisions of the legal notice as they apply to professional and non-professional staff would, in the opinion of the court, amount to a new issue for determination and which was not before the court at the time the court made the orders now subject of the review application. The court holds that review jurisdiction is not meant to afford parties to the suit an opportunity to create and urge determination of issues which were never before the court at the time of the trial or decision subject to the review application.

In conclusion, the application for review filed by way of the notice of motion dated 24.02.2015 is dismissed with costs.

Signed, dated and delivered in court at Nyeri this Wednesday, 8th April, 2015.

BYRAM ONGAYA

JUDGE