



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**PETITION NO. 57 OF 2015**

**(Before Hon. Justice Hellen S. Wasilwa on 20<sup>th</sup> August, 2015)**

**ROBERT CHERUIYOT.....PETITIONER/APPLICANT**

**VERSUS**

**TEACHERS SERVICE COMMISSION.....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT OF THE COURT**

1. THE Petition in court is dated 16/6/2015. The Petition was filed under Certificate of Urgency through the firm of Ondabu & Company Advocates and brought also through Chamber Summons brought Pursuant to Rule 23 (1) of the constitution of Kenya (Supervisory Jurisdiction enforcement of fundamental rights and freedoms of the individual, High Court Practice and Procedure Rules 2013 and any other enabling provisions of the law.

2. The Applicant sought orders that:

1. *This application be certified urgent and be heard ex-parte at the first instance.*
2. *This Honourable Court be pleased to issue a Conservatory Order restraining the 1<sup>st</sup> Responent from making any further replacement and transfer of teachers in Koibatek Sub-County pending the hearing and determination of this Petition.*
3. *This Honourable Court be pleased to make such orders or other conservatory orders and or directions as would preserve the set of circumstances in such a way that this Petition is not rendered nugatory.*
4. *This Honourable Court be pleased to give such directions and orders as to the hearing of the Petition filed herewith as it may deem just and expedient in the light of all circumstances.*
5. *The costs of this application be in the cause.*

3. The application was supported by the supporting affidavit of one Robert Cheruiyot, the Petitioner herein and on the following grounds:-

- a. *That on the 2<sup>nd</sup> June, 2015 the 1<sup>st</sup> Respondent advertised for the replacement of teachers who left service permanently in the 2014/2015 financial year but deliberately left out schools in Eldama Ravine Constituency in Baringo County in which three teachers had left service permanently in the 2014/2015 financial year.*
- b. *While the 1<sup>st</sup> Respondent has not even replaced the fifteen (15) teachers who were transferred from the constituency in the same financial year, it has not included the schools within the constituency in the replacement of teachers who left service permanently.*
- c. *That the refusal by the 1<sup>st</sup> Respondent to include schools in Eldama Ravine Constituency in the list of schools set to benefit from the intended replacement amounts to discrimination in contravention of Article 27(4) of the Constitution of Kenya, 2010.*
- d. *That the blatant refusal to replace teachers who left service permanently and those who were transferred to other schools is not only unconstitutional but does not inspire confidence in the 1<sup>st</sup> Respondent.*

4. When this application was scheduled for hearing on 8/7/2015, the parties agreed to proceed with the main Petition.

5. The Petitioner complained that:

1. *That on the 2<sup>nd</sup> June, 2015 the 1<sup>st</sup> Respondent advertised for the replacement of teachers who left service permanently in the 2014/2015, financial year but deliberately left out schools in Eldama Ravine Constituency in Baringo County in which three teachers had left service permanently in the 2014/2015 financial year.*
2. *While the 1<sup>st</sup> Respondent has not even replaced the fifteen (15) teachers who were transferred from the constituency in the same financial year, it has not included the schools within the constituency in the replacement of teachers who left service permanently.*
3. *That the refusal by the 1<sup>st</sup> Respondent to include schools in Eldama Ravine Constituency in the list of schools set to benefit from the intended replacement amounts to discrimination in contravention of Article 27(4) of the Constitution of Kenya, 2010.*
4. *That the blatant refusal to replace teachers who left service permanently and those who were transferred to other schools is not only unconstitutional but does not inspire confidence in the 1<sup>st</sup> Respondent.*

6. The Petitioner therefore prays that:

1. *This Honourable Court do declare that the 1<sup>st</sup> Respondent's advertisement of 2<sup>nd</sup> June, 2015 in which three (3) teachers who left service permanently in Eldama Ravine Constituency will not be replaced amounts to contravention of Article 27(4) of the Constitution of Kenya, 2010.*
2. *This Honourable Court do declare that the 1<sup>st</sup> Respondent's refusal to replace fifteen (15) teachers who were transferred from schools in Eldama Ravine Constituency in the 2014/2015 financial year unconstitutional.*
3. *This Honourable Court be pleased to issue a Writ of Mandamus compelling the 1<sup>st</sup> Respondent to replace the three (3) teachers who left service permanently from schools in Eldama Ravine Constituency in the 2014/2015 financial year and to replace the fifteen (15) teachers who were transferred to schools in other constituencies.*

7. In their submissions before court, the Petitioner stated that the basis of the Petition is an advertisement by 1<sup>st</sup> Respondent seeking to replace teachers who left service in Koibatek Sub-county but for which the Petitioner avers that the number of advertised posts does not tally with the exact number of positions available in the records.
8. The Petitioner pointed out that their Annex 1 is the advertisement where only 2 positions were advertised yet according to the Petitioner, the correct vacancies are 18 in number as per their documents No. 4 and RC 2.
9. The Petitioner avers that from the 2 records, 18 teachers left the services in Koibatek – 3 permanently and 15 on transfer.
10. The Petitioner therefore avers that the Respondent acted in a discriminatory manner in the way he dealt with Koibatek County.
11. The Petitioner also avers that in paragraph 13 of the 1<sup>st</sup> Respondent's affidavit, they depone that 5 vacancies were advertised yet in the Advertisement Annex 2 – only 2 vacancies are seen.
12. The Petitioners also referred court to Annex No. 5 of 1<sup>st</sup> Respondent which shows that Bakhita Secondary School has 5 teachers employed by the Teachers Service Commission (TSC) and the number of students is 161 compared with Kipsogon in Mogotio County, the school has 9 teachers employed by Teachers Service Commission (TSC) yet they have 75 pupils. They also compared the statistics with Maji Mazuri Mixed School with 494 students and yet have 16 teachers. However, in Mogotio, Rosoga School has 324 students but they have 16 teachers. The Petitioner therefore avers that Koibatek Sub-County has been discriminated against and they want the Petition to be allowed.
13. The Respondents on their part opposed this Petition. The 1<sup>st</sup> Respondent filer their replying affidavit on 1/7/2015 through Stella C. Ruto Advocate. The affidavit was sworn by Zani Edward, the staffing officer assigned to the Teachers Management, Post Primary Section of the Teachers Service Commission (TSC) on 30/6/2015.
14. The 1<sup>st</sup> Respondent deponed that the Teachers Service Commission (TSC) has mandate to staff teachers in the entire Country but that his mandate is exercised subject to allocation of funds from the National Treasury and the national distribution of teachers country wide.
15. The 1<sup>st</sup> Respondent also avers that contrary to what the Petitioner has alleged, replacement of teachers is normally done on the IPPD System which captures the number of teachers who have exited service. They aver that during the 2014/2015 year only 1 teacher in Baringo County exited service as per their Annex 1 and they aver that the Petitioner's documents are not truthful (i.e. Annex 2 of Petitioner).
16. They aver further that the DEO is not an agent or employee of the Teachers Service Commission (TSC) and the DEO does not have accurate data in regard to distribution of teachers. The 1<sup>st</sup> Respondent further avers that the document obtained from the DEO is not accurate. According to the 1<sup>st</sup> Respondent, 5 teachers were replaced in the same period contrary to what Petitioner alleges in Annex 2 which shows 6 teachers. They also aver that is not true that 15 teachers were transferred from Koibatek and not replaced as their Annex 3 shows how teachers were transferred within Baringo County and only 1 teacher joined Koibatek and none left.
17. The 1<sup>st</sup> Respondent avers that the teachers shortage is a national problem and 1<sup>st</sup> Respondent cannot allocate teachers optimally. They refer to their Annex 5 – a matrix of the distribution of teachers in Rift Valley and they aver that it shows a shortage in the entire County.
18. As to schools showing high population e.g. Bakhita, the 1<sup>st</sup> Respondent avers that they were made centres of excellence and so student population increased. The 1<sup>st</sup> Respondent want the Petition

dismissed.

19. The 2<sup>nd</sup> Respondent concurred with the 1<sup>st</sup> Respondent in their submissions.

20. The Petitioner insisted that Koibatek Su-County was discriminated against and that the data from the DEO is accurate as the DEO is in charge of the division is in charge of.

21. I have considered the submissions of both parties and the issues for determination are as follows:

- a. ***What is the criteria the 1<sup>st</sup> Respondent, the Teachers Service Commission (TSC) uses in teachers replacement.***
- b. ***According to the available data how any teachers left Koibatek and how many were replaced.***
- c. ***Whether there was any discrimination in the way the 1<sup>st</sup> Respondent handled the teacher replacement for Koibatek Sub-county.***
- d. ***What remedies are available in the circumstances?***

22. In seeking to answer issue Number 1, I will refer to the Teachers Service Commission (TSC) Policy on Teacher Recruitment and Selection dated July 2006. In the preface, the Policy states as follows:

***“Following the Government embargo on recruitment in the Public Service in 1998, the automatic employment of trained teachers ceased. Consequently in 2001, the Commission adopted new policy of recruiting teachers on the basis of demand and availability of vacancies (emphasis is mine). In line with this new Policy, the recruitment process has been decentralized to the district and school levels”***

23. The Teacher Service Code of Conduct has this to say on recruitment:

***“The Teacher Recruitment***

***53 (1) the Commission shall recruit registered teacher in accordance with the recruitment guidelines issued by the Commission from time to time.***

***(2) The Commission shall advertise available vacancies:***

***(a) based on the demand for and supply of teachers and***

***(b) taking into consideration the existing establishment.***

***(3) A teacher who is recruited by the Commission may be deployed to serve in any part of the Country based on the Teaching Service requirement”***

24. From my reading of the above Policy document and the Teachers Service Commission (TSC) Code of Regulation for teachers, teachers are recruited based on demand and supply and based on the existing establishment.

25. When it comes to replacement of teachers, the criteria as submitted by the Petitioner is based on teachers who have either been transferred out of the school or county and those who have left due to natural attrition i.e. deaths or retirement. The 1<sup>st</sup> Respondent agreed that this is the position on teachers replacement but that is subject to national distribution of teacher and availability of funds as distributed by the National Treasury.

26. The word replacement according to Macmillan Distortionary is the action or process where a person

or thing takes the place of another. It also means substitution or change. The replacement cannot therefore depend on national distribution of teachers as the Teachers Service Commission (TSC) only does the replacement for teachers leaving. This therefore means one out, one in, two out, two in etc.

27. Having come to the funding that of the Teachers Service Commission (TSC) Policy on teachers recruitment and replacement, the next issue is analysis of how many teachers left Koibatek and how many were replaced. According to the Petitioner, as per their Appendix 2, five teachers left service in Koibatek in 2014/2015. There was replacement for two teachers. The document was prepared by the DEO's office and Teachers Service Commission's (TSC's) office Koibatek.

28. In their Appendix 4, 15 teachers left Koibatek either on transfer or deployment on promotion. The total number of teachers who therefore left Koibatek were 18 but only 2 were replaced leaving a gap of 16.

29. The 1<sup>st</sup> Respondent's avers that these statistics from the DEO are not authentic because according to their data from the IPPD System (Appendix 1) the 1<sup>st</sup> Respondent also submitted that there is a teacher shortage nationwide and 1<sup>st</sup> Respondent cannot allocate teachers optimally. The 1<sup>st</sup> Respondent annexed their Annex 3 to show how teachers were transferred within Baringo County. This document concerns the entire County but picking out Koibatek Sub-County which is the subject of this case, shows only 1 teacher left Koibatek.

30. However, the discrepancy between the 1<sup>st</sup> Respondent's data and that by their own agent Teachers Service Commission (TSC) office and DEO Koibatek can only be reconciled by 1<sup>st</sup> Respondent which has not been. According to the 1<sup>st</sup> Respondent's code of conduct, they delegate their duties to their agents who include the DEO and the 1<sup>st</sup> Respondent cannot deny a document from their agent. I therefore find that in the period under question, 18 teachers were transferred out of Koibatek and only 2 were replaced leaving a gap of 16.

31. The Petitioner avers that they were discriminated against in this exercise contrary to the provisions of Article 27(4) of the Constitution. Article 27(4) of the Constitution states as follows:

***“The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”***

32. The policy of teacher replacement has already been discussed above and it is the duty of the 1<sup>st</sup> Respondent to adhere to it. In this case, the 1<sup>st</sup> Respondent failed to fulfill their obligation to the Residents of Koibatek as they fulfilled in other regions. I find the action of the 1<sup>st</sup> Respondent, discriminatory and I therefore order and find as follows:

- a. ***The 1<sup>st</sup> Respondent's advertisement of 2<sup>nd</sup> June 2015 in which 16 teachers who left the service permanently in Koibatek will not be replaced amounts to discrimination contrary to Article 27(4) of the Constitution.***
- b. ***I now issue a Writ of Mandamus compelling the 1<sup>st</sup> Respondent to replace the said 16 teachers in Koibatek within the Financial Year 2014/2015.***
- c. ***The 1<sup>st</sup> Respondent to pay costs of this Petition.***

Read in open Court this 20<sup>th</sup> day of August, 2015

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for Petitioners

Miss Chege for 2<sup>nd</sup> Respondent