



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW NO. 14 OF 2014

(FORMERLY HIGH COURT NAIROBI JR NO. 428 OF 2013)

**IN THE MATTER OF AN APPLICATION BY KENYA UNION OF POST PRIMARY
EDUCATION TEACHERS**

AND

IN THE MATTER OF THE LABOUR RELATIONS ACT LAWS OF KENYA

AND

IN THE MATTER OF THE CIVIL PROCEDURE RULES

AND

**IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW SEEKING ORDERS OF
CERTIORARI AND MANDAMUS**

AND

**IN THE MATTER OF TEACHERS SERVICE COMMISSION & KENYA NATIONAL UNION
OF TEACHERS**

BETWEEN

REPUBLIC APPLICANT

VERSUS

- 1. THE TEACHERS SERVICE COMMISSIONRESPONDENT**
- 2. THE KENYA NATIONAL UNION OF TEACHERS INTERESTED PARTY**

EX-PARTE

KENYA UNION OF POST PRIMARY EDUCATION TEACHERS (KUPPET)

M/S Guserwa for the Applicant

M/S Kaluai for Respondent

JUDGMENT

1. The Application was initially filed at the High Court of Kenya at Nairobi as JR Misc. Application No. 428 of 2013. It was subsequently transferred to the Employment and Labour Relations Court at Nairobi and registered as JR No. 14 of 2014.
2. Leave to commence Judicial Review proceedings was granted on 2nd December 2013 by Korir J.
3. The Court also granted Interim orders directing the Respondent (TSC) to effect deductions of union dues from 4005 members (whose membership is in dispute) and deposit the full amount of the deduction in a suspense account in respect to the month of December, 2013 and subsequent months pending the determination of the proceedings.
4. The Ex-parte Applicant filed Notice of Motion dated 4th December 2013 supported by Supplementary Verifying Affidavit deposed to by Mr. Akello M. J. Misori together with the annexure thereto.
5. The Application was brought under Order 53 Rule 3 of the Civil Procedure Rules, 2010 and seeks the following orders:
 - i. an order of *certiorari* to issue to bring into this Court and quash the decision of the Secretary / Chief Executive of the Teachers Service Commission dated 5th November 2013 sopping and / or reversing the 4005 members of the Applicant Union on alleged grounds of procedural and illegal migration from Kenya Union of Teachers;
 - ii. an order of *Mandamus* to compel the Secretary / Chief Executive of the Teachers Service Commission to restore the membership of 4005 teachers to the list of its membership as the duly registered Union with the mandate to represent hem and to restore the deduction of their respective dues.
6. The Application is based on a statement of facts in which the Applicant avers as follows;
7. That the Applicant is duly registered as a Trade union and was registered in November 1998 and has membership covering the areas set out in Article 3 of its Constitution. That the Applicant is mandated to recruit and represent teachers in the Post Primary Sector.
8. That the Secretary / Chief Executive of the Respondent stopped and / or reversed the recruitment of 4005 members and the act of the Respondent is unconstitutional.
9. That the decision to reverse the membership was made without due process to and in contravention of the provisions of the Labour Relations Act, 2007 and the Constitution of Kenya.
10. That the Respondent has denied the Applicant Union membership and the respective Union dues in violation of the Union's legitimate expectation.
11. The Application is further supported by Annextures 1 to 4 attached to the

Replying Affidavit

12. The Respondent filed a Replying Affidavit deposed to by M/S Josephine Maundu the Director in charge of Human Resource Management and Development at the Teachers Service Commission.
13. The Respondent states that it was the legal duty and mandate to reverse all teacher management functions including management of its payroll in terms of Article 237 of the Constitution of Kenya, 2010.
14. That in the months of July, August and September 2013 the Commission received a total of 4005 union membership Application forms from the Applicant Union.
15. That subsequently, the Commission in the honest belief that the Applicant forms submitted by the Applicant Union were genuine and duly authored by the respective teachers proceeded to effect the same in the October payroll and duly remitted the Union fees deducted from the teachers to the Applicant Union.
16. That in early November, 2013 or thereabout, the Commission started receiving and in fact continues to receive complaints letters from individual teachers stating that they have been irregularly, unlawfully and without their consent transferred from the Kenya National Union of

- Post Primary Education Teachers. Copies of ten (10) letters marked EM-1 are attached to the Replying Affidavit.
17. That Commission made a decision on 5th November 2013 to reverse the transfer of membership of the 4005 members from the membership of the Interested Party (KNUT) to the Applicant Union (KUPPET) fearing that the transfer forms submitted by the Applicant Union were not genuine.
 18. The Respondent prays that the Application dated 27th November 2013 was brought long after the decision to reverse the transfer had been made and effected and the Application be dismissed with costs.
 19. The Kenya National Union of Teachers (KNUT) was cited as an Interested Party in the Application.
 20. The Interested Party filed grounds of opposition to the Application on 11th December 2013 and a Replying Affidavit sworn by the General Secretary of the Union, Mr. Wilson Sossion on 28th February 2014.
 21. The Interested Party submits that in the period between October and November 2013, it received numerous complaints from its members who protested that they had been fraudulently removed from the Interested Party's membership and transferred to a rival Union being the Applicant.
 22. The Interested Party conducted an investigation and verified that the complaints by its members were genuine in that the recruitment forms submitted by the Applicant to the Commission were forged.
 23. The Respondent in pursuance of the submitted forms effected the attendant change of membership in its check-off system of Union dues for the October 2013 payroll and remitted membership dues to the Applicant.
 24. The Interested Party lodged a complaint with the Respondent and after investigations by the Commission a decision was made to stop and reverse the fraudulent transfer of members to the Applicant hence this Application by the Applicant.
 25. The Interested Party avers that as a matter of fact, up to Kshs.4,695 members of the Interested Party had been fraudulently transferred to Applicant. The list of affected members is attached to the Replying Affidavit and marked "WS-1".

Determination

26. It is not in dispute that all the teachers of the Commission subject of this Application were until, they were transferred to the Applicant members of the Interested Party.
27. The Applicant submitted recruitment forms to the Respondent purporting to have recruited the teachers as its members leading to the impugned transfer of membership of the affected teachers from KNUT to KUPPET.
28. It is not in dispute that complaints were received both by KNUT and the Commission regarding the transfer of membership from KNUT to KUPPET.
29. The teachers complained that the transfer forms submitted by the Applicant to the Commission were not genuine.
30. Pursuant to these complaints, the Commission made a decision on 5th November 2013 to reverse its earlier decision with the effect that all the affected teachers reverted to the membership of KNUT and the deduction of Union dues in favour of the Applicant was also stopped.

Onus of proof

31. The onus of proof that the 4005 teachers had changed their membership from KNUT to KUPPET lies squarely on the Applicant on a balance of probabilities.
32. The Applicant did not attach to the Application the recruitment forms of the alleged 4005 members who had allegedly transferred membership from KNUT to KUPPET.
33. The 4005 teachers and / or their representative did not swear an Affidavit attached to the Application deposing under oath that they had indeed transferred membership from KNUT to KUPPET.
34. The Respondent has attached a sample of letters of complaint made by some of the teachers allegedly recruited by the Applicant denouncing the alleged recruitment and affirming their

- membership to KNUT.
- 35.The Interested Party (KNUT) has attached numerous statements of the affected members made to the police on diverse dates alleging that the alleged transfer / recruitment forms submitted by the Applicant to the Respondent were forgeries. The statements are marked WS-2.
 - 36.The Applicant has only made bare denials to the allegations made by the Interested Party and the Many teachers who have denounced the purported recruitment by the Applicant.
 - 37.The Applicant has clearly failed to discharge the evidential burden required of it to obtain the relief sought.
 - 38.The Respondent acted with its statutory and constitutional mandate to prevent what was apparently an irregular recruitment of members of KNUT by KUPPET.
 - 39.The Respondent did not act ultravires its mandate nor has it been shown that it contravened the rates of Natural Justice in reversing it had initially made in good faith but had turned out to be erroneous.
 - 40.For these reasons the Application by KUPPET as against the Respondent (TSC) and Interested Party (KNUT) is dismissed with costs to both the Respondent and Interested Party. The interim order is discharged accordingly.

Dated and Delivered at Nairobi this 25th day of September 2015

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE