



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

PETITION NO. 15 OF 2014

IN THE MATTER OF ARTICLES 10, 22, 23(1),(3) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 10, 19, 20, 28,33,47,48 AND 236 OF THE CONSTITUTION OF KENYA

BETWEEN

JOEL NJOROGE WANYOIKE

PETITIONER

VERSUS

TEACHERS SERVICE COMMISSION (TSC)

1ST RESPONDENT

TSC COUNTY DIRECTOR, NAKURU COUNTY

2ND RESPONDENT

DIRECTOR OF STAFFING, NAIROBI

3RD RESPONDENT

JUDGMENT

1. Joel Njoroge Wanyoike (Petitioner) filed a Petition against the Respondents on 6 October 2014 seeking an order *declaring his transfer and interdiction as a violation of his fundamental rights and freedoms, a conservatory order stopping the employment of Sub-County Directors of Education in Kenya, reinstatement, salary arrears and damages.*
2. Together with the Petition was a motion under certificate of urgency seeking temporary conservatory orders against the process to recruit Sub-County Directors by the 1st Respondent.
3. The Court certified the motion urgent and directed that it be served for *inter partes* hearing. It was served and heard and a ruling was delivered on 5 December 2014. The Court determined that the motion lacked merit and dismissed it.
4. The Respondents filed a Replying Affidavit sworn by Rotich Mary on 5 December 2014 to the Petition.
5. On 24 December 2014, the Petitioner filed another motion under certificate of urgency seeking the staying of disciplinary proceedings against him scheduled for 9 January 2015. The Respondents filed a replying affidavit opposing the motion on 10 February 2015, but on 12 March 2015, the parties agreed to have the motion withdrawn and that the Petition be heard based on the record and written submissions, to be filed.
6. The Petitioner filed his submissions on 30 April 2015 while the Respondents filed their submissions on 27 May 2015. The submissions were highlighted on 10 June 2015.

Background

7. The Petitioner was employed by the 1st Respondent as a Graduate teacher in 1990. He was promoted in the course of time and was deployed/transferred as Deputy Headteacher and Headteacher, Chief Staffing Officer and Senior Principal Staffing Officer.
8. On 4 January 2012, the Petitioner was promoted to the grade of Assistant Deputy Director and at the material time he was the District Staffing Officer, Gilgil.
9. The 1st Respondent through a letter dated 16 April 2014 wrote to the Petitioner advising him that it had been decided that he be posted to Litein High school to teach Maths/Business with effect from 1 May 2014 and that he should report within 14 days.
10. The Petitioner appears to have been taken aback and on 9 June 2014, he wrote an appeal to the 1st Respondent to reconsider the transfer.
11. On 14 July 2014, the 1st Respondent through a letter of even date informed the Petitioner of his interdiction on the ground of desertion and failing to report to Litein High School.
12. This, prompted the Petitioner to commence the instant proceedings.

Petitioner's case

13. In his papers, the Petitioner's case is that around November 2013, the Sub-County Staffing Committee met and resolved to effect transfers of head teachers and deputy head teachers but 4 among the transferred head teachers declined the transfers.
14. In the course of the transfers, the 3rd Respondent summoned him to Nairobi and informed him of allegations against him and thereafter he received the transfer letter to Litein High School to teach subjects he had not qualified in (Petitioner's subjects were Kiswahili/CRE).
15. According to the Petitioner, the transfer was instigated by the 4 head teachers who had declined the transfers and the 3rd Respondent and he therefore declined to report to the new school, hence the interdiction.
16. The Petitioner contended that the transfer to the classroom was a demotion and not redeployment which was made without affording him an opportunity to be heard and was made in bad faith and contrary to the provisions of Articles 10, 19, 20 47 and 236 of the Constitution.
17. In the written submissions, the Petitioner urged that pursuant to Article 236(b) of the Constitution, he could not be demoted in rank without following due process of the law. He also urged that by dint of sections 12 and 13 of the Teachers Service Commission Act, he was entitled to audience before the decision to demote him was taken.
18. The Petitioner further urged that by operation of Article 47 of the Constitution, he was entitled to a hearing before interdiction. He equally urged that the interdiction was contrary to the provisions of Regulations 55 and 56 of the Code of Regulations for Secretariat Staff.

Respondents' case

19. The Respondents on the other hand asserted that being a professional teacher, the Petitioner did not relinquish his profession and remained a teacher and could be deployed back to the classroom and that the Petitioner's services were considered as necessary at Litein High School (to teach Kiswahili/CRE).
20. It was also asserted that the 1st Respondent had unfettered discretion to transfer the Petitioner to a station where his services were necessary and that the transfer was without reduction of salary or loss of benefits. The transfer, it was contended did not amount to a demotion as the Petitioner's salary and benefits had not been reduced/withheld.
21. As to why the Petitioner was deployed, the Respondents contended that this was occasioned by the fact that he had failed to maintain standards expected of a staffing officer as stipulated in the Code of Ethics by committing professional misconduct (*operating Migingo Bar; irregularly posting a teacher; irregularly transferring a teacher and irregularly deploying 3 acting head teachers*).
22. Responding to the question of conducting a hearing prior to the Petitioner's deployment to Litein High School, the Respondents stated that the Petitioner was invited to the 1st Respondent's head

- office and was afforded an opportunity on 11 February 2014.
23. On the interdiction, the Respondents justified the action on the basis that the Petitioner failed to report to Litein High School and this was in breach of the Code of Regulations for Secretariat Staff, and that this was a disciplinary offence which was not connected with the initial deployment to Litein High School.
 24. The Respondent urged that the Petitioner's fundamental rights and freedoms had not been violated by the transfer/deployment and interdiction.
 25. In the written submissions, the Respondents urged that being a public officer, the Petitioner was bound by the provisions of chapter 6 of the Constitution, the Leadership and Integrity Act, Public Officer Ethics Act, the TSC Code of Conduct and Ethics and that he fell short of the requirements of the provisions.
 26. Regarding the interdiction, the Respondents submitted that this was necessitated by the Petitioner failing to report to his new station within 14 days as instructed and that the interdiction was a preliminary process in the disciplinary process and was thus fair and regular.
 27. The case of *Miguna Miguna v Permanent Secretary, Office of the Prime Minister & Another* (2011) eKLR was cited for the proposition that employers should not be stopped from carrying out a disciplinary process unless it was unreasonable or illegal.
 28. On violations of constitutional rights, the Respondents cited the cases of *Anarita Karimi Njeru v the Republic (No. 1)* (1976-80) 1 KLR 1272 and *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* (2013) eKLR to submit that the Petition had not met the required standard/threshold of stating with precision the rights and freedoms violated and the manner of violation.
 29. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the Petitioner was demoted, and if so, whether it was fair, whether the interdiction was unfair/unlawful, whether the Respondents violated the Petitioner's constitutional rights, whether the Petition set out rights violated and manner of violations, and appropriate remedies/orders.*

Whether Petitioner was demoted

30. The Petitioner was a District Staffing Officer at the material time. He had been appointed as a Graduate Teacher, Graduate Teacher -1 and promoted to Graduate Approved Teacher- 1, Senior Graduate Teacher, appointed as Chief Staffing Officer to Senior Principal Staffing Officer and lastly (according to documents produced) to Assistant Deputy Director. This must have been the substantive post the Petitioner held.
31. On 16 April 2014, the 1st Respondent informed the Petitioner he was being posted to Litein High School to teach. The posting letter was silent on the terms and conditions of service.
32. Schedule V of the Code of Regulations for Teachers set out the grades in the teaching service. It does not have a grade or position of Assistant Deputy Director. In fact, it is doubtful and in any case the parties did not suggest that the Code of Regulation for Teachers applied to the Secretariat staff. Reference was made to a Code of Regulations for Secretariat Staff but this was not produced before Court except for a 2 page extract.
33. In so far as the Petitioner who held an Assistant Deputy Director's position was being posted to the classroom for which schedule V of the Code of Regulations for Teachers has outlined the grades in the teaching service, he was being demoted.
34. *Demote* has been defined in Black's Law Dictionary, ninth edition as *to lower (usu. A person) in rank, position, pay, or other status.* Although the Respondents contended that the Petitioner's salary would not be reduced and benefits would not be withdrawn, he was being demoted in rank and position.

Whether demotion was (un)fair

35. The Code of Regulations for Secretariat Staff was not produced in Court.
36. The Court therefore is unable to determine whether it had provision for demotion or indeed transfer from secretariat staff back to the teaching service.
37. The Respondents asserted that the Petitioner was afforded an opportunity to make representations

- on 11 February 2014. The Court has looked at the minutes. It is not clear from the papers how and whether the Petitioner was formally (in writing) advised of what was the agenda of the meeting.
38. In the Court's view, the meeting was at best a semi-formal meeting and not part of the envisaged and applicable disciplinary process in place in respect of the secretariat staff of the 1st Respondent.
39. Procedural fairness in employment law (right to natural justice in public law-*audi partem* rule) requires a party likely to be affected by a decision to be informed in advance. That appears not to have been the case here.
40. The minutes also suggest that the Respondents had received allegations/complaints against the Petitioner. The Court has also looked at the replying affidavit by Rotich Mary in answer to the Petition.
41. Paragraphs 18 to 21 of the affidavit leave no doubt that the *deployment* (according to the Respondents) was occasioned by what the Respondents felt amounted to professional misconduct.
42. Accepting the assertions in the affidavit, fairness required that the Respondents set out clearly these acts of professional misconduct and ask the Petitioner to formally respond to the same. This was not done.
43. In this regard, the Court finds that the demotion of the Petitioner was unfair (Court will return to this issue when considering violation of Petitioner's constitutional rights).

Whether interdiction was unfair/unlawful

44. The letter of interdiction set out the charges against the Petitioner. The regulations breached were outlined. The letter requested the Petitioner to make written representations within 21 days. The letter also informed the Petitioner of a right to an oral hearing.
45. Regulation 56 of the Code of Regulations for Secretariat Staff gave the 1st Respondent the contractual authority to interdict the Petitioner.
46. Regulation 56(1) however require the 1st Respondent to conduct investigations and assemble evidence to establish whether an employee has a case to answer before taking the decision to interdict the employee.
47. It is not clear from the interdiction letter or the documentation placed on record whether the Respondents had conducted investigations and assembled evidence which satisfied the test of a case to answer before placing the Petitioner on interdiction.
48. The interdiction therefore was not in compliance with the 1st Respondents own internal rules and was therefore premature and unlawful.

Whether Respondents violated Petitioner's constitutional rights

49. The Petitioner is a public officer to whom Article 236 of the Constitution is applicable. The Article protects him from demotion without due process of the law.
50. The Court has reached a finding that he was demoted. The Respondents did not follow due process of law. The process was also inconsistent with the *audi partem* rule and requirements of procedural fairness.
51. Among the Articles the Petitioner set out as having been violated was Article 236. This was both in the intitlement of the Petition and in paragraph 21 of the Petition.
52. The Court finds this protection afforded the Petitioner was violated by the Respondents

Rights violated and manner of violation

53. With the findings in the preceeding subtitle of issues for determination, this question becomes moot.

Appropriate remedies Orders

54. Flowing from the hereinabove discussion, the Court finds and declares that

(a) the demotion and transfer of the Petitioner to Litein High School was unfair.

(b) the interdiction of the Petitioner was premature hence unlawful

(c) the Respondents violated the Petitioners right as a public officer to due protection from demotion without due process of law as envisaged by Article 236 of the Constitution.

55.The Court orders that the Petitioner be reinstated to his previous work station or such equivalent station at his position/grade at the material time.

56.The Petitioner to have costs.

Delivered, dated and signed in Nakuru on this 20th day of November 2015.

Radido Stephen

Judge

Appearances

For Petitioner Mr. Morintat instructed by Kiplenge & Kurgat Advocates

For Respondents Ms. Rutto, Legal Officer, Teachers Service Commission

Court Assistant Nixon