



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NUMBER 72 OF 2015

TEACHERS SERVICE COMMISSION.....PETITIONER

VERSUS

KENYA NATIONAL UNION OF TEACHERS.....1ST RESPONDENT

KENYA UNION OF POST PRIMARY

EDUCATION TEACHERS.....2ND RESPONDENT

AND

HON. ATTORNEY GENERAL.....INTERESTED PARTY

RULING

1. On 29th October, 2015 the respondents called up this matter for mention before me seeking that I give timelines within which the petitioner and the interested party must comply with the orders of the Court made on 25th September, 2015.

2. According to Senior Counsel Paul Muite for the 1st respondent, this Court ordered teachers back to work and they obliged hence there was no reason why the petitioner was not obeying the order of the Court by refusing to release the respondent's members September salary as ordered by the Court. Counsel complained that it was not in the interest of administration of justice for the Court to be hard on the respondents and not the petitioner and the government. He contended that there was potential perception that the Court was hard on teachers but not the Teachers Service Commission. Mrs. Guserwa who appeared for the 2nd respondent associated herself with the submissions by Mr. Muite and added that the respondents had been pushed too far.

3. Mr. Kiragu for the petitioner in response stated that the respondents were asking for substantive orders which the court had no jurisdiction to make on a mention. He urged the Court not to entertain claims improperly placed before it. According to Counsel, the Court only acts on evidence and that statements from the Bar were not evidence. The Court required to be moved so that the petitioner could respond as appropriate.

4. According to Mr. Kiragu, an award can only be enforced in accordance with the civil procedure rules and that directions are not provided for as a means of enforcement. Ms. Mumo who appeared for the interested party associated herself with submissions by Mr. Kiragu and stated that substantive issues were

being raised without the Court being properly moved.

5. Mr. Muite in reaction to Mr. Kiragu's submissions stated that the respondents were not asking for guidelines but rather timelines. The orders were already there and the petitioner was aware they have not paid the respondents their September salary. He further argued that article 159 of the Constitution permits the Court to do substantial justice without undue regard to technicalities. After listing to submissions by Counsel, I reserved my ruling to abide the arguments in Mr. Kiragu's application dated 28th October, 2015.

6. In the application aforesaid, the petitioner sought orders in the main that:-

(a) That the order issued on 25th September 2015 directing the parties to appoint within 30 days a neutral and mutually agreeable conciliator or conciliation committee, with help of the Cabinet Secretary for the time being in charge of Labour and engage in conciliation in good faith limited to exploring viable modalities of implementing the award in Petition No. 5 of 2015 bearing in mind Government's fiscal policies and budgetary cycle be stayed pending the hearing and determination of this application.

(b) That the order issued on 25th September 2015 directing the parties to appoint within 30 days a neutral and mutually agreeable conciliator or conciliation committee, with help of the Cabinet Secretary for the time being in charge of Labour and engage in conciliation in good faith limited to exploring viable modalities of implementing the award in Petition 5 of 2015 bearing in mind Government's fiscal policies and budgetary cycle be stayed pending the hearing and determination of Nairobi Civil Appeal No. 257 of 2015.

(c) That the order issued on 25th September 2015 directing the Petitioner not to victimize or in any way take any adverse steps against the respondents' members for participating in the strike called on 1st September, 2015 by the respondents and for payment of full salaries and allowances without any deductions whatsoever on account of the period the respondents' members participated in the strike called by the respondents be stayed pending the hearing and determination of this application.

(d) That the order issued on 25th September 2015 directing the Petitioner not to victimize or in any way take any adverse steps against the respondents' members for participating in the strike called on 1st September 2015 by the respondents and for payment of full salaries and allowances without any deductions whatsoever on account of the period the respondents' members participated in the strike called by the respondents be stayed pending the hearing and determination of Nairobi Civil Appeal No. 257 of 2015.

(e) That the order issued on 25th September 2015 directing that either party shall upon the expiry of the 90 day period stipulated in the judgment and failure to conciliate the dispute be at liberty to declare a trade dispute and exercise any of their rights as provided under article 41 of the Constitution as read together with section 76 of the Labour Relations Act be stayed pending the hearing and determination of this application.

(f) That the order issued on 25th September 2015 directing that either party shall upon the expiry of the 90 day period stipulated in the judgment and failure to conciliate the dispute be at liberty to declare a trade dispute and exercise any of their rights as provided under Article 41 of the Constitution as read together with section 76 of the Labour Relations Act be stayed pending the hearing and determination of Nairobi Civil Appeal no. 257 of 2015.

7. In support of the application Mr. Kiragu submitted that the petitioner had partially appealed and that a party exercising the right of appeal ought to as far as possible be assisted by the Court to facilitate the maintenance of a level playing field pending the hearing of the appeal.

8. Mr. Kimani stated that it was not in dispute that between 4th and 25th September, 2015 there was an order by Lady Justice Mbaru issued on 4th September, 2015 which declared the strike unprotected. The two respondents challenged this decision but there was a binding Court order. The respondent members nonetheless did not resume work. According to counsel a Court Order is a Court order binding on all parties and those who claim under them. This order was by a Court of concurrent jurisdiction and whether it can be nullified by the judgment of 25th September, 2015 was before the Court of Appeal and not before me. He submitted.

9. According to Counsel, there was an arguable appeal. That is to say the appeal had seven grounds and each ground was noble in its own way such that even if one arguable ground was analysed it meet the first test. In this regard counsel relied on the case of **Judicial Commission on Goldenberg v. Job Kilach**.

10. On the issue whether the appeal would be nugatory if stay is not granted, Mr. Kiragu submitted that the Court of Appeal has introduced a new limb under new Constitution which is “is there sufficient cause of grant of stay? In this respect he argued that the affidavit of Nancy Macharia demonstrates there was sufficient cause and refusal of a stay would render the appeal nugatory. Further Section 79(6) of the Labour Relations Act, even in case of a protected strike, payment of wages is at the sole discretion of the employer. To support this argument counsel relied on the case of **William Obura & Others v. RVR**. According to Mr. Kimani, there can be no remuneration where there is no work done to this end he cited the case **Stufford Stores Ltd. V. S.A Clothing & Textiles Workers Union**.

11. According to Counsel, protected strike only protects employment not wages. An employee who withdraws labour ought not to be paid. The contention was on September wages. The wages to be paid was approximately 13.7 billion. He argued therefore that under article 249(3), the applicant was funded through public funds hence it would not be right to expend public funds on work not done. Further, if wages were paid and the Court of Appeal upholds the petitioner’s position, wages would have to be withheld in order to recover the sums paid yet an employer can only withhold up to 1/3 of an employee’s salary. This, he contended would create an undesirable situation and a recipe for industrial strife. Payments made would also be in contravention of 76(6) of Labour Relations Act if made. These matters constitute sufficient cause to grant a stay.

12. Even if a party would be able to reimburse the funds is not the only reason in deciding whether to grant a stay. In support of this argument he relied on the case of **NMG & 2 Others v. J.J. Kamotho & 3 others**. Where substantial public funds were involved was sufficient cause to grant a stay for to refuse could lead to irremediable damages whose recovery could be difficult.

13. Concerning the respondent’s response to the application, Counsel urged the Court to strike out the following paragraph in Mr. Sossion’s affidavit sworn on 3rd November, 2015, namely paragraphs 5, 6, 11, 17, 18 and 20 and the following paragraph in Mr. Misoï affidavit sworn on 2nd and filed on 4th November. That is paragraphs 6, 9, 13, and 15. These paragraphs, according Mr. Kimani, contained arguments yet affidavits should only contain facts. The arguments, according Counsel were scandalous, irrelevant and oppressive. He submitted that the source of information should be from a natural person not an artificial person.

14. Mr. Muite for the 1st respondent submitted that the time had come for the Court to bring to an end the impunity and arrogance on the part of the petitioner in the manner in which they were choosing to deal with the orders of the Court. According to Counsel, the 25th September judgment issued orders as a package. The Court tried to balance the interest of the parties but eventually zeroed on the interest of the children. The petitioner cannot therefore after taking advantage of part of the order renege from parts of it. According to Mr. Muite, the petitioners had three prayers namely, declaration of the strike as illegal, order that teachers go back to class and if not they be cited for contempt.

15. Counsel argued that it could not be right for the petitioner to circumscribe the jurisdiction of the Court. The Court has to balance scales and according to him the application was an abuse of the Court process He questioned the reason why the petitioner was not honouring the order on payment of

September salaries. He asserted that obeying Court orders was important and in that regard drew the Courts attention to the case of **Justice Mate v. Martin Wambora**. He argued that the danger was grave if the party disobeying the Court order was the government.

16. Mr. Muite further submitted that the good intentions of the Court in protecting welfare of the children would only be realized if Teachers Service Commission (the petitioner) and the government assists the Court since demoralized teachers could not teach.

17. Concerning section 79(6) of the Labour Relations Act, Counsel submitted that the discretion of the employer not pay workers who participate in an unprotected strike can be restricted by an order of the Court made in resolving a labour dispute such as the case here. According to counsel, section 79(6) must give way to the Constitution. He further submitte that Labour Relations Act is a 2007 Act and ought to be interpreted in tandem with section 7 of the 6th schedule of the Constitution.

18. Regarding the declaration of the strike as unprotected, counsel submitted that the learned Judge made a ruling on an interim application. The ruling was pending the hearing of petition. The Court then was not adjudicating on the petition. The orders lapsed when the petition was determined. Appeal on this issue therefore has no prospect of success.

19. Concerning the submission that the appeal would be rendered nugatory, counsel submitted that if the appeal succeeds the monies paid can be deducted back from subsequent salaries. He complained that the petitioners have callously refused to remit union dues with the sole intention to cripple union financially.

20. Mrs. Guserwa for the 2nd Respondent submitted that the paragraphs cited were not argumentive and should not be struck out. According to her, paragraph 6 of Mosori's affidavit merely said the petitioners were abusing the Court process.

21. She further submitted that the application as filed targets two areas of the Court's judgment. It says nothing about teachers being in class. The petitioner was not saying anything about September salaries and formation of a conciliation committee. The application has ulterior motives. The petitioner does not have an arguable appeal. No sufficient ground had been shown to warrant a stay. Monies if paid is recoverable. The application lacks merit and should not be allowed. No security has been tendered hence the applications should be dismissed.

22. Mr. Biita for the Attorney General submitted that he was not opposed to the application for stay. None of the orders save order B touched on the government. Conciliation was not by force. It could only be undertaken by consent. None of the parties have said they have approached Cabinet Secretary Labour for formation of conciliation committee. The government has not disobeyed any order hence there was no need to summon Cabinet Secretary Education or Cabinet Secretary Treasury. He further contended that deductions of Union dues were the mandate of Teachers Service Commission and not the government.

23. Mr. Kiragu in response to the submission by the respondents stated that the Court was being moved by Teachers Service Commission to suspend the implementation of certain aspects of the judgment. Issue of disobedience of the Court order was not before the Court. According to him the Constitution could not be used to disguise disorder. He submitted that the Employment and Labour Relations Court Act and Labour Relations Act have been amended to align them to the Constitution.

24. Regarding partial appeal, Counsel submitted that rule 74 of Court of Appeal rules allow a party to appeal against entire judgment or part of it. The respondents elected not to appeal against the order that teachers resume work. Court looks at facts and circumstances of each case.

25. Regarding relationship between the Labour Relations Act and the Constitution, he submitted that Section 7 of 6th schedule only comes in where there is conflict. There was no such thing as an absolute right. In absence of any compelling reasons the orders sought should be granted. If there was and issue of disobedience of the Court order the same could be addressed through section 13 of the Employment

and Labour Relations Court.

26. Before I embark on the merit or otherwise of this application, the Court observes that the Court of Appeal has recently set aside the award by my brother Justice Nderi Nduma in Petition Number 3 of 2015. This award was an essential component of my judgment delivered on 25th September, 2015 which the applicant herein intends to appeal against. With this development the only issue left for appeal would be my order concerning the payment of the respondents' members September, 2015 salaries.

27. Second the Court would like to state concerning the issues raised by Senior Counsel Paul Muite during the mention on 29th October, 2015 that in interest of justice and without occasioning a party prejudice, a Court of law can consider any issue at any stage in a matter before it without undue regard to technicality of procedure. Whether a matter is listed as a mention or not, a Court can deal with any issue arising if such issue is live and in the common knowledge of the parties before the Court without waiting for the formalities of a formal application.

28. The issue of the teachers strike and the non-payment of September salaries have been in the lips of many of us lately. It is common knowledge that the teachers' September salaries have not been paid. The petitioner in this matter has even preferred an appeal against that part of the Court's judgment delivered on 25th September, 2015 and by this application is seeking a stay pending appeal. There is therefore absolutely nothing wrong for Counsel for the respondent to call up the file for mention to express concern over what they feel about the implementation of the order of the Court. Whereas the Court may be restricted in the nature of the order it can make through such an informal process, directions can be given by the Court which in a sense cue may be taken to bring forth a formal and substantive application.

29. Concerning allegations for contempt this Court and Courts of concurrent jurisdiction have on occasion ordered an alleged contemnor to appear before it to show cause why leave should not be granted to the party alleging contempt to prosecute for such contempt. In most cases when the alleged contemnor appears the matter may take a different character and the intended contempt proceeding may end up not being pursued after such appearance. These are informal directions that a court can in a proper case make without a formal application. They are underpinned by the judicial principle and policy that justice should be dispensed without undue regard to procedural technicalities especially where the omission to follow a particular procedure does not occasion any party loss or prejudice.

30. This being an application for stay pending appeal the Court will only concern itself with the parameters set by the rules of this court and case law generally on considerations the court makes when faced with an application for stay pending appeal.

31. One of the considerations that has been canvassed by the applicant is that the appeal is arguable with a high chance of success. Mr. Kiragu submitted that the Court erred in refusing to declare the strike unprotected in its judgment delivered on 25th September, 2015 while the Lady Justice Mbaru had earlier declared the same unprotected. He further argued that the order by the Court that the petitioner pays the respondents' members their September salaries was in contravention of section 79(6) of the Labour Relations Act.

32. Concerning the order made by Lady Justice Mbaru declaring the strike unprotected, the Court is of the view that this was an order made at the interlocutory stage pending the hearing and determination of the petition. The issue of legality or otherwise of the 1st September, 2015 strike was one of the issues for trial before me. I had to determine it and did so the way I did. I was in no way bound by the interlocutory order by My sister Lady Justice Mbaru. Interlocutory orders are made to preserve or hold certain situations pending the hearing and determination of the main dispute. It is not unusual to reach a decision totally different from the one made at the interlocutory stage after having the benefit of taking evidence and listening arguments. An order of interlocutory injunction for instance can be discharged once the dispute is heard on merit yet at the interlocutory stage it was the proper order to make. Further, at the risk of criticizing my colleague, I became of the view that the declaration over 1st September, 2015 as unprotected was not the best order to make given the magnitude and complexity of the contestation over

its legality or otherwise. It required to be made after reviewing evidence and listening to arguments like I did on 25th September, 2015. To this extent this is not a very strong ground of appeal to warrant grant of a stay.

33. Concerning the order on September salaries for respondents' members, I considered the genesis and evolution of the dispute over teachers' pay. I further took regard to the right to strike as recognized by ILO Conventions and our Constitution at article 41. In considering the right to strike I was further bound and guided by the canons of interpretation provided under article 20 of the Constitution which enjoins anyone interpreting the Bill of Rights to adopt an interpretation that most favour the enforcement of that right or fundamental freedom and rendered myself the way I did. I may have not been perfect in my analysis and appreciation of the law but that was my honest opinion and the best I could in the circumstances. An appeal on this ground does not therefore strike as an arguable point with a high chance of success.

34. The contention that under section 79(6) of the Labour Relations Act, the petitioner is not obliged to pay the respondents members salary for the period they were on strike is a moot point since plain reading of the section does not prohibit payment. It merely gives an employer the discretion to pay or not. Grounded on the provisions of the Constitution and international law and conventions the Court made an order that payment be made. This therefore made it obligatory for the petitioner to pay. This ground also does not present an arguable point with a high chance of success on appeal.

35. The argument that if the payment is made it would be difficult to recover the same from the respondents' members lacks substance because deductions as authorized by law can be made to the respondents' members' salaries if the appeal turns out to be successful.

36. In the case of **East African Breweries Limited v. Castle Brewing Kenya Limited HCCC No. 848 of 1998** Kuloba J (as he then was) stated as follows:

“...with regard to the viability, prospects and chances or otherwise of the appeal succeeding, it is really not for a trial court, or the court appealed from to reconsider its own decision to find out whether it was probably wrong, and to assess the chances of the appeal against the decision succeeding. It is invidious, if not odious, for a judge of the court from which an appeal emanates, whether he is the one who rendered the decision to be challenged on appeal, or some other judge of the same jurisdictional hierarchy, after a decision in his court, to embark upon reconsideration of the merits and demerits of the same case or application so as to change his mind and reach a different position and hold that he realizes that with hindsight, the decision rendered by his court was wrong or doubtful and that there are reasonable or high prospects of the appeal succeeding.”

37. I do not possess the linguistic prowess as the learned judge but in essence the Court shares the same view and further states that the amount of time and energy spent in rendering myself in the Judgment intended to be appealed from left me with intellectual fatigue and inability to reconsider my decision afresh and hopefully realize that I could have made a mistake in my analysis and apprehension of the legal questions presented to me to determine which the court of appeal might set aside. I will leave it the Court of Appeal to undertake the analysis of my decision and if persuaded, to stay the same pending the hearing and the determination of the Appeal.

38. The Court therefore declines to grant an order of stay with the consequence that the application is dismissed with costs.

39. It is so ordered.

Dated at Nairobi this 20th day of November 2015

Abuodha Jorum Nelson.

Judge

Delivered this 20th day of November 2015

In the presence of:-

.....for the Petitioner and

.....for the Respondent.

Abuodha Jorum Nelson.

Judge