



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU
CAUSE NO. 129 OF 2014

GITAU HARRISON JOSHUA.....CLAIMANT

- VERSUS -

TEACHERS SERVICE COMMISSION.....1ST RESPONDENT

COUNTY DIRECTOR OF TEACHERS SERVICE

COMMISSION, NAKURU COUNTY.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 23rd May, 2014)

RULING

The claimant is at all material time a registered professional teacher in the employment of the 1st respondent. He was at the material time deployed as the head teacher at Hyrax Primary School. The 2nd respondent wrote to the claimant the letter dated 1.04.2014 as follows:

“RE: DEPLOYMENT AS ASSISTANT TEACHER

It has been decided that you be deployed as Assistant teacher and be transferred from Hyrax Primary School to Menengai Primary School with effect from 1st April 2014.

You should hand over school property to Geoffrey Muruli TSC No. 224812 who is in a separate communication has been advised accordingly.

By a copy of this letter, the Headteacher Menengai Primary School is requested to inform TSC Headquarters and this office the date you report for duty.

Signed

KITHEKA A.M

COUNTY DIRECTOR

TEACHERS SERVICE COMMISSION

NAKURU”

The claimant was dissatisfied with the respondent’s action and he filed the suit together with an urgent application on 2.05.2014. The application was by way of the notice of motion brought under section 3, 3A of the Civil Procedure Act, Order 51 of the Civil Procedure Rules, section 45 and 49 of the Employment Act and Article 23 of the Constitution. The claimant prayed that pending hearing and determination of the cause, the honourable court be pleased to issue conservatory orders suspending the contents of the letter dated 1.04.2014 Ref. No. TSC/NKR/288140 purporting to demote and transfer the claimant from Headteacher, Hyrax Primary School to an Assistant teacher at Menengai Primary School. The application was supported by the affidavit of the claimant filed together with the application.

The claimant’s case was that he was demoted without a notice and a hearing. The claimant urged that he was promoted to the position of a head teacher after excellent service and a competitive interview. It was his further case that the unilateral demotion was a big blow to his career and extremely humiliating and he did not know the reason why he was demoted or transferred in such unfair manner. The claimant further stated thus:

- a. **The respondents’ actions are arbitrary, unfair, capricious and contrary to fair labour practices as protected in Article 41 of the Constitution.**
- b. **That he was entitled to fair administrative action including being given a notice to show cause why he should be demoted or at least the reason for demotion.**

The respondent opposed the application by filing on 13.05.2014, the replying affidavit of Agnetta Kitheka Mwikali. It was the respondents’ case that the 1st respondent is empowered within its constitutional functions in Article 237 and statutory provisions in the Teachers Service Commission Act, 2012 to transfer or deploy any teacher in its employment to any public institution. It was urged that the 1st respondent could transfer by itself or through its agents on delegation. The respondents urged that the 1st respondent transferred the claimant within the provisions of regulation 26 (1) on powers of the 1st respondent to assign duties and regulation 27(3) of the 1st respondent’s code of regulations on the 1st respondent’s discretion to transfer teachers. Further, the claimant was bound by the condition of service that he will be ready to serve anywhere in Kenya in any school which the 1st respondent considered the claimant was qualified to teach.

The respondent further urged that the claimant was transferred on demotion because Hyrax Primary School had experienced consistent declining performance in the Kenya Certificate of Primary Education examinations for the years 2011, 2012, and 2013. The court has seen exhibit **AKM-5** and it shows the consistent declining performance. Thus, it was the respondents’ case that before the claimant’s transfer in this case, the factors considered included the claimant’s performance record, commitment to administrative duties and the need to ensure balancing of teachers across the country.

The court has considered the parties’ rivalling submissions. The only issue for determination is whether the claimant is entitled to the conservatory orders as prayed for. The prayer is in the nature of a temporary injunction.

In **Giella –Versus- Cassman Brown & Company Limited (1973) E.A 358**, the court held that an applicant for an injunction like the claimant in this case must show a *prima facie* case with a probability of success; an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; and when the court is in doubt, it will decide the application on a balance of convenience.

The court has considered the present case and makes the following findings:

1. The claimant is a long serving teacher. He has built a reputation as a teacher and the court finds that his professional reputation is at stake. The respondents have delved into their wide discretion

to redeploy or transfer the claimant. The respondents have nevertheless not showed why the transfer should be on demotion, without notice, without a hearing, without reasons and done unilaterally. The court finds that the unilateral transfer of the claimant on demotion is an irreparable injury that is intimidating, adverse to the claimant's reputation as a teacher and unfair labour practice that cannot be compensated with a pecuniary relief.

2. The claimant has shown that the respondents did not accord him the due process of law as encapsulated in the celebrated rules of natural justice and codified in our Constitution such as in Articles 47, 50(1) and 41 of the constitution. On that account, the court finds that the claimant has established a *prima facie* case with a probability of success.
3. It was submitted for the respondents that the claimant had not been demoted. The respondents further agreed that if the transfer took effect, the claimant will not be paid the responsibility allowance paid to him as a head teacher. The court holds that a promotion is conferment upon the employee, an office or designation to which there is attached higher pay or higher pay scale. Conversely, the court holds that a demotion is conferment upon the employee, an office or designation to which there is attached lower pay or lower pay scale. In the circumstances, the court holds that the claimant was demoted and therefore subjected to a disciplinary action for which the claimant was entitled to due process of law as provided for in Article 236 of the Constitution.
4. The respondents submitted that the claimant was transferred on demotion on account of consisted poor performance in the national examination. However, the respondents did not file any benchmarks to establish that the poor performance was attributable to the claimant. It is the court's opinion that in absence of agreed targets between the parties and in absence of the objective individual appraisal report for the claimant, the poor performance could not be established as attributable to the claimant.

In conclusion, the claimant's application will succeed with orders as follows:

1. **Pending the hearing and determination of the suit, there shall be stay of implementation of the claimant's transfer on demotion as conveyed in the letter dated 1.04.2014 Ref. TSC/NKR/288140 purporting to demote and transfer the claimant from head teacher, Hyrax Primary School to an assistant teacher at Menengai Primary School.**
2. **Pending the hearing and determination of the suit, the claimant will continue to serve as the head teacher at Hyrax Primary School with full pay and benefits.**
3. **The respondents will pay costs of the application.**
4. **Parties are now invited to take directions on the hearing of the main suit.**

Signed, dated and delivered in court at Nakuru this Friday 23rd May, 2014.

BYRAM ONGAYA

JUDGE