



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**

**PETITION NO. 8 OF 2014**

**CATHERINE WANJIRU**

**WATORO.....PETITIONER**

**- VERSUS -**

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

**DIRECTOR, TEACHERS SERVICE COMMISSION, NAKURU COUNTY.....2<sup>ND</sup>  
RESPONDENT**

**PRINCIPAL, NAKURU DAY SECONDARY SCHOOL.....3<sup>RD</sup>  
RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 6<sup>th</sup> June, 2014)**

**RULING**

The petitioner filed a notice of motion on 20.05.2014 through Kiplenge & Kurgut Advocates. The notice of motion was brought under Order 51 of the Civil Procedure Rules and all enabling provisions of law. The application was supported by the petitioner’s affidavit and prayed for orders that pending the hearing and determination of the petition, the honourable court be pleased to order the stay of the decision of the respondents to transfer from Nakuru Day Secondary School to Upper Hill Secondary School and subsequently interdict the petitioner from her teaching at Nakuru Day Secondary School.

The petitioner’s case was based on the following grounds:

- a. That she is employed by the 1<sup>st</sup> respondent and has been deployed to teach at Nakuru Day Secondary School for the previous 16 years.
- b. During the school holidays for April 2014, the school principal at the school designed to undertake holiday tuition contrary to standing government policy proscribing such holiday tuition. The claimant opposed the move. Nevertheless, the principal instituted the relevant holiday tuition timetable and declared unspecified action against anyone who went against the directive to teach.
- c. The petitioner also sat on the school’s tender committee. The principal awarded a tender for renovation of the school bus without the relevant tender and the decision of the committee. The petitioner objected to such irregular tendering by the principal, the 3<sup>rd</sup> respondent.

In the circumstances, the petitioner received a transfer letter dated 29.04.2014 deploying her from Nakuru

Day Secondary School to Upper Hill Secondary School with effect from 5.5.2014. The petitioner appealed to the 1<sup>st</sup> respondent against the transfer decision by her letter dated 29.04.2014. She requested for stay of her transfer pending the determination of the appeal. In the meantime, the 3<sup>rd</sup> respondent wrote to the 2<sup>nd</sup> respondent the letter dated 30.04.2014 stating that the petitioner had cleared with the school and was free to move to her new station; but which the petitioner has urged to have been untrue as she was waiting for feedback on her appeal and was still returning the students' assignment books in her possession. The 3<sup>rd</sup> respondent then issued the letter dated 12.05.2014 headed "**LETTER OF INTERDICTION**" purportedly interdicting the petitioner from service as a teacher in a public secondary school. The letter alleged that the petitioner had "**insubordinated**" the 2<sup>nd</sup> respondent by failing to report to Upper Hill Secondary School as instructed in the letter of 22.04.2014.

The 2<sup>nd</sup> respondent filed her replying affidavit on 27.05.2014. She stated that the 1<sup>st</sup> respondent is established in Article 237(1) of the constitution and its functions in Article 237(2) include registering trained teachers; to recruit and employ trained teachers; to assign teachers in its service to teach in various public schools; to promote and transfer teachers; and to terminate the employment of teachers.

She further stated that under the Teachers Service Commission Act 2012, the 1<sup>st</sup> respondent was mandated to transfer or deploy teachers to serve in any educational institution as the 1<sup>st</sup> respondent deemed the teacher was qualified to teach. That function was amplified in regulation 27(3) of the 1<sup>st</sup> respondent's Code of Regulation for Teachers empowering the 1<sup>st</sup> respondent to transfer teachers to any school where it is considered that the teacher is qualified to teach. The 2<sup>nd</sup> respondent urged that the petitioner was employed by the 1<sup>st</sup> respondent subject to the condition that she would be deployed to serve in any school in Kenya.

The 2<sup>nd</sup> respondent stated at paragraph 13 that she made the decision to transfer the petitioner as the 1<sup>st</sup> respondent's county director by issuing the letter dated 22.04.2014. That having been transferred and released as transferred, the 2<sup>nd</sup> respondent stated that the petitioner rebelliously refused and ignored to proceed as decided thus, the 2<sup>nd</sup> respondent issued the purported interdiction letter.

The 2<sup>nd</sup> respondent's case was that she transferred the petitioner solely to correct staff balancing in public schools and the need to post the petitioner to a new environment as she had overstayed at one station and the decision was not influenced by the 3<sup>rd</sup> respondent as submitted for the petitioner. She denied knowledge of the petitioner's appeal and therefore ever receiving the petitioner's copy of the letter of appeal against the transfer.

The court has considered the material on record and the parties' respective submissions and the following findings are made.

First, the court has to establish whether there are valid decisions to transfer and to interdict the petitioner. As between the parties, there is no dispute that the 1<sup>st</sup> respondent is vested with the constitutional and statutory power to transfer and exercise any legitimate disciplinary control over the petitioner as a teacher in its employment. The 2<sup>nd</sup> respondent has not denied making of the letter of transfer and the letter headed "**Letter of Interdiction**". The issue before the court is whether the 2<sup>nd</sup> respondent was vested with authority to make the decisions in the letters as she proceeded to act and whether in making the decisions she acted in accordance with the law and legitimate policies of the 1<sup>st</sup> respondent.

It was submitted for the respondents that under section 20 of the Teachers Service Commission Act, the 1<sup>st</sup> respondent was entitled to delegate its powers, with respect to any of its functions, to any of its officers such as the 2<sup>nd</sup> respondent.

The court finds that there was nothing placed before the court to show that the 1<sup>st</sup> respondent had delegated to the 2<sup>nd</sup> respondent the power to transfer the petitioner or teachers in the petitioner's grade.

In the opinion of the court, such delegation would be by a published instrument like a regulation in the gazette for all to know and with clear guidelines on how the person enjoying the delegated powers would exercise the delegation.

The court's further opinion is that the person exercising such delegated powers has to observe the standards, procedures and all safeguards as would be done by the 1<sup>st</sup> respondent if the 1<sup>st</sup> respondent had exercised the powers by itself. The court's further opinion is that where the decisions may be adverse or have far reaching consequences, then rules of due process or natural justice, as they have come to be celebrated, must be provided for with clear efficient and effective appeal or review steps in event of dissatisfaction.

In absence of the delegation by the 1<sup>st</sup> respondent and the demonstration of the relevant safeguards and standards to be observed, the court finds that the 2<sup>nd</sup> respondent in making the two letters walked outside her authority and pretended to make decisions in the sole preserve of the 1<sup>st</sup> respondent. The court finds that *ab initio*, the two letters were authored without jurisdiction and were from the outset, offensive and amenable to question. In the circumstances, the court finds that the petitioner has established a prima facie case with a high chance of success.

Secondly, the court has spent considerable time to examine the letter headed, **“LETTER OF INTERDICTION”**. The court has looked at that letter's contents and finds that while referring to itself in the reference as a letter of interdiction, the letter in its content does not in fact impose any interdiction. The court holds that such blank letter without the desired communication suggest that the decision maker did not in fact direct the mind and make the decision and the consequence is that it would be unjustified and oppressive for the petitioner to be loaded with compliance of imaginary decision. In the opinion of the court, to permit such compliance would amount to unjustified irreparable injury to the petitioner.

Thirdly, the court has reminded itself of its opinion in **Kenya Plantation and Agricultural Workers Union –Versus- James Finlay (K) Limited [2013] e KLR** where it was stated at page 10 thus:

**“The court considers that the employer is entitled to undertake redundancy just like the other human resource functions like recruitment and selection, appointment and promotion, training and development and termination of the contract of service including dismissal on disciplinary grounds. The general principle is that the court shall not interfere in the employer's entitlement to undertake these functions and interference by the court shall be exercised very sparingly. The court's rare intervention can be justified on account of obvious breach by the employer of the statutory or agreed due process or such other manifest injustice and in circumstances whereby the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process....”**

In the present case, the court finds that the 2<sup>nd</sup> respondent has proceeded to make decisions without showing her jurisdictional authority to do so; in a manner that undermines the 1<sup>st</sup> respondent's constitutional and statutory powers and functions; without demonstration of compliance with performance standards of decision making as set in the Constitution, law and relevant policies; and in a manner that exhibits preponderance of exercise of unchained discretion but which is not permitted under Article 236 of the Constitution as against any public officer like the petitioner. In the opinion of the court, such are circumstances blended with manifest injustice and whereby the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process, and, therefore justify the interference by the court.

The court has also revisited and upheld its opinion in **Aviation and Allied Workers Union –Versus- Kenya Airways Limited [2012]eKLR** thus,

**“The court in exercising the jurisdiction to intervene in an administrative disciplinary procedure must proceed with caution so as to protect the employer's right to fairly terminate the employment relationship. In Miguna Miguna – versus- Permanent Secretary, Office of the Prime Minister and**

**the Attorney General (2011) eKLR, the High Court held that the employer was entitled to commence disciplinary proceedings against the employee and it was the duty of the employee to justify in the administrative disciplinary process the continuation of his employment. The court further stated that its duty would be to stop a process started with ulterior motive or one based on outright illegality or one which is defective *ab initio*. In Muthusi and 2 others -versus- Gathogo and 2 others (1990) KLR 90, the High Court held that it would be futile for the court to involve itself in the day to day running of a union which had its own governing rules. Thus, similarly, this court would be reluctant to involve itself in a disciplinary process commenced by the employer unless in an appropriate case it is established that the disciplinary process has been commenced or is continuing unfairly. The intervention in disciplinary process by employers will be entertained by the court rarely and in clear cases where the process is likely to result into unfair imposition of a punishment against the employee. The court will intervene in an administrative disciplinary procedure if it is established that the procedure relied on by the employer offends fairness or due process by not upholding the rules of natural justice, or, if the procedure is in clear breach of the agreed or legislated or employer's prescribed applicable policy or standards, or, if the disciplinary procedure were to continue it would result into manifest injustice in view of the circumstances of the case. The court will normally not intervene if it is established that there exist mechanisms between the employer and the employee such as appeal or revision or review that the employee could invoke internally to remedy the dissatisfaction that would otherwise justify the court's intervention and, the employee has not exhausted such internal mechanisms.”**

In this case, the 2<sup>nd</sup> respondent has stated that she is not aware of the petitioner's appeal and is proceeding as though the appeal process would serve no purpose. Further, the court has found that the transfer and interdiction decisions would be null and void *ab initio* unless the 2<sup>nd</sup> respondent's authority to proceed as per the offensive letters is established. The court further finds that the 1<sup>st</sup> respondent has not addressed itself to the appeal submitted by the petitioner and it is not clear how and when the respondents would determine the appeal.

The court has also noted the deep silence on the part of the 3<sup>rd</sup> respondent in view of the petitioner's allegations of threatened consequences flowing from the petitioner's upholding of the government policy against holiday tuition and protecting the role of the tender committee. In the opinion of the court, the respondents' deep silences constitute a basis to strongly suggest that the allegedly offending transfer and later the interdiction process was started with an ulterior motive. In the court's opinion, such silences and circumstances on the part of the respondents justify intervention by the court.

In conclusion, the court allows the petitioner's application filed on 20.05.2014 with orders:

- a. Pending the hearing and determination of the petition, there shall be a stay of implementation by the respondents of the transfer decision in the letter dated 22.04.2014 and the purported letter of interdiction dated 12.05.2014.
- b. Pending the hearing and determination of the petition, the petitioner shall continue to render her teaching services at Nakuru Day Secondary School and the respondents shall assign her duties accordingly with prevailing full pay and benefits.
- c. The respondents to pay costs of the application.

**Signed, dated and delivered in court at Nakuru this Friday 6<sup>th</sup> June, 2014.**

**BYRAM ONGAYA**

**JUDGE**