REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 747 OF 2014

FREDRICK SAUNDU AMOLO

[suing through the Executive

Secretary KUPPET Kajiado County Branch] ……CLAIMANT

VERSUS

THE PRINCIPAL

NAMANGA MIXED DAY SECONDARY SCHOOL……..…… 1ST RESPONDENT

BOARD OF GOVERNORS

NAMANGA MIXED DAY SECONDARY SCHOOL ..…….2ND RESPONDENT

TEACHERS SERVICE COMMISSION ……..……....3RD RESPONDENT

RULING

1. The claimant Fredrick Saundu Amolo has filed his application dated 7th May 2014 against the respondents through the Executive Secretary KUPPET Kajiado County Branch. the application is brought under a Notice of Motion under the provisions of section 25 of the Employment Act, section 12 of the Labour Institutions Act and other enabling provisions of the law seeking for;

a. …
b. *restraining orders against the 1st, 2nd and 3rd respondents, their agents, servants and anybody claiming through them from harassing, intimidating, threatening, investigating, dismissing, interdicting, discussing, passing a decision and in any other way interfering with the claimant's employment until hearing and determination of this application and/or suit;*
c. *restraining orders against the 1st, 2nd and 3rd respondents, their agents, servants and anybody claiming through them from convening, organising meetings to discuss and in particular if any decision made in regard to a meeting held on the 29th April 2014 and or in any other way interfering with the claimant's employment until hearing and determination of this application and/or suit*
d. *that costs of this application be provided for*

2. this application is supported by the annexed affidavit of the claimant and on the grounds that the

1st respondent (the Principal) being propelled by malice alleged the claimant was insubordinate whereupon she convened an illegal meeting to discuss the claimant knowing the allegation was baseless, the meeting was convened without following the laid down procedures and which meeting was convened by a Board of Governors that was illegally in office contrary to section 55 of the Basic Education Act, 2013. That the claimant was not informed of any allegations in good time or offered a chance to give a defence and those who were at the meeting were biased or had an interest and hence the proceedings not fair and their judgement biased.

3. In the affidavit, the claimant states that he has served as a teacher of the 3rd respondent and based at the 2nd respondent for over 8 years. He claimant was accused of insubordination and the 1st and 2nd respondent proceeded to convene an illegal meeting contrary to section 55 of the Basic Education Act. That events leading to the allegations against the claimant started in 2011 when the Principal made derogatory and snide remarks that had ethnic connotations to the chairman of Kajiado KUPPET branch with reference to the claimant. The Principal created a scenario whereby one cannot see her while at office without booking an appointment by writing a letter two days prior to the due date stating clearly the need to see the principal. On 10th April 2014 the claimant received a letter from the principal to attend a Board meeting on 29th April 2014 due to what the claimant was said to have been in professional misconduct and character assassination which was not true as no evidence was tabled over the same at the hearing. The claimant was prevented from bringing anybody at the meeting who was not invited by the Principal and the Union was also barred at the meeting. The Principal and the Board failed to conform to the guidelines set by the 3rd respondent in proceedings as regards what the claimant faced before them on 29th April 2014 and hence their decision was illegal.

4. In reply the 1st and 2nd Respondent through the Replying Affidavit of Teresa Baru sworn and dated 20th May 2014 stated that as the Principal [1st respondent] of the 2nd respondent was conversant with the application lodged by the claimant. that in February 2014 several allegations which included infamous conduct were levelled against the claimant by parents and students on his professional conduct as a teacher, which related to what was reported to the Principal by Mr Shipo as head of careers department that the claimant had committed acts of negligence and failure to perform duty and thus issued him with a notice to show cause as to why action should not be taken against him. The claimant failed to respond and the matter was then reported to the 2nd respondent which scheduled a hearing on 29th April 2014 where the claimant appeared and defended him and at no time failed to state that he required representation. The board therefore went ahead and made a decision.

5. The matter herein was brought under Certificate of Urgency and there are interim orders. The Respondent has undertaken to comply with these orders until this ruling is delivered. The questions that emerge from the application and submissions of both parties are;

Whether the 2nd respondent was properly constituted to address the matters before it on 29th April 2014;

Whether the 2nd respondent decision against the claimant should take effect; and

Whether the orders sought should be granted.

6. Though not raised in the proceedings with regard to this application by either party, I note the claimant is suing through the Executive Secretary KUPPET Kajiado County Branch. Under the provisions of the Industrial Court Act section 22, the Labour Relations Act, a Union is now empowered and allowed to sue for and on behalf of their member directed before the Industrial Court where the Union becomes the claimant and their member is the grievant. This is the core of what goes into a Recognition Agreement and a Collective Bargaining Agreement, to ensure that where these two agreements exist, the Union whose member is affected by an industrial action is dully represented in matters as this one in court to ensure that such a member is left to attend to his duties at his place of work while the Union and the employer or the employer's association are addressing and or causing arbitration

to such matters. To sue as in this case through the *Executive Secretary KUPPET Kajiado County Branch* is a misnomer as the Executive Secretary KUPPET Kajiado County Branch should have been the Claimant herein and in the outline indicate who the grievant is.

7. Affidavits relate to facts known and within the knowledge of a deponent known to be true at the time of such averments are made. Averments in the paragraph 6 and 7 of the claimant's affidavit in support of his application are stated to have been made by third parties, such averments as contained in a person's affidavit are not facts deposed to by themselves, the persons who heard or have knowledge of such matters are the ones to made an affidavit. Affidavits relate to matters of fact that a person has knowledge of or personally believed the same to be true at the time the oath is taken. Hearsay is thus to be treated very cautiously with regard to contents in an affidavit.

8. The genesis of the application before court is the meeting held by the 2nd respondent on 29th April 2014 which resulted in the decision to interdict the claimant following notification for such meeting on 10th April 2014, 19 days prior to the meeting. This letter notes;

> *LETTER OF INTERDICTION*
>
> *I am directed by the Teachers Service Commission to say that, <u>it is alleged that you should have your name removed from the register of teachers … [</u>*emphasis added].

9. Allegations remain matters that are not proved, unsupported or suspect. Allegations when made are therefore matters that can be confirmed through call for evidence, witness in support or explanation from the suspect after which a decision can be made and based on the circumstances of the case, a sanction following all mitigating factors. From the letter of interdiction issued to the claimant, the allegations made against him were followed with far and wide reaching sanctions - An interdiction and notice for removal from the teachers register.

10. This sanction followed the 2nd respondent meeting of 29th April 2014. The members present were recorded, those absences with apologies are recorded and also those in attendance are recorded. It is not clarified at what point the claimant and the witnesses became participants at the meeting so as to commence hearing of his case. What is clear is that there is a record of Min 1/04/2014: ***discipline of the teacher – Amollo Fredrick Saundu TSC No. 525162.*** The records indicate;

> *The issue of the teachers' discipline was discussed at length. The Board suggested that a deliberation must be looked at within the Kenya Law ad Merits adviced by the TSC Human Resource Department at the County level. … The teacher's mitigation is also paramount and has the right to be heard. … The chairman of BOM gave a brief history of the teacher who had previously appeared before the board with similar allegations and showed no change. The teacher had asked to be given a second chance. Apparently the teacher had not changed even after promising to change. Mr Hassan adviced the board to put down all allegations concerning the teacher so that as they take action on him they have the facts written.*
>
> *The secretary read the charges:-*
>
> *…*
>
> *The chairman of the board wanted to know from the teacher why he never attended school function…*
>
> *… The members unanimously passed to interdict the teacher, on the grounds laid out against him.*

11. At what point was the teacher invited into these proceedings? Was it at the beginning of the meeting or when the chairman asked him to address the allegations of being absent from a school

function? There is no such record. The minutes that recorded the proceedings where the claimant was heard and a decision taken against him cannot be surmised to be the same as minutes taken for the 2nd respondent meeting. It cannot be both. It has to be one and not the other. To mix the two as the 2nd respondent has done is to remove the claimant totally out of such proceedings. Nothing prevented the 2nd respondent from constituting themselves into a disciplinary hearing panel and listing those present at the meeting and the witnesses called. This would indicate who was present for the claimant and if there was attend of his union representative or a fellow employee of the claimant's choice.

12. The above notwithstanding, the 2nd respondent went ahead and sanctioned the claimant. He was interdicted. The nature of such interdiction is not indicated. Was this a sanction the respondents could issue? How was it to be issued?

13. It is important to note that there can be preventive interdicts or punitive interdicts. On the one part being an interdict that is done in the context of allegations of misconduct prior to finding of guilt and the other interdict is implemented as a sanction after the finding of guilt. a Punitive interdict can only issue in circumstances where the employment contract, the employer code of conduct, the Collective Bargaining Agreement or the law allows for it as a sanction, a good example being what would fall under the provisions of section 44 of the Employment Act in cases that warrant summary dismissal and are outlined therein. Whether it is preventive of punitive, the interdict, suspension, dismissal or a termination the same to be valid must meet the requirements of substantive and procedural fairness. This is the position articulated in **Chirwa versus Transnet and Others [2008] 2 BLLR 29, at the Constitutional Court of South Africa** and reiterated by this Court in **Industrial Petition No 150 of 2012, in the Matter of Joseph Mburu Kahiga et al versus KENATCO Co. Ltd et al.** this is so because, suspensions and interdictions are not administrative acts as the detrimental effect of it impacts on the employee's reputation, advancement, job security and fulfilment. The manner in which and the reasons for which suspensions and interdictions are effected can be outlined as;

> *…employers tend to regard suspension as a legitimate measure of first resort to the most groundless of misconduct, or worse still, to view suspension as a convenient mechanism to marginalise an employee who has fallen from favour.*

14. as held in **Mogothle versus Premier of the North-West Province et al [2009] 4 BLLR .** At paragraph 27;

> *… the freedom to engage in productive work – even where that is not required in order to survive – is indeed an important component of human dignity. For mankind is pre-eminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth – the fulfilment of what it is to be human – is most often bound up with being accepted as socially useful*

15. Therefore, before an interdict can be found to be valid, the same must be based on fair reasons and must be implemented pursuant to fair procedure. This is what can be cited as the 3-dimension criteria;

> First, the employer must have a justifiable reason to believe the employee has engaged in serious misconduct to form what is commonly called a *prima facie* case;
>
> Secondly, there is some objectively justifiable reason to deny the employee access to the workplace based on the integrity of any pending investigation into the alleged misconduct, or some relevant factor that would place the investigation or the interest of the affected parties in jeopardy; and
>
> Thirdly, the employee is given the opportunity to state his case or be heard before any final decision to interdict is made.

16. The justifiability of an interdict rests on the existence of a *prima facie* case on the reason that the

employee committed serious misconduct and the employee is formally informed in whiting of the allegations of misconduct that precipitated the interdict, in circumstances where knowledge of the allegations are apparent from the surrounding circumstances and where such circumstances do not exist, since there is a pending investigation, the reasons can only be broad, vague or general hence subjective and removed from what is a *prima facie* case. An interdict has the result to deny an employee access to the workplace and when done without due process and due regard to the first criteria the ultimate result is to negate the principles of procedural fairness and thus unfair labour practice as held in **IC 1972 of 2012 Elizabeth Washeke et al versus Airtel Network Ltd et all.** Therefore the reason to deny an employee access to the workplace is closely linked to any ongoing investigations over alleged gross misconduct in that;

> *… the continued presence in the workplace could potentially jeopardise the investigations, is reasonable in light of the serious nature of the charges brought against [an employee].* ***[1]***

17. There must be a clear reason why the employee interdiction is necessary, independent of any contention relating to the seriousness of the misconduct. An interdiction or suspension is the employment equivalent of criminal trial arrest, with the consequence that an employee suffers palpable prejudice to reputation, advancement and fulfilment. Thus a suspension or interdiction should only follow pending a disciplinary enquiry only in **exceptional circumstances,** where there is reasonable apprehension that the employee will interfere with any investigation that has been initiated, or repeat the misconduct in question. The purpose of such removal from the workplace even temporarily, must be rational and reasonable and conveyed to the employee in sufficient detail to enable the employee to defend himself in a meaningful way.

18. Once these preliminaries are addressed, then the employee must be heard on the merits of the case as a cardinal rule. This is not to revisit the decision to suspend or interdict, the hearing is simply aimed at determining the allegations levelled against the employee and any defences that the employee may wish to make. Only then, after the close of the hearing or investigation is a sanction issued to the employee. In a case where an interdiction is the sanction, The period of the interdiction must be stated and the reasons for the same as well as what the employee is expected to do during this interdict to avoid further injury to the reputation of the employee or any stigma as a result. Where an interdict is without pay or a condition that removes part of the pay, this must clearly be indicated together with the applicable provisions, administrative policy, the law or the employment contract. Where these do not exist and are stated, the employee must remain on full pay and any deduction without valid cause would be in breach of the employment contract on the part of the employee and an unfair labour practice. Therefore, where an employee is not heard or his right to be heard not guaranteed per the law, such an employee is entitled to urgent relief in the event that he is interdicted without being given the opportunity to state his case.

19. Paragraph 10 of Teresa Baru affidavit state;

> *That at no time at the course of this meeting did the applicant raise the issue of his representation.*

20. it is not for the claimant to call for representation. The employer, the respondent herein had the duty to inform the claimant of the allegations against him as remind him of his fundamental right to have at the hearing a person of his choice, his Union or a fellow employee. Whether the claimant was aware of this right or not, the duty vested upon the employer to reiterate these rights and dully accord them to an employee being subjected to disciplinary proceeding such as the claimant faced. Where an employee chooses not to have such representation or the presence of a fellow employee of his choice, then this must be carefully recorded as when raised at any hearing before the Industrial Court, the Court is as a matter of justice, caused to refer to such proceedings. In the absence of such confirmation that the claimant was represented by his Union or a fellow employee of his choice present, then the respondent made a fundamental omission in the disciplinary process that does not meet the tenants of section 41 of the Employment Act, thus negating the proceedings and any decisions therefrom. Section 41 of the Employment Act is stated in mandatory terms as;

41. (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

21. Even where the above provisions apply with regard to termination proceedings, where an employer has no policy guidelines or regulations that are indicated as to apply for their internal disciplinary proceedings before an advance action is taken against any employee, the standard outlined in section 41 apply. These provisions give each party a fair chance to articulate their case in a fair and reasonable process where an employee is accused of misconduct, poor performance or any other matter as the claimant herein that was said to have insubordinate the respondents. Due process must be accorded to all employees even in a case that amounts to gross misconduct.

22. On 10th April 2014, the claimant was issued with official summons to appear before the 2nd respondent over various allegations, which process should be left to proceed to completion as that far the respondents had conformed to fair procedure. Where there are legitimate reasons for an employer to commence the process of suspension or interdiction, this court will not interfere with the same but this process must conform to both procedural and substantive fairness. This is a right due to any employer to employ disciplinary measures at the workplace and to ensure industrial or workplace peace.

23. Whatever measure the Principal has put in place in the management of the affairs of the school as the institution that she has responsibility over must be complied with by all those under her supervision. Otherwise there would be chaos where a team has no leader and every team member does as they please. It is not for the claimant to decide for the Principal on how to run the institution, if her mode of leadership is put into question that is for the 3rd respondent to address. There must be a leader and a team that accepts to be lead. Otherwise laws, regulations and policies would not be necessary. There would be the rule of the jungle. That is not to be encouraged by this Court.

24. The issue as to the composition and how the 2nd respondent was constituted on 29th April 2014 was brought into question. A body such as the 2nd respondent has perpetual succession and does not lapse or become illegal simply because a new law has come into force as there are transitional provisions to the same to convert from a Board to a Management Board per the Basic Education Act, 2013. The 2nd respondent still carry out their mandate in a legal manner as they can be sued and sue in their own right and take responsibility for any action undertaken by themselves, their agents, servants and the 1st respondent. They are sued in this case, in that capacity.

25. In conclusion, I find that the Court can only intervene in an employer's internal disciplinary proceedings until they have run their course, except in exceptional circumstances – that is where grave injustice might result or where justice might not by other means be attained. The hearing of the claimants has not run its course, but the procedure adopted with sanction before according him a fair chance to be heard in the presence of his Union or a fellow employee of his choice not accorded to him. This far the court will interference with the proceedings as by not so doing grave injustice will be occasioned to the claimant. this is one such exceptional case and thus the Court directs as follows;

a. **the interdict of the claimant was not procedurally fair as outlined above and following the 2nd respondent meeting held on 29th April 2013 and that is hereby set aside;**

b. **the claimant shall to receive his full pay unless there are valid reasons to justify the withholding of such pay or part of such pay;**

c. **Where there are legitimate reasons to allow for the suspension or interdiction of the claimant, fair procedure shall be applied to conclude the same;**

d. **Where The process as (c) above is to be undertaken the same should be without harassment, intimidation, or threatening of the claimant;**

e. **Costs will be in the cause.**

These are the orders of the Court

Delivered in open Court at Nairobi and dated this 4th Day of June 2014

Mbaru

JUDGE

In the presence of

Court Assistant: Lilian Njenga

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[1] See Hlubi et al versus Universal Services & Access Agency of SA [2012].