



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

PETITION NO. 8 OF 2014

CATHERINE WANJIRU WATORO.....PETITIONER

- VERSUS -

TEACHERS SERVICE COMMISSION.....1ST RESPONDENT

DIRECTOR, TEACHERS SERVICE COMMISSION,

NAKURU COUNTY.....2ND RESPONDENT

PRINCIPAL, NAKURU DAY SECONDARY SCHOOL..... 3RD RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 11th July, 2014)

JUDGMENT

The petitioner filed the petition on 20.05.2014 through Kiplenge & Kurgat Advocates together with the petitioner's supporting affidavits. The petitioner prayed for:

1. An order declaring that the transfer and subsequent interdiction of the petitioner from work amounted to a violation of the petitioner's fundamental rights and freedoms as enshrined in the Constitution of Kenya.
2. An order compelling the respondents to reinstate the petitioner back to work and in her work station at Nakuru Day Secondary School.
3. Award damages to the petitioner for the violation of the petitioner's fundamental rights and freedoms.
4. An order that the grievances raised by the petitioners in respect of breach of procurement laws and the ban of Holiday Tuition by the 3rd respondent be investigated by the Ministry of Education and the Ethics and Anti-corruption Commission.
5. Costs of the petition.

To oppose the application, the respondents filed on 08.06.2014, the replying affidavit of Agnetta Kitheka Mwikali being the 2nd respondent and also filed on 03.07.2014, the further replying affidavit of Wafula Wycliffe being the 3rd respondent.

The petitioner filed on 26.06.2014 the further supporting affidavit. The petitioner is at all material time a registered teacher in the employment of the 1st respondent and deployed at Nakuru Day Secondary School. The petitioner's case is that in April 2014, the 3rd respondent designed to undertake holiday tuition contrary to standing government policy banning such tuition. The petitioner's further case is that the 3rd respondent undermined the role of the school tender committee where the petitioner was a member.

In particular, the petitioner's case was that the 3rd respondent awarded a tender for the renovation of the school bus to a service provider who had not participated in the tendering procedures. In those circumstances and the petitioner having objected to the irregular holiday tuition and the irregular procurement, the petitioner received a letter dated 22.04.2014 indicating that the petitioner had been transferred to Upper Hill Secondary School. The letter stated that the petitioner had been transferred with effect from 5.05.2014. The letter stated that the 3rd respondent was required to inform the 1st respondent's headquarters and the 2nd respondent the date of release of the petitioner to take up the transfer and that the petitioner was to be released not later than 14 days from the date of the letter, 22.04.2014. The transfer letter was addressed to the petitioner through the 3rd respondent but the copy filed in court does not show the date the 3rd respondent received the letter and when the 3rd respondent forwarded the letter to the petitioner.

The petitioner's case is that the 3rd respondent claimed to have delivered the transfer letter on 24.04.2014 and the petitioner stated that the letter was in fact delivered to her on 29.04.2014 in an envelope dated 28.04.2014.

By the letter dated 29.04.2014, the petitioner by way of appeal to the 1st respondent objected to the transfer. It is not disputed between the parties that the petitioner was entitled to make the appeal. The petitioner objected to the transfer because she believed that the transfer had been maliciously instigated by the 3rd respondent in view of the petitioner's objection to the irregular procurement and the designs by the 3rd respondent for April, 2014 school holiday tuition contrary to the prevailing policy. In the objection, it was the petitioner's case that the 3rd and 4th respondents connived to transfer her with a view of silencing, harassing and intimidating the petitioner in order that the 3rd respondent would continue perpetuating the maladministration and other unethical practices in the school.

The petitioner urged in the appeal that the 1st respondent should intervene in the case and protect her from intimidation for having performed her duties as provided for in Article 236 of the Constitution. It was her case in the appeal that the 1st respondent should not be allowed to harass and intimidate innocent teachers who fail to pander to his whims in total disregard of existing regulations and government policies. The petitioner concluded by requesting to remain in her current work station awaiting further communication and guidance from the 1st respondent's office. It is not disputed between the parties that the 1st respondent's policy and regulations are silent on whether an appeal would act or not act as stay of the transfer decision. The petitioner's advocates on record further wrote to the 1st respondent seeking intervention and failing, legal action would follow. The petitioner's case is that in the meantime, she continued clearance process between 8.05.2014 and 13.05.2014 because she had not received a response on the request that she remains in her current work station.

On 13.05.2014, the petitioner stated that she received two letters. The 1st letter by the 2nd respondent dated 7.05.2014 stated thus, **"Your letter dated 29th April 2014 addressed to the TSC Secretary in which you gave the TSC County Director a copy. Note that the instructions given in the letter dated 22nd April 2014 still stands."** The second letter of interdiction dated 12.05.2014 signed by the 2nd respondent stated thus,

"LETTER OF INTERDICTION"

I am directed by the Teachers Service Commission to say that, it's alleged that you should have

your name removed from the register of teachers.

The allegations made against you are as follows:

INSUBORDINATION

You insubordinated the TSC County Director – Nakuru by failing to report to Upper Hill Secondary School as instructed by the letter dated 22nd April 2014.

Before the Commission proceeds to investigate, consider and determine your case, you are invited to make a statement to the Commission in writing, which should be received by the Commission within (21) days from the date of this letter. Before your case is determined, you will be given an opportunity to be heard by the Commission in person.

Signed

KITHEKA A. M.”

The petitioner stated that after she received the interdiction letter, she learned that the 3rd respondent had written the letter dated 30.04.2014 addressed to the 2nd respondent indicating that the petitioner had cleared with Nakuru Day Secondary School and was free to join her new station at Upper Hill Secondary School where she had been deployed.

Dissatisfied with the turn of events, the petitioner filed the petition. The petitioner’s claims are as follows:

- a. The interdiction was in bad faith and in contravention of the bill of rights because the interdiction contravened Article 10 (2) (a), (b) and (c) of the Constitution on principles of governance.
- b. The respondents’ actions violated the petitioner’s fundamental rights and freedoms as enshrined in Article 47(1) and (2) of the Constitution on the right to fair administrative action.
- c. The respondents’ actions lowered the petitioner’s dignity and that of her family contrary to Article 28 of the Constitution.
- d. The interdiction was imposed in contravention of Article 236 of the Constitution on protection of public officers.

The court has considered the petition, the supporting affidavits, replying affidavits and the submissions on record. The issues for determination as they emerge in the case are as follows:

1. Whether the 3rd respondent instigated the petitioner’s transfer.
2. Whether the transfer was fair.
3. Whether the interdiction was constitutional and fair.
4. Whether the petitioner is entitled to the remedies as prayed for.

The 1st issue is whether the 3rd respondent instigated the petitioner’s transfer. In the 2nd respondent’s replying affidavit at paragraph 15, it is stated that on 3.04.2014, the 2nd respondent received a letter from the 3rd respondent conveying that the Curriculum Based Establishment (C.B.E) for Chemistry at Nakuru Day Secondary School was overstuffed. The letter stated as follows:

“REF: SURRENDER AND REQUEST OF TEACHERS

We are facing a shortage of teachers which is a common feature now in our schools but I make a special request as follows:

The school is willing to release a Chemistry/Maths teacher for a Biology/ Agriculture as soon as possible.

The C.B.E for Chemistry is overstaffed by one teacher. We have five teachers in Chemistry, while we have one for Biology/Agriculture.

Other urgent subjects needed are;

- i. **History/Geography**
- ii. **Geography/ C.R.E**

Thank you.

Yours faithfully,

Signed

W. Wafula

PRINCIPAL.”

The court finds that the letter quoted above initiated the petitioner’s transfer. It is the finding of the court that it was after the letter was issued that the 2nd respondent moved to issue the transfer letter. Thus, to answer, the 1st issue for determination, the court finds that the 3rd respondent instigated the petitioner’s transfer.

The 2nd issue for determination is whether the transfer was fair. The petitioner’s case is that the 2nd and 3rd respondents connived to bring about the transfer due to the petitioner’s objections to irregular holiday tuition and to irregular procurement including award for repair of the school bus contrary to the relevant regulations.

The 2nd respondent’s case is that the transfer was within the 1st respondent’s functions under Article 237 (1) (c), (d), (e) being to assign teachers in its service to teach in various public schools; to promote and transfer teachers; and to exercise disciplinary control over teachers. Further, it was stated for respondents that under Article 237(3) (b) of the Constitution, the 1st respondent is mandated to review the demand and supply of teachers across the country to achieve equitable distribution of teachers in all public schools in the country. The respondents’ case was that under regulation 27(3) of the 1st respondent’s Code of Regulations, the 1st respondent had the discretion to transfer any teacher to any school even if the teacher had not requested for the transfer. The enumerated constitutional, statutory and regulatory provisions have not been disputed between the parties.

The 2nd respondent stated that she effected the transfer of the petitioner by considering the factors of staffing levels of the two schools in issue; curriculum based establishment of the two schools; petitioner’s length of stay at Nakuru Day Secondary School; equitable distribution of teachers within Nakuru County; professional conduct of the petitioner; and geographical distance between the two schools. It was not explained by the 2nd respondent the manner in which the factors were considered to justify the petitioner’s transfer. Further, the court finds that the 2nd respondent failed to establish the 1st respondent’s benchmarks in matters of deployment and transfer as may have been established and instituted in the 1st respondent’s deployment or transfer policy so as to show that the transfer in this case was objectively initiated and effected.

Certain pertinent issues have emerged in the case. First, it is said that under regulation 27(4) (b) of the 1st respondent’s code of regulations for teachers, the petitioner was to be released within 30 days. The transfer letter prescribed release in 14 days effective 22.04.2014 by stating that the transferred was with

effect from 5.05.2014 and in circumstances whereby the transfer letter had been delivered belatedly. The court finds that the 2nd and 3rd respondent acted in bad faith by giving the claimant unexplained short time within which to report to the new station. The 3rd respondent has not disputed the belated delivery and did not file the copies of the letters to show the time and date he may have forwarded the same to the petitioner. In such circumstances, the court finds that there is no ground to doubt the petitioner's account that the transfer letter was delivered belatedly.

Secondly, the 3rd respondent has filed the investigative report by the Ministry of Education, Science and Technology. The attachments to the report include the 3rd respondent's letter dated 4.04.2014 clearly setting out a design for students to be in school throughout the holidays. The petitioner has filed the tuition timetables that had been instituted for the holiday tuition. The 3rd respondent's memorandum of 17.04.2014 is clear that following the communication from the Education Secretary of 16.04.2014, teachers would not be allowed in classes during the holiday period. Taking all the circumstances into account, the court finds that the 3rd respondent had designed to undertake holiday tuition contrary to law and the standing government policy against such tuition so that on a balance of probability, there is no reason to doubt the petitioner's account that she objected to the holiday tuition that resulted into a hostile relationship with the 3rd respondent. The respondents have relied on the Ministry's report to urge that the petitioner may have engaged in teaching elsewhere (at St. Paul's University) during the April, 2014 school holidays but which the court finds to have been extraneous consideration in view of the issues in dispute in the petition.

Thirdly, the Ministry's investigative report found that the 3rd respondent, the parents and Teachers' Association Chairperson and Board of Management Chairperson scouted for quotations to determine the cost of re-fabrication of the school bus and an agreement was signed with the service provider. The report concluded that the renovation process of the school bus was not in accordance with the procurement regulations as it was not done by the tender committee. The finding, in the opinion of the court, vindicates the petitioner's case that the 3rd respondent was not happy with the petitioner's objections and concerns to the irregular procurement and as raised by the petitioner as a member of the school tender committee. The court finds that the petitioner, before the transfer in issue, had raised valid objections against the 3rd respondent's conclusion of the irregular procurement of the repairs to the school bus and taking all the flow of events into consideration, it was not unreasonably remote for the petitioner to associate her looming transfer to the ensuing work relationship.

Fourthly, the court has considered the 2nd respondent's authority as regards to effecting transfers of teachers. The 1st respondent's circular ref. No. TSC/ADM 192A VOL.VIII/18 dated 24th May, 2012 is clear. It provides that the 2nd respondent has the responsibilities to identify and deploy teachers to positions of responsibility in consultation with the 1st respondent's headquarters; to undertake intra-county deployments to ensure staff balances; manage the entire placement process in consultation with the headquarters and to manage all human resource issues for staff and teachers at the county. The court finds that under the circular, the 2nd respondent had the authority to deploy or transfer the petitioner. However, the court finds that the petitioner being a teacher holding a position of responsibility, namely, head of science department, consultations with the 1st respondent's head office were necessary but which have not been demonstrated to have taken place. The transfer being a placement process and relating to staff balancing, it was necessary for the 1st respondent to consult the 1st respondent, and show the balances that were justified in the case. The court has noted that the transfer of the petitioner was an exclusive event not shown to have affected other teachers so that it cannot pass to have been an objective and genuine balancing action as initiated by the 3rd respondent and executed by the 2nd respondent. The court has particularly observed that in the 3rd respondent's letter of 1.04.2014, there was reference to other teaching needs but which the respondents have failed to show the manner the same were addressed throughout the transfer in issue. In the opinion of the court, together with the petitioner's concern that it was not shown that Upper Hill Secondary School had not requested for a Chemistry teacher, it is irresistible to find that the petitioner had been singled out and targeted for transfer. Taking into account the hasty actions on the part of the 2nd and 3rd respondents and the two grievances the petitioner had

advocated for prior to the transfer, the court finds that the transfer was not carried out fairly in the circumstances of the case.

The **3rd issue** for determination is whether the interdiction was constitutional and fair. First, the circular is clear that the 2nd respondent would handle all discipline matters as per guidelines provided by the 1st respondent. The guidelines to be followed by the 2nd respondent in imposing the interdiction against the petitioners were not established before the court. Secondly, the interdiction letter referred to a directive by the 1st respondent but which was not filed in court. Thus, the court finds that there was no directive by the 1st respondent that the petitioner be interdicted. Thirdly, it is said that the reason for interdiction was insubordination and namely, the petitioner's failure to report to Upper Hill Secondary School as instructed in the letter dated 22.04.2014. It is not disputed that the petitioner appealed against the transfer. The authority to decide the appeal vested in the 1st respondent. In making the appeal, the petitioner was clear that she awaited the 1st respondent's guidance as she continued to serve at Nakuru Day Secondary School. Nevertheless, without any consultations with the 1st respondent, the 2nd respondent usurped the 1st respondent's authority to decide the appeal and purported to pre-empt the appeal by declaring in her letter of 7.05.2014, thus, **"Note that the instructions given in the letter dated 22nd April 2014 still stand."** Fourthly, the court finds that the release letter of 30.04.2014 by the 3rd respondent was issued at a time when the petitioner had not cleared at Nakuru Day Secondary School and did not prescribe the date for reporting at Upper Hill Secondary School. The court therefore finds that as at the time of the interdiction letter, the petitioner cannot be said to have refused or disobeyed to take up the transfer.

The court finds that the interdiction was unfair and unconstitutional because in imposing the interdiction, the 2nd respondent did not accord the petitioner lawful, reasonable and procedurally fair administrative action as provided for in Article 47(1) of the Constitution. The court finds that the 2nd respondent acted unreasonably by imposing the interdiction while the petitioner's appeal was pending and while there was no prescribed effective date for the purported release by the 3rd respondent. It was unlawful and procedurally unfair, in the opinion of the court, for the 2nd respondent to impose the interdiction without reference to and compliance with guidelines given by the 1st respondent. The court finds that the interdiction was unfair administrative action imposed in contravention of Article 47(1) of the Constitution.

The **4th issue** for determination is whether the petitioner is entitled to the remedies as prayed for. The court makes findings as follows:

1. The petitioner prayed for an order declaring that the transfer and subsequent interdiction of the petitioner from work amounted to a violation of the petitioner's fundamental rights and freedoms as enshrined in the Constitution of Kenya. The court has found that the transfer was instigated by the 3rd respondent in view of the grievances the petitioner had put forward relating to the irregular designs on holiday tuition and the procurement that undermined the role of the school tender committee. The court further finds that the transfer amounted to victimization against the petitioner for having performed her functions in accordance with the law both as a teacher and member of the school tender committee. The victimization contravened Article 236(1) of the Constitution. The court has found that the disciplinary action by way of interdiction contravened Article 47(1) of the Constitution. Accordingly, the court finds that the petitioner is entitled to the declaration that the transfer and the subsequent interdiction of the petitioner amounted to a violation of the petitioner's fundamental rights and freedoms as provided in Articles 47(1) and 236(1) of the Constitution. For avoidance of doubt, any consequential processes and actions by the respondents based on the letter of transfer and the interdiction letter shall abort and not be continued by the respondents as null and void *ab initio*.
2. The petitioner prayed for an order compelling the respondents to reinstate the petitioner back to work and in her work station at Nakuru Day Secondary School. The court has found that the

transfer was unfair and unconstitutional and the petitioner is entitled as prayed unless lawfully transferred in accordance with the applicable law and policies.

3. The petitioner prayed for award of damages for the violation of the petitioner's fundamental rights and freedoms. The court has considered that throughout the proceedings before the court and by reason of the interlocutory orders by the court, the petitioner remained at work at full pay. In the circumstances, the court finds that in absence of persuasive submissions on the award of damages and the measure of such award, the petitioner is not entitled as prayed.
4. The petitioner prayed for an order that the grievances raised by the petitioners in respect of breach of procurement laws and the ban of Holiday Tuition by the 3rd respondent be investigated by the Ministry of Education and the Ethics and Anti-corruption Commission. The court has considered the investigative report by the Ministry made while the suit was pending and that found possible irregularities in the procurement process. Accordingly, the court finds that the petitioner is entitled to the order that the Ethics and Anti-corruption Commission investigate the breach of procurement laws as raised by the petitioner and take action within the Commission's constitutional and statutory functions.
5. As the petitioner has substantially succeeded, she is entitled to costs of the petition.

It was submitted for respondents that the court lacked jurisdiction to determine the petition or the petition was premature because the appeal by the petitioner had not been determined by the 1st respondent. The respondents invoked the opinion of the court in Aviation and Allied Workers Union –Versus- Kenya Airways Limited [2012]eKLR, where this court stated as follows:

“...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 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.”

First, the court finds that the petitioner was entitled to move the court once the 2nd respondent wrote referring to the appeal and affirming that the transfer as earlier communicated remained in place so that in the opinion of the court, the pending appeal was inconsequential or that the 2nd respondent had, pretentiously so, decided the appeal.

Secondly, the petitioner raised issues about the respondent's administrative actions being unconstitutional. It is true, as submitted for the respondents that the 1st respondent was entitled to consider, but without finality, such petitioner's concerns in the appeal especially in view of the provisions of Article 10 (1) of the Constitution that obligated the 1st respondent to uphold the constitutional values and principles of governance including human rights. Nevertheless, the court further holds that matters of interpretation of the Constitution are in the ultimate preserve of the superior courts as elaborated under Article 165 of the Constitution and the petitioner was entitled to move the court as was done in the present petition. The dispute as to whether the petitioner's constitutional rights and protections had been contravened, in the opinion of the court, is an issue that was properly within the court's jurisdiction under the judicial authority of the court and the court's jurisdiction was primary as it did not crystallize and did not need to crystallize within and after a filtering or sieving jurisdiction under the respondents'

administrative authority.

The court while upholding the opinion in the cited case further holds that the constitutional protections and rights as urged for the petitioner was not an issue that was within the 1st respondent's administrative authority to determine with finality while considering the appeal and further, in this case, the petitioner was entitled to move the court once the 2nd respondent pretended to determine the appeal by declaring the transfer was going to stand despite and in the face of the petitioner's appeal to the 1st respondent. The court finds that the suit was not premature and the petitioner was entitled to move the court in the manner and time that she did to urge her constitutional rights and protections that may have been denied, violated, infringed or threatened.

Thus, the court holds that where administrative proceedings are continuing in contravention or alleged contravention of constitutional or even statutory provisions, the court with relevant jurisdiction is the legitimate platform to question the offending acts, omissions and steps in such administrative proceedings and the court ought to be moved at the earliest possible moment.

In conclusion, judgment is entered for the petitioner against the respondents for:

- 1. The declaration that the transfer and the subsequent interdiction of the petitioner amounted to a violation of the petitioner's fundamental rights and freedoms as provided for in Articles 47(1) and 236(1) of the Constitution.**
- 2. The respondents by themselves, their agents and employees shall retain the petitioner at work and in her work station at Nakuru Day Secondary School unless lawfully transferred in accordance with the applicable law and policies.**
- 3. The declaration that the petitioner is entitled to the order, and the court hereby orders, that the Ethics and Anti-corruption Commission investigates the breach of procurement laws at Nakuru Day Secondary School as raised by the petitioner and to take action within the Commission's constitutional and statutory functions; and for that purpose, the petitioner shall serve this judgment upon the Commission within 7 days from the date of this judgment.**
- 4. The respondents to pay the petitioner's costs of the petition and all proceedings.**

Signed, dated and delivered in court at Nakuru this Friday 11th July, 2014.

BYRAM ONGAYA

JUDGE