



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 897 OF 2014

PETER NDIRANGU.....CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

RULING

The application before me for determination is a Notice of Motion dated 28th May 2014 and filed in court on the same date. It seeks the following orders:

- 1. THAT** this Application be certified urgent and same be heard ex-parte in the first instance.
- 2. THAT** pending the hearing and determination of this Application, an interim injunction be granted restraining the Respondent from causing and/or effecting any transfer of the Claimant/Applicant from Mogogoni Secondary School.
- 3. THAT** pending the hearing and determination of this Application, the Respondent be restrained by way of injunction from replacing or causing to be replaced the Plaintiff as the Head Teacher of Mogogoni Secondary School.
- 4. THAT** pending the hearing and determination of this claim, an interim injunction be granted restraining the Respondent from causing and/or effecting any transfer of the Claimant/Applicant from Mogogoni Secondary School.
- 5. THAT** pending hearing and determination of this claim, the Respondent be restrained by way of injunction from replacing or causing to be replaced the Plaintiff as the Head of Teacher of Mogogoni Secondary School.
6. Any further or other orders as this Hon. Court may find fit to grant.

The application is grounded on the supporting affidavit of the Claimant Peter Ndirangu Waweru sworn on 28th May 2014 and on the grounds on the face of the application.

The respondent filed a replying affidavit and a further affidavit of Jane Gitakaa Njage, the Respondent's County Director of Kiambu County sworn on 10th June and 3rd July respectively.

The application was heard on 21st July 2014. Mr. Mogaka instructed by Musyoki Mogaka & Co.

Advocates represented the Claimant while Ms. Ruto of Teachers Service Commission represented the Respondent.

The background of the case is as follows:

The Claimant is an employee of the Respondent, a Constitutional Commission established under the Constitution of Kenya with the mandate to register and employ teachers, deploy teachers to public schools and institutions, promote, transfer, discipline and terminate employment of teachers. The claimant was deployed as Head teacher to Magogoni Secondary School in 2007 (according to Claimant and 2008 according to Respondent). The school is a public mixed day secondary school within Kiambu County and is sponsored by the Catholic Church.

On 20th November, 2013 there was a complaint against the Claimant by persons calling themselves concerned stakeholders of Magogoni Community. Following the complaint investigations were carried out by both the Ministry of Education Science and Technology and the Respondent. The Report by the Ministry cleared the Claimant of the complaints while that of the Respondent did not clear him.

On 25th April, 2014 the Respondent transferred the Claimant from Magogoni Secondary School to St Joseph Kereita Secondary School as head teacher with effect from 28th April 2014.

On 1st May, 2014 the Chairman of Magogoni Secondary School Board of Governors and the Chairman of the Parents Teachers Association appealed against the transfer of the claimant. On 2nd May 2014 the transfer was cancelled with effect from 25th April, 2014. On 9th May 2014 the claimant was again transferred from Magogoni Secondary School to Kitamaiyu Secondary School as an ordinary teacher of Kiswahili and history. The transfer was to be effective on 12th May 2014.

It is the second transfer of the Claimant to be an ordinary teacher at Kitamaiyu Secondary School that the Claimant is contesting in the claim herein. By notice of motion dated 28th May 2014 and filed in court on the same day together with the Memorandum of claim, the claimant seeks the following orders:

- a. A permanent injunction restraining the Respondent from transferring, demoting, deploying, or taking any other action against the Claimant without sufficient cause and or notice and without due process.
- b. Damages for any loss and illegality caused by Respondent's actions and if transfer is effected, damages for the said illegal and irregular act.
- c. Report conducted on 13/1/2014 dated 14/2/2014 by Ministry of Education Science and Technology on Magogoni Secondary School be implemented.
- d. Cost of this claim and interest.
- e. Any other relief this honourable court may deem fit to grant.

The Respondent's position is that the claimant's transfer to Kitamaiyu Secondary School was to pave way for verification of complaints made against the claimant. The Respondent further states that the transfer is not a demotion as the claimant's benefits have not been reduced and that it was done within the mandate of the Respondent to deploy teachers.

I have considered the pleadings filed by the parties, the oral submissions by the counsel and the authorities relied upon. The issue for determination is whether the Claimant is entitled to an order of injunction restraining the Respondent from transferring him from Magogoni Secondary School and replacing him as Head teacher of the school.

The principles for granting injunctive orders as submitted by the counsels for both the claimant and the

Respondent are those set out in the celebrated case of **Giella v. Cassman Brown & Co. Ltd (1973) E.A. 359**. First the applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.

Mr. Mogaka for the Claimant submitted that the report of the Ministry of Education exonerated the Claimant from allegations that had been made against him and that the audit inspection report also exonerated the claimant from financial impropriety. That the Respondent has since receiving the 2 reports purported to carry out its own investigation to incriminate the claimant. That so far there is no evidence against the Claimant and the demotion offends the claimant's right to fair administrative action. He submitted that the only evidence is the letter from the area Member of Parliament dated 3rd December 2013 but received by the Respondent on 8th May 2014, which coincides with the date of demotion of the claimant. He wondered where the letter had been between the date on its face and the date of its receipt by the Respondent five months down the line. He submitted that the claimant had established a prima facie case against the Respondent and that should the orders sought not be granted the Claimant's reputation in the eyes of the public would be injured irredeemably, a loss that is incapable of compensation by way of damages. He further submitted that the balance of convenience was in favour of the Claimant.

Ms. Ruto for the Respondent restated that the claimant had not been demoted, but was only redeployed after complaints were received from various members of the Community. That after receipt of the complaints investigations were initiated and that the report of investigations by the Respondent touched on professional conduct of the Claimant which required further investigations. She submitted that the investigations by the Respondent were related to professional misconduct while those carried out by the Ministry were related to quality and misuse of funds. She further submitted that the redeployment was necessary to pave way for further investigations in view of the conflicting reports on investigations carried out by the Ministry of Education and those carried out by the Respondent. She submitted that there were also verbal complaints from the Catholic Church who are the sponsors of Magogoni Secondary School regarding administration of the school. She submitted that the applicant had not demonstrated that he had a prima facie case as the Respondent was yet to conclude investigations into his conduct. She further submitted that the claimant had not demonstrated that he will suffer irreparable harm as his salary and benefits had not been affected by the redeployment.

The Claimant's Counsel submitted that the transfer of the Claimant to Kitamaiyu Secondary School as an ordinary teacher is a violation of his right to fair administrative action. It is not contested that the relationship between the claimant and the Respondent is that of employer and employee. I therefore do not agree with the Claimant's advocate that his client's right to fair administrative action has been infringed or is threatened. Employer employee relations are in the purview of private law and the issue of fair administrative action is therefore not relevant as the Respondent was not acting in its capacity as a public administrative body but as an employer.

The Respondent in its response to the application by the Claimant has completely ignored the issue of the Claimant's first transfer to St. Joseph Kereita Secondary School as the head teacher and the reversal of the transfer within days. The Respondent has further not explained why the original transfer to Kereita was in the position of head teacher while the transfer to Kitamaiyu was as ordinary teacher, and why the original transfer was reversed.

To my mind, the transfer of the Claimant to Kitamaiyu Secondary School is an obvious demotion. Demotion is not a matter of salary and benefits only. It is also a matter of authority and power. Transferring a head teacher from one school and deploying him as an ordinary teacher in another school would deprive him of the authority and power of the office of a head teacher and obviously cause him embarrassment and create the impression that he must have done something wrong to have been relieved of his position as head teacher. I did not have the opportunity to look at the code of Regulations for the Respondent but from my recollection of having seen it at one time, demotion is one of the disciplinary measures that the Respondent may melt out in cases where a teacher has been subjected to a disciplinary

procedure and found to be at fault.

I therefore find that the transfer of the claimant to Kitamaiyu Secondary School resulted in him being demoted without having the opportunity to have charges framed against him and being given an opportunity to respond to the charges. To that extent the transfer was in violation of natural justice and the claimant's right to a fair hearing.

Be that as it may, the Respondent as employer of the claimant has a right to redeploy the claimant both under ordinary and special circumstances. The Respondent also has a right to carry out investigations whenever any complaints have been made against any teacher, the claimant included, and to take appropriate measures to remove the teacher from the school where it is deemed that it would not be appropriate to carry out investigations in his presence. However, there are several options available for such including transfer and compulsory leave. A demotion is however not one of the options.

For the foregoing reasons, I find that the decision of the Respondent to demote the Claimant by transferring him to Kitamaiyu Secondary School as an ordinary teacher is likely to cause him embarrassment that would be incapable of reparation by way of damages. I therefore grant an order of injunction against the Respondent from demoting the Claimant by transferring him to Kitamaiyu Secondary School as an ordinary teacher pending the hearing and determination of the claim filed by him.

I however decline to restrain the Respondent from transferring the Claimant or from replacing him as head teacher of Magogoni Secondary School as to do so will be tantamount to interfering with the Respondent's constitutional right of teacher management and its internal operations.

Orders accordingly.

Delivered and Dated in open court this 1st day of October, 2014.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Ms. Banje holding brief for Mogaka for Claimant

Gisemba holding brief for Ms. Ruto for Respondent