



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAKURU**

**PETITION NO. 15 OF 2014**

**IN THE MATTER OF ARTICLES 10, 22, 23(1), (3) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS**

**UNDER ARTICLES 10,19,20,28,33,47,48 AND 236 OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**JOEL NJOROGE WANYOIKE.....PETITIONER**

**v**

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

**TSC COUNTY DIRECTOR, NAKURU COUNTY.....2<sup>ND</sup> RESPONDENT**

**DIRECTOR STAFFING, NAIROBI.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Petitioner was employed by the 1<sup>st</sup> Respondent as a teacher on 12 April 1990. He rose through the ranks and by 2013 had become District Staffing Officer in Gilgil.
2. On 16 April 2014, the 1<sup>st</sup> Respondent transferred the Petitioner to Litein High School to teach but the Petitioner declined to report to the school because he alleges his transfer was instigated by some 4 head teachers who had been transferred within Gilgil unit but had refused to move on transfer.
3. The Petitioner appealed his transfer but instead got an interdiction letter dated 14 July 2014 accusing him of breaching regulation 55(2) & (3) of the TSC Code of Regulations.
4. The Petitioner contends his demotion and transfer is unfair and in violation of his constitutional rights and further that the 1<sup>st</sup> Respondent advertised for positions of sub-county Director and that he cannot apply because of his demotion and transfer.
5. Consequently, the Petitioner filed a Petition on 6 October 2014 seeking a declaration that his transfer

and interdiction amounted to a violation of his fundamental rights, conservatory orders stopping the Respondents from recruiting sub-county directors, reinstatement, monthly wages and damages.

6. Together with the Petition, the Claimant filed a motion seeking

2. THAT pending the hearing and determination of this application this Honourable Court be pleased to issue conservatory orders to restrain the 1<sup>st</sup> Respondent from short listing, interviewing and recruiting sub-county Directors.

3. THAT pending the hearing and determination of this Petition this Honourable Court be pleased to issue conservatory orders to restrain the 1<sup>st</sup> Respondent from short listing, interviewing and recruiting sub-county Directors.

7. This motion was urged on 30 October 2014 and is the subject of this ruling.

8. For the Petitioner it was submitted that he was illegally interdicted and that because of the interdiction he was unable to access the 1<sup>st</sup> Respondents vacancy webpage to apply for the position of sub-county Director. This, it was submitted would affect his career.

9. It was further submitted that the Respondents had not taken any disciplinary action against the Petitioner.

10. The Respondents opposed the motion. It was submitted that the interdiction of the Petitioner was because he had refused to report to his new station.

11. It was also urged that interdiction is part of and preliminary to the Respondent's disciplinary process.

12. Lastly, it was submitted that the Petitioner had not met the threshold for grant of conservatory orders and the test set out in *Gatirau Peter Munya v Dickson Mwendwa Kithinji & 2 others* (2014) eKLR by the Supreme Court was invoked.

13. The Supreme Court in the *Munya* case (supra) stated

*'Conservatory orders' bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as 'the prospects of irreparable' harm occurring during the pendency of a case; or 'high probability of success' in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.*

14. The present motion must be held to the test adumbrated by the Supreme Court.

15. The Constitution mandates organs of state to devolve services closer to the people. The 1<sup>st</sup> Respondent in this respect has created several offices at the County level all over the country. The 1<sup>st</sup> Respondent, the Court is informed is in the process of going a rung lower by appointing sub-county Directors.

16. The Petitioner wants the process stopped, because he is unable to apply using the 1<sup>st</sup> Respondents website because of his interdiction. He contends that the vacancy page is/was available only to internal applicants employed by the 1<sup>st</sup> Respondent.

17. Is it in the *public interest* to stop the devolution process by the 1<sup>st</sup> Respondent because the Petitioner allegedly was not able to apply? Does the Petitioner's case have merit as weighed against the *public*

*interest* in devolving services closer to the people? And what consideration should the Court give the *constitutional values*?

18. The Constitution has also expressly provided for transparency, accountability in the running of public services.

19. From the *Munya* decision, Courts are called upon to act proportionately when balancing these rights.

20. It cannot be disputed that interdiction is a valid disciplinary process recognised and regulated by the TSC Code of Regulations. That process has been initiated against the Petitioner. Should he be limited during the interdiction from seeking to advance his career bearing in mind he has not been found guilty of misconduct against the employer.

21. The Court has looked at the advert No. 3/2014 by the 1<sup>st</sup> Respondent and the requirements. That advert does not on the face of it appear like it has locked out the Petitioner or that it is discriminatory.

22. In the view of the Court, the Petitioner has not placed sufficient material before Court to show that he was blocked from accessing the 1<sup>st</sup> Respondent's online vacancy portal or that applications were restricted to 1<sup>st</sup> Respondent's employees only, and he has not shown that any of his rights have been violated or are threatened with violation.

23. It would therefore not be in the *public interest* to stop the recruitment of sub-county Directors. The Petitioner has not demonstrated *inherent merit* for grant of a conservatory order at interlocutory stage.

24. Once again the Court observes that litigants should always consider the words of the Privy Council in *Kemrajh Harrikissoon v the Attorney General of Trinidad and Tobago (1979) UKPC 3* that

*that the value of the right for redress for breach of fundamental rights and freedoms is diminished when it is misused as a general substitute for the normal procedures for invoking judicial control of administrative action.*

25. The Court reaches the conclusion that the motion dated 6 October 2014 lacks merit and orders it dismissed with no order as to costs.

**Delivered, dated and signed in open Court in Nakuru on this 5<sup>th</sup> day of December 2014.**

**Radido Stephen**

**Judge**

**Appearances**

For Petitioner Mr. Morintat instructed by Kiplenge & Kurgat Advocates

For Respondents Ms. Ruto, Advocate, Teachers Service Commission