

**TEACHERS SERVICE COMMISSION.....CLAIMANT/
APPLICANT**

VERSUS

**THE NATIONAL UNION OF TEACHERS (KNUT).....1ST
RESPONDENT**

**KENYA UNION OF POST PRIMARY EDUCATION TEACHERS (KUPPET).....2ND
RESPONDENT**

RULING

The application in this matter is brought by the Notice of Motion dated 30th August, 2012. The motion is made under Article 53(1) (b), 53 (2) and 162 of the Constitution, Section 77 of the Labour Relations Act, Section 12 Industrial Court Act, 2011 and Rule 16 of the Industrial Court (Procedure) Rules, 2010 and all the enabling provisions of law and the inherent powers of the court.

In view of the pleadings on record and the submissions by Mr. Allan M. Sitima, counsel for the Respondent, the court finds that the application is urgent and is admitted for hearing during the current court vacation.

Counsel for the Applicant has submitted that a restraining *ex parte* order should be issued to restrain the Respondents from taking part in the strike scheduled to begin upon opening of the primary, secondary and post-secondary learning institutions in three days' time.

The court has noted that the Teachers Service Commission Act, 2012 has not been published and it is an Act of Parliament for implementation of the Constitution of Kenya, 2010. The coming into effect and operation of the Act will provide the Respondents' an institutional framework for efficiently and effectively negotiating the matters leading to the filing of this case. In particular the Act establishes in Section 13(5) a Consultative Committee to review the Teachers Remuneration and Salaries. The Act also provides for the appointment of the Chairperson and other members of the Applicant as established in Article 237 of the Constitution and governed in accordance with the provision of Chapter 15 of the Constitution.

The appointment of the Chairperson and the members as well as the bringing into operation of the Consultative Committee are important pre-conditions for effective engagement between the parties in this matter. It is important for the parties to be patient to allow the formation of the institutional framework necessary for the implementation of the Constitutional and Statutory provisions. As the Applicant has submitted, it is ready to engage and address the issues raised by the Respondents once the institutional framework is in place.

The Court further notes the need to protect the rights of the children to free and compulsory education as provided for in Article 53 (1) (b) and the provisions of Article 53(2) of the Constitution, that a child's best interests are paramount importance in every matter concerning the child. The children's right to education enjoy Constitutional protection just as the Respondents' Constitutional rights in Article 41 on labour relations. The matters in dispute commenced in 1997. The court considers the Article 19 of the Constitution offers clear guidance on balancing these two competing rights. The Respondents are substantially demanding payment of money which can be done at a future date. Postponing the rights of the children to education for which both the Claimants and Respondents protect is not a decision that can be remedied in future. It would be an irreparable injury to the children.

Thus on a balance of the right of children to education and the right of the Respondents to go on strike, the court finds that the right to education outweighs the monetary demands the Respondents are making in the instant case. The court has also taken into account the need for both the Respondent and the Claimant to harmoniously work towards the realization of the relevant Constitutional and Statutory provisions.

In the circumstances the court orders:-

- (a) That the application is urgent and is admitted for hearing during this court vacation.
- (b) That the Respondents to be served for *inter-partes* hearing on 4.09.2012 at 9.00 a.m.
- (c) That the Respondents by themselves, their officials, agents and members are hereby restrained from taking part in, calling, instigating or inciting others to take part in unprotected strike pending the hearing and determination of the Application.
- (d) That the Claimant shall serve this court order by way of advertisement in at least two newspapers with nationwide circulation.
- (e) Costs in the cause.

Delivered at Nairobi this 31st day of August, 2012 in presence of counsel for claimant.

Byram Ongaya
JUDGE