



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1539 of 2012

**TEACHERS SERVICE COMMISSION
CLAIMANT**

VERSUS

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

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

RULING

On 31st August 2012 the Claimant herein **TEACHERS SERVICE COMMISSION** filed Notice of Motion dated 30th August 2012 against the two Respondent Unions seeking the **following orders**:

- 1. THAT this Honourable court certifies this Application as urgent;**
- 2. THAT the service of this application on the Respondents be dispensed with in the first instance and the application be heard ex-parte;**
- 3. THAT, this Honourable Court be pleased to issue an order restraining the Respondents by themselves, their officials, agents and/or members from taking part in, calling, instigating or inciting others to take part in unprotected strike pending the hearing and determination of this Application;**
- 4. THAT, this Honourable Court declares the strike called by the Respondents' in their respective letters/Notices to the Hon. Minister for Labour dated 20th August, 2012 and 27th August, 2012 and copied to the applicant/Claimant un-protected and therefore unlawful;**
- 5. THAT this Honourable Court declares the strike called by the premature and unwarranted;**
- 6. THAT the Respondents be directed to jointly and severally resume negotiations with the Applicant/Claimant.**
- 7. THAT the Respondents be condemned to pay the costs of this Application.**

The application which was under certificate of urgency and filed together with an application seeking leave for the hearing of the matter during the vacation was heard *ex parte* on the same day and the following orders issued:

1. **THAT the application is certified urgent and is admitted for hearing during the Court vacation.**
2. **THAT the Respondents be served for *inter partes* hearing on 4th September 2012 at 9.00 a.m.**
3. **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 this application.**
4. **THAT the Claimant do serve this Court order by way of advertisement in at least two newspapers with nationwide circulation.**
5. **Cost in the Cause.**

The case came before me for hearing on 4th September 2012. **MR. ALLAN M. SITIMA** appeared for the Claimant while **MR. ALEXANDER JAOKO** appeared for the 2nd Respondent the **KENYA UNION OF POST PRIMARY EDUCATION TEACHERS (KUPPET)**. There was no appearance for the 1st Respondent the **KENYA NATIONAL UNION OF TEACHERS (KNUT)**.

The Claimants application is supported by the affidavit of **MR. GABRIEL LENGOIBONI**, the Chief Executive Officer and Secretary of the Claimant. In the affidavit he deposes that the Respondents issued strike notices on 20th and 27th August 2012 respectively, that the timing of the strike is in bad faith to coincide with the opening date of public schools for the 3rd term and will affect students and children scheduled to sit for Kenya Certificate of Secondary Education (KCSE) and Kenya Certificate of Primary Education (KCPE), that the strike is ill advised in view of the fact that the Teachers service commission Act has just been enacted and awaits operationalization and appointment of committees under section 13 thereof through which the consultative committee to review the teachers remuneration and salaries is to be established. The deponent further avers that the Respondents are in contravention of Article 53 of the Constitution and that the Respondents members' rights under Article 41 is subject to limitation and qualifications as stipulated in the Constitution. Further that the Respondents are not interested in amicable settlement and the Claimant will suffer irreparable harm that cannot be compensated with damages should their claim be successful. He urges the court to issue the injunction and direct the Respondents to commence and/or resume negotiations.

In the replying affidavit sworn by **AKELO M.T. MISORI**, the National General Secretary on 4th September 2012, the 2nd Respondent avers that the strike called by the 2nd Respondent to commence on 5th September is protected within the provisions of section 76(c) of the Labour Relations Act having complied with all the requirements of the law and the recognition agreement between the 2nd Respondent and the Claimant. A copy of the strike notice is annexed to the affidavit as Exhibit "AM1". The affidavit further states that the 2nd Respondent on 13th January 2010 entered into an agreement with the Claimant to harmonize teachers' salaries with the rest of the civil servants, that the 2nd Respondent raised the issue of disparity in payments with civil servants with the Claimant on 17th May 2012 and sent a reminder on 12th July 2012 warning the Claimant of intended industrial action if the Claimant continued to ignore their proposals, that it was not until 31st August that the Claimant wrote to ask the 2nd Respondent to withdraw the strike notice after failing to take steps to forestall the industrial action. The 2nd Respondent further avers that they engaged the Salaries and Remuneration Commission by letters dated 20th January and 16th July 2012 but no action was taken and that the Claimant is acting in bad faith. On Article 53 of the Constitution the 2nd Respondent avers that the right of children is not superior to the rights of teachers under Article 41. They urge the court to vacate its orders of 31st August 2012.

During the hearing of the application 4th September 2012 the counsels for the parties largely based their submissions and expounded on the same grounds deponed in the two affidavits as summarized above. The facts of this case are not contested. The only point of departure whether the strike is protected or not. The Claimant urges the court to find that the Respondents did not comply with the law relating to strikes while it is submitted for the 2nd Respondent that the strike is protected under the law.

The issues that the court has to determine in my opinion are the following:

1. Whether the strike action called by the Respondents is protected;
2. Whether the Claimant is entitled to the prayers sought;
3. Whether the Respondents have contravened Article 53 of the Constitution.

I will consider the issues under the 3 heads.

1. Whether the strike action called by the Respondents is protected

The law relating to strikes is to be found in Article 41 of the Constitution and Part X of the Labour Relations Act. The relevant portions are the following:

41. (1) Every person has the right to fair labour practices.

(2) Every worker has the right—

(a) to fair remuneration;

(b) to reasonable working conditions;

(c) to form, join or participate in the activities and programmes of a trade union; and

(d) to go on strike.

The Labour Relations Act provides the procedure to be followed for a strike to be protected in sections 76, 77, 78, 79 and 80. The sections are reproduced below:

76. A person may participate in a strike or lock-out if -

(a) the trade dispute that forms the subject of the strike or lock-out concerns terms and conditions of employment or the recognition of a trade union;

(b) the trade dispute is unresolved after conciliation-

(i) under this Act; or

(ii) as specified in a registered collective agreement that provides for the private conciliation of disputes; and

(c) seven days written notice of the strike or lock-out has been given to the other parties and to the Minister by the authorised representative of -

(i) the trade union, in the case of a strike;

(ii) the employer, group of employers or employers' organisation, in the case of a lock-out.

78. (1) No person shall take part in a strike or lock-out or in any conduct in contemplation of a strike or lock-out if-

(a) any law, court award or a collective agreement or recognition agreement binding on that person prohibits a strike or lock-out in respect of the issue in dispute;

(b) the subject matter of the strike or lock-out is regulated by a collective agreement or recognition agreement binding on the parties to the dispute;

(c) the parties have agreed to refer the trade dispute to the Industrial Court or to arbitration;

(d) in the case of a dispute concerning the recognition of a trade union, the trade union has referred the matter to the Industrial Court;

(e) the trade dispute was not referred for conciliation in terms of -

(j) this Act; or

(ii) a collective agreement providing for conciliation;

(f) the employer and employees are engaged in an essential service;

(g) the strike or lock-out is not in furtherance of a trade dispute; or

(h) the strike or lock-out constitutes a sympathetic strike or lock-out.

(2) For the purposes of this section -

(a) an employee engages in a sympathetic strike if the employee participates in a strike in support of a trade dispute in respect of which the employee's employer-

(i) is not a party to the dispute; or

(ii) is not represented by an employer's organisation that is a party to that dispute; or

(b) an employer engages in a sympathetic lock-out if the employer locks-out an employee in support of a trade dispute -

(i) to which the employer is not a party; or

(ii) in respect of which the employer is not represented by an employer's organization that is a party to dispute.

Section 79 of the Labour Relations Act defines a protected strike. It reads-

79. (1) In this Part, a "protected strike" means a strike that complies with the provisions of this Part and "protected lock-out" means a lock-out that complies with the provisions of this Part.

(2) A person does not commit a breach of contract or a tort by taking part in -

(a) a protected strike or a protected lock-out; or

(b) any lawful conduct in contemplation or furtherance of a protected strike or a protected lock-out.

(3) An employer may not dismiss or take disciplinary action against an employee for participating in a protected strike or for any conduct in contemplation or furtherance of a protected strike.

(4) Civil proceedings may not be instituted against any person for -

(a) participating in a protected strike or a protected lock-out; or

(b) any conduct in furtherance of a protected strike or protected lock-out.

(5) Subsections (2) (3) and (4) do not apply to any action that constitutes an offence.

(6) An employer is not obliged to remunerate an employee for services that the employee does not render during a protected strike or lock-out.

Both parties are in agreement on the facts leading to the strike. The Respondents gave notices to the Claimant on 20th and 27th August 2012 respectively. The notices are attached to the Claimants affidavit as annexure 1 and 2. The relevant parts are the following-

LETTER FROM NOTICE BY THE 1ST RESPONDENT:

KNUT/LAB/52/3/2012

August 20, 2012

**Hon. John Munyes
Minister for labour
Ministry of labour
P.O. box 40326
NAIROBI.**

Dear Hon. Munyes,

NOTICE OF INDUSTRIAL ACTION, TRADE DISPUTE OVER SALARY REVIEW & IMPLEMENTATION OF LEGAL NOTICE 534 OF 1997:

We write to report to you the existence fo a Trade Dispute between the Kenya National Union of Teachers (KNUT) and the Teachers Service Commission (TSC). The issue in dispute is as follows:-

“SALARY REVIEW & IMPLEMENTATION FO LEGAL NOTICE 534 OF 1997”.

As you are aware, the Ministry of Public Service recently announced salary increments, the union learnt that these increments would not be extended to the teaching fraternity for reasons best known to the Government.

Seeing as it is, that the teachers have once gain been ignored, the Union wish to remind the Government that teachers had presented a memorandum for salary increments to the Teachers Service Commission as well as to the Minister for Finance. Our memorandum generally contained the following:-

- 1. A 300% salary increment.**
- 2. Immediate implementation of legal Notice 534 of 1997 with regard to teachers allowances.**
- 3. Responsibility allowance at 50%,40%,& 30% For Principlas, heads Deputies & Senior Teachers, and heads of Departments.**

We have attached annexure A, B, and C that summarize the above demands very vividly.

Owing to the Government’s and the TSC un-responsive position on these issues, the teachers of this nation are concerned and perturbed by the fact that the TSC continues to treat these issues casually. We want the Government to know that the hard working teachers shall not accept such discriminatory administrative action.

Subsequently guided by the Labour Relations Act 2007, Sections 62-76 and on behalf of the National Executive Council (NEC) and the entire membership of the KNUT, the Union hereby serves the Minister for Labour with a Seven (7) day Notice from Tuesday August 21, 2012 of intended Industrial Action by teachers on issues as indicated above.

PLEASE TAKE FURTHER NOTICE that at the expiry of this notice, if no solution will have been found to this problem, all the members of the KNUT shall commence Strike Action on Monday September 3, 2012 as directed by the NEC without further reference to the Ministry.

Be advised accordingly.

NOTICE BY THE 2ND RESPONDENT

KUPPET/MIN(LBR)O3/12

The Minister for Labour

Social Security House, Bishops Road

**P.O. Box 40326 00100
NAIROBI.**

RE: STRIKE

Having notified the employer and the relevant Minister of the Industrial Action to take place as from 5th September 2012, the Union's decision organ on these issues has directed that on 5th September 2012 no teacher will report to work.

Subsequently;

- 1. All principals of Schools, Teacher Training colleges and Technical Institutes are informed that on 5th September 2012 no teacher/instructor/lecturer will report for duty because of the nationwide teacher's strike that begins on that date.**
- 2. All teachers in Post Primary Institutions are asked to keep off from their work stations until further notice from the Secretary General.**
- 3. County Branch Secretaries are asked to keep this office informed of any incidences that do not conform to this notice.**

Thank you

It is clear from the text of the notices that they do not comply with the provisions of section 76 (b) and (c) and section 78 (1) (e) of the Labour Relations Act. The parties did not go for conciliation either as provided in section 62 of the Labour Relations Act or in their own internal machinery under the recognition agreements. Both notices are therefore not in compliance with the law as there were no conciliations that had failed to warrant the issuance of the strike notices. The strikes are therefore not protected under section 79 of the Labour Relations Act.

1. Whether the Claimant is entitled to the prayers sought

The second issue is whether the Claimant is entitled to the prayers sought. From the exhibits attached to the 2nd Respondents affidavit and the submissions made on its behalf in court, it is evident that the 2nd Respondent did make effort to get the Claimant to the negotiating table. The 2nd Respondent has attached its proposals through the memorandum sent to the Claimant on 17th May 2012 (**EXHIBIT AM 3**), the

letter dated 13th July 2012 addressed to the Minister for Education and copied to the Claimant among others (**EXHIBIT AM 1**), the letter dated 18th January 2012 addressed to the Salaries and Remuneration Commission (**EXHIBIT AM 2(b)**), and their analysis of the disparity in allowances between teachers and other civil servants (**EXHIBIT AM 4**). There is no evidence that the Claimant reacted to any of these correspondence from the 2nd Respondent. The only time the Claimant seemed to take any action was by the letters dated 27th and 30th August 2012 in response to the strike notices. I agree with the 2nd Respondent that this was too little too late. There was ample opportunity to engage earlier or to show a little more concern to the overtures made by the 2nd Respondent to draw the attention of the Claimant to the plight of its members. This was not forthcoming.

The jurisdiction to grant an interim injunction is equitable and the exercise of the order must be in accordance with equitable principles. The Claimant has not shown that it has conducted itself in a manner meriting the orders it has asked the court to give it. It did not respond to the gestures of the 2nd Respondent to discuss this issue before the strike notice was issued. It drove the 2nd Respondent to issue the strike notice before making any steps to have the issues discussed. It therefore cannot merit the equitable reliefs sought.

1. Whether the Respondents have contravened Article 53 of the Constitution

The third issue for determination is whether the Respondents have contravened Article 53 of the Constitution. The Claimant has submitted that the Respondents are in contravention of Article 53 of the Constitution. The relevant parts of Article 53 read as follows-

53. (1) Every child has the right—

- (a) ...**
- (b) to free and compulsory basic education;**
- (c) ...**
- (d) ...**
- (e) ...**
- (f) ...**

(2) A child's best interests are of paramount importance in every matter concerning the child.

I agree with the 2nd Respondents submission to the effect that the right of children under this Article does not override that of the Respondents members under Article 41 of the Constitution. In any event, what role did the Claimant play to ensure that those rights are not infringed? They simply ignored all the threats of industrial action by the 2nd Respondent. They must have known that if the threats were not forestalled the result would be a strike and it was therefore the responsibility of the Claimant to take all measures within their power to ensure that no industrial action took place. The Claimant did nothing. It is the responsibility of the Claimant to ensure that both the rights of the Children and those of the Respondents members are not infringed. In any event, this court is not dealing with a complaint brought by children whose right has been infringed. This is a case of employees who have decided to exercise their constitutional right to strike against an employer who has turned a deaf ear to their requests to harmonize their remuneration with those of other civil servants.

The court is however alive to the provisions of the Constitution establishing the Salaries and Remuneration Commission and the responsibilities of the Commission. It is the role of the Salaries and Remuneration Commission to advise the Government on the remuneration and benefits of all public officers and to ensure that the total public compensation bill is fiscally sustainable. This court cannot make any orders that will have the effect of contravening any provisions of the Constitution. The court also takes into account the wider public interest and urges the Salaries and Remuneration Commission to facilitate the resolution of this dispute by giving the necessary advice as mandated by the Constitution.

The powers of this court in dealing with a strike are provided for in section 77 of the Labour Relations Act as follows:

77. (1) A party to a dispute that has received notice of a strike or lock-out may apply to the Industrial Court to prohibit the strike or lockout as a matter of urgency if -

(a) the strike or lock-out is prohibited under this Part; or

(b) the party that issued the notice has failed to participate in conciliation in good faith with a view to resolving the dispute.

(2) A party that failed to attend any conciliation meeting may not seek relief under subsection (1)(b).

(3) The Industrial Court may, in granting relief in respect of any application made under subsection (1)(b), direct the parties to engage in further conciliation in good faith with a view to resolving the dispute.

Section 80(3) further gives this court the power to determine whether any strike or lockout complies with the provisions of the Act as follows-

80. (1)

(2)

(3) Any issue concerning whether any strike or lock-out or threatened strike or lock-out complies with the provisions of this Act may be referred to the Industrial Court.

The foregoing notwithstanding, the position still remains that there was no conciliation held by the parties before the strikes were called by both Respondents. Section 77(3) of the Labour Relations Act gives this court powers to “**direct the parties to engage in further conciliation in good faith with a view to resolving the dispute.**”

The court therefore makes the following orders:

1. The strikes called by the Respondents in their respective notices dated 20th and 27th August 2012 are unprotected having failed to comply with the requirements of section 76 of the Labour Relations Act;
2. The orders of this court made on 31st August 2012 restraining the Respondents from taking part in, calling, instigating or inciting others to take part in an unprotected strike pending the hearing and determination of this case are extended until final determination of the dispute;
3. The parties are directed to immediately engage in conciliation in good faith with a view to solving the dispute;
4. No employee shall be victimized for taking part in the strike called by the Respondent provided they report back to work immediately. No protection will be extended to any employee who continues to take part in the unprotected strike after the date of this order;
5. Should parties fail to agree on the issues in dispute after conciliation any of the parties is free to move the court to hear the parties on the substantive issues in dispute for final determination;
6. There shall be no orders for costs.

Orders accordingly

DATED AT NAIROBI THE 7TH DAY OF SEPTEMBER 2012.

Read in open court and signed on 19th September 2012.

HON. LADY JUSTICE M. ONYANGO

JUDGE