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REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

OF KENYA AT NAIROBI

PETITION NO. E 223 OF 2023

THE FORUM FOR GOOD GOVERNANCE AND

HUMAN RIGHTS.....PETITIONER

-VERSUS-

TEACHERS SERVICE COMMISSION..... 1ST RESPONDENT

HON. CABINET SECRETARY,

MINISTRY OF EDUCATION2ND RESPONDENT

THE HON. ATTORNEY GENERAL..... 3RD RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 09th May, 2024.)

RULING

1. The 1st respondent filed an application dated 19th April, 2024 through learned Counsel Mr. Allan Sitima Advocate for the Teachers Service Commission. The application was by the notice of motion under Article 159 of the Constitution, Section 3A, 75, 78 of the Civil Procedure Act, order 42 rule 6(1) and 8, order 51 rule 1 of the Civil Procedure Rules, section 21(1) and (3) of the Government

Proceedings Act and all enabling provisions of law. The application was based on the supporting affidavit of Antonina Lentoijoni sworn on 19.04.2024. The applicant prayed for orders:

- a) (Spent).
- b) (Spent).
- c) THAT the Honourable Court be pleased to order a stay of execution of the Judgement and Decree of Court (Ongaya PJ) delivered on the 17th April 2024 and all consequential orders pending the hearing and determination of the intended appeal.
- d) THAT the costs of this application be provided for.

2. The following grounds were stated in the application:

- a) That on 17th April 2024, the Honourable Court delivered judgement in the absence of the applicant in this matter wherein the Court issued orders in favour of the petitioner in terms of orders (a) to (d).
- b) That the applicant is aggrieved by the entire judgement of the Honourable Court and has lodged a Notice of Appeal to that effect. The said appeal raises substantial and weighty issues of law and fact with a high probability of success.

- c) The applicant has further requested a certified copy of the judgement and proceedings to facilitate the filing of the record of appeal.
- d) That the applicant is apprehensive that the petitioner will commence the process of execution to enforce the judgment and the consequential orders.
- e) That if the judgement is enforced in its present form, the applicant herein is likely to suffer irreparable loss and damage in that:
 - i) Learning in public schools scheduled to resume on 29/4/2024 will be paralysed as contracts for intern teachers have been declared unconstitutional and unenforceable.
 - ii) The Commission has no financial resources to facilitate compliance with the judgement specifically, to instantly convert the 46,000 interns to permanent and pensionable terms of service, as the national assembly did not appropriate the same in current financial year. The Court is invited to safeguard public interest for the greater interest of the public.

- iii) That the learning in public schools specifically in the junior schools is on the verge of being paralysed and disrupted as the teacher interns will demand full compliance with the judgement in terms of enhanced remuneration and conversion to permanent and pensionable status yet the Commission lacks budgetary provisions to do so.
- iv) That the rights of all learners in public schools underpinned under Articles 43 and 53 of the Constitution are on the verge of being violated as the commission has no financial resources to employ the 46,000 on permanent and pensionable terms and conditions of service.
- v) That the entire framework of the internship program, which is a key plank in teaching and learning, has been declared illegal which will make learning come to a standstill in the public sector.
- vi) That the effect of order no. (a) is that the employment contracts between the applicant and the teacher-interns are unconstitutional, null and void. Consequently, there is no

valid contract of service between the applicant and the teacher interns forthwith.

- vii) That in having the contracts of service between the teacher-interns and the applicant voidable, there will be a huge disruption of learning in all the learning institutions in the country as there will be no teachers in the schools.
- viii) That the applicant does not have the budgetary allocation of Kshs. 30 Billion to employ the teacher-interns on permanent and pensionable terms.
- ix) That the judgement does not align with the budgetary-making process as envisaged by the Finance Act and Public Finance Management Act.
- f) That the amount of money required for employment of the teachers on permanent and pensionable terms of service in compliance with the judgement in this matter runs into colossal public funds or resources, which were not budgeted for, and the Court is invited to issue stay orders for the greater interest of the public.

- g) The applicant has met the requirements under order 42, rule 6 of the Civil Procedure Rules, 2010.
- h) That it is in the interest of justice and fairness that pending the hearing and determination of the intended appeal the subject matter of the appeal be preserved by granting orders for stay. Unless the application is heard and determined urgently, the intended appeal shall be rendered nugatory and purely an academic exercise.
- i) That the petitioner or respondent will not suffer any prejudice if the orders sought herein are granted.
- j) That this application has been timeously filed without unreasonable delay.

3. It was further stated in the supporting affidavit as follows:

- i. That Antonina Lentoijoni is the acting director in charge of the staffing directorate of the 1st respondent, the applicant herein.
- ii. That the applicant can only propose the substantive appointment of teachers on permanent and pensionable terms in the budget-making process for the financial year 2025/2026. This budget must ultimately be subjected to Parliamentary approval before the

Commission can be mandated to employ the huge number of required teachers on permanent and pensionable terms.

- iii. That the Government has made provision to employ 26,000 teacher interns on permanent and pensionable terms beginning January 2025. Consequently, implementing the judgement in the current form will deny these teachers the opportunity to be engaged on permanent and pensionable terms come January 2025, as they will have been ejected from employment because of holding unconstitutional letters as per the impugned judgement.
- iv. That the applicant will continue to pay the interns their due stipend and employ those who have completed two years and are yet to be absorbed on permanent and pensionable terms into permanent and pensionable employment.
- v. She prayed that the application be allowed to enable the applicant to ventilate its appeal.

4. The petitioner also put in a notice of appeal dated 29.04.2024 seeking to appeal on part of the judgement of 17.04.2024. Consequently, in response to the application herein, they filed the

replying affidavit of Samson Omechi Ongera sworn on the 22.04.2024 and Mr. Leonard Ochieng appeared in that behalf. It was stated as follows:

- a) That Samson Omechi Ongera is the General Secretary of the petitioner herein.
- b) That pursuant to rule 77 of the Court of Appeal rules, 2010, an intended notice of appeal is in a prescribed Form D and the same must be lodged before the Registrar of the trial superior court and such notice of appeal shall be endorsed and sealed by the stamp of the Court. That from the foregoing, the notice herein does not meet the prescribed form and is hence defective and that the stay application herein is mounted against no intended appeal.
- c) That the order granted ex parte as order 4 by the Honourable Court was not sought in the application by the applicants herein and that this Honourable court lacks the jurisdiction to do so.
- d) That the said order was issued against already lapsed contracts which ended on 31.12.2023 amounting to re-

writing of the contracts between the applicant and the said teachers.

- e) That from the previously sworn replying affidavit of M/S Antonina Lentoijoni, the engagement of the said interns did not confer upon them any form of contract of employment.
- f) That the Honourable Court declined to grant the orders for mandamus and compensation and therefore the orders so sought and the grounds as contained at paragraph (e) to (f) of the Notice of Motion and paragraphs 6 & 7 of the supporting affidavit are in variance with the reliefs which this Honourable Court allowed in the impugned judgement and that parties should be bound by their own pleadings.
- g) That the applicant has not presented the argument of the lawfulness and the constitutionality of engaging duly certified teachers as student teachers and purporting to employ qualified teachers as interns.
- h) That the fiscal capacity and budgetary ability of the applicant to employ those teachers are extraneous issues to the subject matter and appeal cannot lie on issues which

were not for determination for this Honourable Court. That the issues being raised did not form part of the proceedings prior to the delivery of the judgement and no error of law or fact in the said judgement have been identified.

- i) That once the Honourable Court has made a finding and pronouncement of a constitutional injury, it has no authority under the Constitution to extend the life of anything done and or conducted in contravention to the Constitution.
- j) That no order in issue has compelled the applicant to employ the teachers who were disguised as interns nor are there orders to compensate them and the question of budgetary allocation and financial physical sustainability is grounded on quick sand of no legal value in the circumstances.
- k) He urged that the court finds the application frivolous and without merit and have it dismissed with costs.

5. The Court has considered the parties' respective cases and makes findings as follows:

- a) The record shows that both parties have filed their respective notice of appeal against the judgment. To that extent, the Court finds that the parties have indeed moved the Court of Appeal. For purposes of the instant application, there is no doubt that appeals have been preferred.
- b) As urged for the petitioner the Court declined to grant compensation or regularise the impugned contracts for intern teachers as per the reasons set out in the judgment. Accordingly, the orders in the judgment were declaratory as defining the parties' respective position in relation to the constitutional issues that had been raised in the petition. To that extent there appears to be no order potentially subject to execution flowing from the judgment save for parties taking appropriate steps consistent with the findings and declarations made therein.
- c) The applicant submitted that it had an arguable appeal and if application were not granted, the same would be rendered nugatory. The Court considers that such are considerations beyond the trial Court and such considerations would be made

in an appropriate application before the Court of Appeal. The Court is indeed precluded from reconsidering its judgment as though it were a Court of Appeal upon own judgment. Considerations of whether the appeal would be nugatory or arguable are found outside the Court's jurisdiction.

d) In the interest of justice, it appears to the Court that it would be appropriate for the *status quo* prior to the judgment to be maintained, with respect to the findings and orders of the Court in the Judgment, pending a compromise or rearrangement of affairs between parties or, the applicant filing appropriate application at the Court of Appeal, and, for that purpose in those terms, the *status quo* be maintained until 01.08.2024. Considering the public interest litigation involved no orders on costs of application will issue.

In conclusion, the application for the 1st respondent by the notice of motion dated 19.04.2024 is hereby determined with orders:

1) The *status quo* prior to the delivery of the judgment to be maintained, with respect to the findings and orders of the Court in the Judgment, pending a compromise or rearrangement of

affairs between parties, or, the applicant filing appropriate application at the Court of Appeal, and, for that purpose in those terms, the *status quo* be maintained until 01.08.2024.

2) No orders on costs of application.

**Signed, dated and delivered by video-link and in court at Nairobi
this Thursday 09th May 2024.**



**BYRAM ONGAYA
PRINCIPAL JUDGE**

