



REPUBLIC OF KENYA

AT THE EDUCATION APPEALS TRIBUNAL NAIROBI

EAT A 003/019

JOSEPHINE KATHURE MURIUNGI.....APPELLANT

VS

TEACHERS SERVICE COMMISSION.....RESPONDENT

AWARD

Facts of the Case

The brief facts upon which the appellant hinged her appeal are that;

1. She was employed by The Teacher's Service Commission on the 8th day of February 2012 and was posted to Lubunu day Secondary School in Tigania West within Meru County.
2. During her stint at Lubunu Day Secondary School, the appellant experienced medical conditions that hindered her ability to discharge her duties and on at least two occasions she miscarried. By a letter dated 12th June 2014, the Medical Superintendent-Meru Level Five Hospital recommended that she be deployed to a location where she can easily access her doctor as well as avoid to strain while reporting on duty. That appellant consequently requested to be transferred to a learning institution that is near a health institution.
3. Following her request, vide a letter dated 27th November, 2017, issued by the TSC Sub County Director, the appellant was transferred on medical grounds to Kaaga Girls Secondary school in Imenti North Sub-County.
4. The appellant worked there until on or about 31st January, 2019 when she received a letter from the TSC Sub County Director to the effect that she had been transferred from Kaaga Girls secondary School to Chugu Boys Secondary school in Imenti North Sub County.
5. Upon receipt of the letter, the appellant vide a letter dated 13th February 2019 addressed to the Meru County Director-Teachers Service Commission lodged an appeal with her employer against the transfer on the grounds inter alia that;
 - a) She had not requested for a transfer to Chugu Boys Secondary school and that the location of the School was away from town being an additional 4.5kms away from the main access road where she can board a public Service Vehicle. She stated that this distance would expose her to danger as observed by the doctor.
 - b) She also contended that the decision to transfer her was not based on any valid reason and that it failed to consider her medical condition and that the transfer would worsen her medical situation.
 - c) She sought audience with the principal of Kaaga Girls High School with a view to discuss the transfer to no avail.
 - d) She finally made a plea that the transfer be reconsidered on account of her medical condition until such a time when her doctors would declare that she can walk long distances.
6. By a letter dated 26th February 2019, the Meru County TSC Director informed the appellant that her appeal was unsuccessful and directed her to adhere to the contents of the transfer letter dated 31st January 2019.
7. Subsequently, vide a letter dated 2nd March 2019, the appellant wrote to the Cabinet Secretary Ministry of Education Science & Technology setting out the history of the matter and seeking his intervention. The matter was then referred to this tribunal and was fixed for hearing and disposal on 30th July 2019.

8. On the appointed date, the appellant herein informed this tribunal that she had filed a petition at the Employment & Labour Relations Court in Meru which has been heard and has been reserved for judgement on 3rd November 2019.

Determination

9. From the foregoing, it is emerging that the respondent is the employer of the appellant herein. It has the mandate to conduct all affairs pertaining to employment of teachers. The respondent made a decision to transfer the appellant which decision is contested by the appellant owing to her medical condition.

10. Having analysed the rival positions of the parties herein, it is important to appreciate the law establishing this tribunal.

This tribunal is established under the provisions of section 93 of the Basic Education Act No.14 of 2013.

The Basic Education Act is

“An Act of Parliament to give effect to Article 53 of the Constitution and other enabling provisions; to promote and regulate free and compulsory basic education; to provide for accreditation, registration, governance and management of institutions of basic education; to provide for the establishment of the National Education Board, the Education Standards and Quality Assurance Commission, and the County Education Board and for connected purposes “

Sec 93. The Education Appeals Tribunal

(1) There is established an Education Appeals Tribunal.

(2) Any person aggrieved by the decisions of the County Education Board may appeal to the Education Appeals Tribunal.

(3) The Cabinet Secretary in consultation with the National Education Board and relevant stakeholders shall prescribe regulations on the operation and structure of the Education Appeals Tribunal.

(4) The Education Appeals Tribunal shall comprise of—

(a) the chairperson of the National Education Board;

(b) the Director-General;

(c) the Secretary to the Teachers Service Commission;

(d) a representative of the Education Standards and Quality Assurance Council;

(e) a representative of the Kenya Private Sector Alliance;

(f) a representative of the Attorney-General; and

(g) the Chief Executive Officer of the National Council for Nomadic Education in Kenya.

11. From the foregoing, having analysed the facts of the case and the law, there are two preliminary issue that arises for determination;

(i) First is the question as to whether this tribunal has jurisdiction to preside over the appellant’s case.

(ii) Secondly is whether the matter before the tribunal is ***sub-judice***

(i) On Jurisdiction

12. From the appellant’s case, she was employed as a teacher by the respondent herein. She served in various schools until a decision was made by her employer to transfer her. The decision was made by The Teachers Service Commission. Aggrieved by that decision, she lodged an appeal with the Teacher’s Service Commission Meru County Director and The Cabinet secretary in charge of education seeking to have the transfer reconsidered. The appellant is aggrieved by that decision hence this appeal.

In ***Samuel Kamau Macharia & Another v. Kenya commercial Bank & 2 Others***, Application No. 2 of 2011 [2012] eKLR, the supreme court pronounced itself on jurisdiction thus [paragraph 68]:

“(68) A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the

very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.” (Emphasis provided).

13. The supreme Court in an extensive analysis of the issue of its own jurisdiction quoted with approval the oft cited case of **Owners of Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Limited**[1989] KLR 1 in the first advisory opinion rendered by the Court in **In Re The Matter of the Interim Independent Electoral Commission** where the Court stated:-

*“[29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in **Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited** [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):*

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”(underlining supplied)

*[30] The **Lillian ‘S’** case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.”*

14. The jurisdiction conferred on this tribunal is an appellate jurisdiction. That jurisdiction is strictly limited by section 93(2) of The Basic Education Act to matters arising from the decisions of The County Education boards. With utmost respect, the appellants case does not arise from a decision of the County Education Board but from The Teachers Service Commission which is an independent Commission established under Chapter 15 of The Constitution of Kenya. On that account alone this tribunal holds and finds that it does not have jurisdiction to preside over the appeal in the nature presented.

(ii) Whether the matter before the tribunal is sub-judice

15. A careful reading of the appellants case reveals with utmost respect, that the case does not arise from a decision of The County education Board. It therefore follows that the dispute herein is a dispute between an employer and employee which falls squarely within the sphere of employment and labour relations.

16. The constitution at article **162(2)(a)** has established a court that deals with employment and labour relations and at article **162(3)** Parliament has determined the jurisdiction and function of this court by enacting The Employment and Labour Relations Court Act.

Article 162

(1).....

(2) Parliament shall establish courts with the status of the High court to hear and determine disputes relating to

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause 2

17. The Employment and Labour Relations Court Act No. 20 of 2011 is an Act of Parliament to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations and for connected purposes.

18. At the hearing of this matter, the appellant herein informed this tribunal that she had filed a petition no.3 of 2019 before the Employment & Labour Relations Court in Meru which has been heard and has been reserved for judgement on 3rd November 2019.

19. It is therefore reasonable that the appellant having filed a petition before the Employment & Labour Relations Court this tribunal downs its tools.

20. From the foregoing, this tribunal having considered both the facts of the appellant and respondent’s case and taking into consideration the above provisions of the law makes the following observations;

a) This tribunal exercises an appellate jurisdiction by dint of section 93(1) of The Basic Education Act. This appellate jurisdiction is further limited by dint of section 93(2) of The Basic Education Act to appeals by any person aggrieved by **the decisions of the County Education Board.**

b) The appeal before this tribunal does not arise from a decision of The County Education Board but rather a decision of The Teachers' Service Commission implemented and communicated by The Meru County TSC Director. There is nothing that shows that the County Education Board was involved in the impugned decision herein.

c) The nature of the dispute by the appellant and lodged before this tribunal is that arising from an employer employee relationship. The proper forum would be the Court established by Article 162(2)(a) and article 162(3) of the Constitution and it is encouraging that the appellant has already moved the Court.

Conclusion

Taking into account the decisions in **Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited**[1989] & **Samuel Kamau Macharia & Another v. Kenya commercial Bank & 2 Others, Application No. 2 of 2011 [2012] eKLR**, and which are binding on this tribunal, this tribunal must **only exercise jurisdiction as conferred by statute which is The Basic Education Act. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. Put differently, it cannot usurp the jurisdiction conferred by the constitution at article 162(2)(a) and The Employment & Labour Relations Act to The Employment and Labour relations Court.**

Therefore without jurisdiction, this tribunal cannot entertain these proceedings.

The upshot of the foregoing is that this tribunal makes a finding that it does not have jurisdiction to entertain this appeal and cannot therefore grant the appellant's prayer seeking to challenge the transfer.

Following the facts outlined above, this tribunal is not inclined to grant the appellant the relief sought save to dismiss the appeal.

That shall be the order of the tribunal

Dated and delivered at Nairobi this 17th day of September 2019.

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| WAIGI KAMAU | - | CHAIRMAN..... |
| ELYAS ABDI | - | MEMBER..... |
| PIUS MUTISYA | - | MEMBER..... |
| HARUN YUSUF | - | MEMBER..... |