REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO. 151 OF 2018

IN THE MATTER OF ARTICLES 53(1) (b), 53 (2) 41 (1), (5),159 (1) & (2),230 (4) & (5) AND 237 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE LABOUR RELATIONS ACT (2007)

AND

IN THE MATTER OF THE TEACHERS SERVICE COMMISSION ACT, 2012

AND

IN THE MATTER OF THE CODE OF REGULATIONS FOR TEACHERS

AND

IN THE MATTER OF THE COLLECTIVE AGREEMENT NO. 282 OF 2016

AND

IN THE MATTER OF THE NOTICE OF WITHDRAWAL OF LABOUR BY KENYA NATIONAL UNION OF TEACHERS (KNUT)

W.E.F. 2ND JANUARY, 2019

BETWEEN

TEACHERS SERVICE COMMISSION.....APPLICANT/PETITIONER

-VERSUS-

KENYA NATIONAL UNION OF TEACHERS (KNUT).....RESPONDENT

AND

MINISTRY OF LABOUR & SOCIAL PROTECTION.....INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Friday 12th July, 2019)

JUDGMENT

The petitioner filed the petition on 31.12.2018 through Oyucho Timon Advocate who appeared together with Mr. Anyuor Advocate. The petition was based on the annexed supporting affidavit of Nancy Njeri Macharia, the petitioner's Secretary and Chief Executive Officer. The petitioner prayed for:

a) A declaration that the Notice of Withdrawal of Labour by teachers in the public service dated 19.12.2018 is illegal, null and void ***ab initio*** and is hereby quashed.

b) A declaration that the respondent's industrial action set to commence on 02.01.2019 or soon thereafter is illegal and unprotected under the Labour Relations Act, 2007.

c) A prohibitory injunction restraining the respondents, its officials, members or any persons acting on its behalf, from commencing, engaging in or participating in the illegal strike.

d) An order directing the respondent to resume the bi-partite negotiations which were adjourned on 03.10.2018 on all outstanding issues.

e) In the alternative, to prayer (d) herein above, an order directing the respondent to subject it-self to the conciliation proceedings already commenced by the interested party.

f) Any other order that the Honourable Court may deem fit and just to grant.

g) Costs of the petition to be borne by respondent.

The respondent opposed the petition by filing on 25.03.2019 the replying affidavit of Hon. Wilson Sossion through SMS Advocates and Mr. Sigei and Mr. Mbaluto Advocates appeared as lead by Mr. Paul Muite, SC.

On 02.01.2019 the Court delivered a ruling on the petitioner's interlocutory application which had been filed together with the petition and by the notice of motion dated 31.12.2018. In the ruling, the Court gave orders as follows:

a) That pending the hearing and determination of the petition or further orders by the Court, there shall be stay of the taking effect of the strike and the strike notice issued by the respondent Ref. No.KNUT/LAB/52/59/2018 dated 19.12.2018 as reinforced by strike circular No. KNUT/CIRC/122/41/2018 dated 30.12.2018 or any strike notice on the 4 grievances or disputes as may subsequently issue with the effect that the respondent by itself, its officials, members, agents or any other person acting in that behalf is hereby restrained from implementing such strike notice or strike and the strike as scheduled effective 02.01.2019 or any date thereafter, as the case may be in that regard, is stayed, and the teachers affected by the notice shall continue on duty uninterrupted accordingly.

b) That pending the hearing and determination of the petition or further orders by the Court, the applicant and the respondent to attend the conciliation proceedings before the Conciliation Committee on 03.01.2019 at 9.00 O'clock in the forenoon at the Ministry of Labour and Social Protection, Nairobi; and for that purpose the applicant's Chairperson and Secretary, and, the respondent's Secretary General and Chairperson, to lead their teams respectively.

c) That pending the hearing and determination of the petition or further orders by the Court or resolution of the dispute through conciliation committee, whichever is earlier:

i. The applicant will determine appeal or application for review of transfer of any of the 3,094 teachers as currently transferred not later than 15.02.2019 and no teacher who so appeals or seeks a review will be victimised, harassed or intimidated in any manner.

ii. Pending an agreement on transfer of branch union officials beyond the geographic limits of the branch they are elected to serve, the decisions to transfer any of such union officials and as per the list in exhibit WS9 is hereby stayed as such transfer beyond the

branch territory is set aside.

iii. There shall be stay of implementation of Career Progression Guidelines being circular No. 7 of 2018 being Ref. No. TSC/ADM/192A/VOL.IX/37 of 02.05.2018 and pending agreement in that regard and enactment.

iv. Promotional decisions to be made as per the collective agreement and the prevailing regulations or such other regulations that may be promulgated as per section 35 (2) of the Teachers Service Commission Act, 2012 on career progression and professional development programmes as may be prescribed by regulations.

v. As teacher professional development programme has not yet been implemented, parties to engage as per the clause 12 of the collective agreement towards appropriate Teachers Professional Development (TPD) Modules and policy.

vi. Parties to engage per clause 11 of the collective agreement towards tools, instruments, processes and procedures on performance management and the same be implemented only after such agreement and promulgation of the relevant regulatory provisions.

d) Mention on 17.01.2019 at 9.00 O'clock in the forenoon or soon thereafter to report on the progress of the conciliation proceedings and for further directions on the petition.

e) Costs of the application in the cause.

On 05.03.2019 and by consent of the parties the Court ordered thus, "**2. In view of the conciliator's report and comments thereon as filed and served for the parties, the parties to meet and to file a joint memorandum on agreed resolutions on issues in dispute and in event of disagreement on any of the grievances, the parties' respective positions be stated.**" The parties filed the joint memorandum on 08.04.2019 and on the same date the Court, by consent of the parties, adopted the joint memorandum as an order by the Court and parties directed to file submissions on the matters in dispute. This judgment is the Court's findings on the disputed issues towards disposal of the petition as agreed between the parties. The Court has considered the material on record including the parties' respective submissions and makes findings as follows.

The **1st issue** in dispute was on transfer of teachers. Parties have consented as follows:

a) The petitioner shall undertake transfer of teachers being members but non-officials of the respondent in accordance with the provisions of the Code of Regulations of Teachers (CORT).

b) The teachers being non-institutional administrators and being the respondent's officials shall be transferred within respective geographical areas they are elected as such to represent.

The parties have failed to agree on transfer of teachers being institutional administrators and being the respondent's officials. The petitioner's position is that institutional administrators being part of the administrative structure of the employer (TSC) should not hold elective posts in the respondent trade union. The respondent's position is that all teachers are unionisable as per Article 41 of the Constitution, Part II; sections 4, 5, 8, and 9 of the Labour Relations Act and Regulation 190 of the CORT.

The petitioner's case is that its functions are provided for in Article 237 (2) of the Constitution including to promote and transfer teachers. The petitioner further submits that under Article 249 (2) (b) of the Constitution the petitioner as a constitutional commission is subject only to the Constitution and the law; and is independent and not subject to direction or control by any person or authority. Thus in effecting transfer of teachers, the petitioner is not subject to any direction or control by any person or authority including the respondent. Thus it is submitted for the petitioner that the respondent should not involve itself in demanding that it is involved in the petitioner's discharge of the function to transfer teachers. The petitioner's case is that the CORT as a subsidiary legislation, the recognition agreement between the parties, and the collective agreement between the parties are subject to the Constitution. Where they are inconsistent to the constitutional provisions, then they are void, null and invalid to the extent of their inconsistency. The petitioner further submits that in the teaching service institutional administrators (who include principals, head teachers, deputy principals, deputy head-teachers, senior masters or mistresses and senior teachers) are appointed by the petitioner and are responsible for the overall management of school's human and other resources, supervision of staff, implementation of educational policy guidelines and professional practice. As part of the petitioner's administrative structure to manage functions at school level, the administrators were converted to special super salary scales per the addendum to the collective bargaining

agreement dated 16.06.2017. The petitioner therefore submits that the institutional administrators should not be unionisable at all. The petitioner submits that the Industrial Charter dated 30.04.1984 is the tripartite foundation on which industrial relations are premised in Kenya and as was negotiated by the government, workers and employers. Recognition agreements must flow from the Industrial Charter. The petitioner submits that Appendix C of the Industrial Charter excludes the following persons from union representation:

a) Persons who are formulating, administering, coordinating or controlling any aspects of the organisation's policy.

b) Staff performing work of confidential nature as shall be defined by a tripartite committee.

c) The executive chairman, managing director, general manager and his deputy, and financial heads, that is, departmental heads and their deputies.

d) The branch manager and his deputy.

e) Persons in charge of operations in an area and their deputies.

f) Persons having authority in their organisations to hire, transfer, appraise, suspend, promote, reward, discipline and handle grievances provided that such persons fall within the Industrial Charter, clause No. 11-1.

g) Persons training for the above positions (including under-studies).

h) Personal secretaries to persons under (a) above.

i) Persons whose functional responsibilities are of a confidential nature as shall be agreed upon between the parties.

j) Any other category of staff who may, in the case of any particular undertaking be excluded from union representation by mutual agreement.

The petitioner has cited **Kenya Union of Sugar Plantation and Allied Workers –Versus- Mumias Sugar Company Limited & 6 Others [2016]eKLR**, where Onyango J held that trade unions are bound by the Industrial Charter. The petitioner also cited **Kenya Chemical and Allied Workers Union –Versus- Bamburi Cement Limited [2017]eKLR**, where the Court of Appeal held that as per clause B (10) and Appendix C of the Industrial Charter, it must follow that, those in the management of an organisation cannot form or belong to a trade union. The petitioner further cited **Kenya Game Hunting and Safari Workers Union –Versus- Lewa Wildlife Conservancy Limited [2014]eKLR**, where Rika J held that the Industrial Charter was a product of tripartite engagement and through its wide acceptance, it has become a cornerstone of industrial jurisprudence.

The petitioner further submitted that the recognition agreement between the parties did not provide for levels of union representation and therefore the recognition agreement had no legal validity because it had not been properly executed and parties have operated on the belief that there exists a recognition agreement signed on 15.05.1968; and the provisions of the recognition agreement are in direct conflict with the provisions of section 54 of the Labour Relations Act, 2007. The petitioner submitted that the Court should rectify the error as was held by Ndolo J in **Banking Insurance and Finance Union (K) –Versus- Standard Chartered Bank of Kenya [2013]eKLR** thus, "**It also cannot be that just because parties operate in error out of Court, then the Court is called upon to give its seal of approval that error. The Court must always operate within the four corners of the law....**"

The petitioner submits that section 2 of the Labour Relations Act, 2007 defines "**Industrial Charter**" as "**a tripartite agreement between the Government, the most representative employers' organisation, and the most representative employees' organisation for the regulation of labour and industrial relations in Kenya.**" Thus, the petitioner submits that the Industrial Charter is, per Article 24 of the Constitution, a limitation to the right in Article 41(2) (c) and (d) of the Constitution that every worker has the right to form, join or participate in the activities and programmes of a trade union; and to go on strike. The institutional administrators should therefore not join the union or participate in activities of the union. The petitioner further submitted that Article 53 of the Constitution upholds the best interest of the child and the institutional administrators are custodians of institutional property and resources and they act as guardians of the welfare and interests of the school going children. They should therefore be exempted from trade union activities. The institutional administrators should not therefore be allowed to

mobilize industrial action, be stimulants of union activities and champions of union welfare and at the same time play the role as managers. The petitioner cited the Court of Appeal holding in **Kenya Chemical and Allied Workers Union –Versus- Bamburi Cement Limited [2017]eKLR**, that the Industrial Charter has identified those in the management who by reasons of conflict of interest cannot be members of the union. The petitioner also cited regulation 190(1) of the CORT thus, "**A teacher serving in an administrative capacity may be a member of a trade union provided that such membership shall not interfere or in any way conflict with the performance of the teacher's assigned duties.**" It was submitted for the petitioner that the provision contravened the provisions of the Charter and it was therefore null and void to that extent. It was further submitted for the petitioner that should the Court find that institutional administrators are unionisable then such institutional administrators may remain ordinary members of the KNUT but should not hold any elective position in the union to avoid conflict of interest.

The respondent submits that the relationship between the petitioner and the respondent is anchored in the Constitution, relevant statutory provisions, the recognition agreement and the collective bargaining agreement (CBA) for the period 01.07.2017 to 31.06.2021. Under section 59 of the Labour Relations Act, the CBA binds parties thereto. The respondent submits that it is cognisant of the petitioner's constitutional mandate but teachers who are not interested in administrative roles should not be forced to take such roles. The respondent relies on regulation 190 of the CORT for the position that institutional administrators are unionisable subject to limitations that there should be no interference or conflict to performance of their duties. Further, the respondent submits that Industrial Charter is subject to law and does not replace or substitute relevant statutes. Further the respondent and the petitioner are bound by the recognition agreement, the CBA and the issue of unionisable members was not before the Court and the Court should not delve into the issue as urged for the petitioner. The issue on validity of the recognition agreement was not pleaded, it was only raised in submissions, and existence of a recognition agreement is not in dispute. Section 4 of the Labour Relations Act proclaims freedom of association and does confer the right to members of a trade union to participate in all lawful activities including standing for an election or seeking for election or appointment as a representative without limitation in that regard. Further the holding in **Kenya Chemical and Allied Workers Union –Versus- Bamburi Cement Limited [2017]eKLR**, is instructive that the cadre to be excluded from joining the union would flow from mutual agreement between the parties to the recognition agreement and the employees excluded would be removed from the union and application of the CBA. The respondent submitted that the petitioner had made a conscious election and accepted the adoption by the respondent of the entitlement of all its members to offer themselves for elective positions in the trade union and the petitioner is estopped from going back on that acceptance.

The Court has considered the parties' positions and submissions.

First, as submitted and acknowledged for both the petitioner and the respondent, the Labour Relations Act, 2007 defines "**Industrial Relations Charter**" thus "**means a tripartite agreement between the Government, the most representative employers' organisation and the most representative employees organisation for the regulation of labour and industrial relations in Kenya.**" The Court finds that the Industrial Relations Charter is therefore undisputedly a tripartite agreement. Article 24 (1) of the Constitution of Kenya 2010 provides that a right or fundamental freedom in the Bill of Rights (such as Article 41 on Labour Relations) shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including:

a) the nature of the right or fundamental freedom;

b) the importance of the purpose of the limitation;

c) the nature and extent of the limitation;

d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and freedoms of others; and

e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

The Court has considered that the Industrial Relations Charter is a tripartite agreement and falls short of law or legislation. Thus the Court returns that the provisions of the Industrial Relations Charter cannot serve as a limitation of the rights conferred under Article 41. However, the Charter draws its relevance and binding force by reason of the parties' agreement or consent and where the tripartite contracting and consenting parties desire that any content of the Industrial Relations Charter amounts to a limitation of any of the rights in the Bill of Rights such as Article 41 of the Constitution, it is the opinion of the Court that such limitation must be

enacted into law as contemplated and envisaged in Article 24(1) of the Constitution.

Second, it is clear that the Industrial Relations Charter is an agreement of general application for the regulation of labour and industrial relations in Kenya**.** In the opinion of the Court and as submitted for the respondent, the provisions of the Charter apply where the recognition agreement and collective bargaining agreement (CBA) are silent and have not specifically provided for the issue at hand or the Charter serves by way of filling the gaps not agreed upon by the parties and further as a point of reference in concluding the recognition agreement and CBA in individual cases. Thus where the employer and the trade union have considered the provisions of the Industrial Relations Charter and concluded their specific provisions on the matter at hand in their individual recognition agreement and CBA, the overriding and applicable provision is as per the recognition agreement and the CBA in the individual cases and not the general provision in the Industrial Relations Charter. The Court has further considered that the prevailing Industrial Relations Charter was agreed upon and concluded on 30.04.1984 long before the coming into operation of the Constitution of Kenya, 2010 and its provisions will therefore need to be aligned to the provisions of the Constitution. As submitted for the respondent the Charter is not law but an agreement and it is therefore not part of law in force immediately before the effective date of the Constitution of Kenya 2010 as envisaged in section 7 of the 6th schedule to the Constitution. In the opinion of the Court an urgent and important assignment is for the parties to the tripartite agreement to review the Industrial Relations Charter with a view of aligning it to the Constitution and keeping pace with the changed employment and labour relations environment.

Third, in the present dispute, the CORT and the CBA concluded between the parties appear to resolve the issue at hand. Regulation 3 defines "**Head of Institution" means the lead educator or administrator in a public educational institution appointed by the Commission as such and responsible for the implementation of the educational policy and professional practices**." Regulation 190 (1) provides that a teacher serving in administrative capacity may be a member of a trade union provided that such membership shall not interfere or in any way conflict with the performance of the teacher's assigned duties. Regulation 190(2) provides that in event of an industrial action or any other disturbances leading to stoppage of work, the administrator shall ensure the safety of all the learners, colleagues, members of the public and the property and facilities within the educational institution. Regulation 191 then provides as follows:

1) Every teacher has a right to fair labour practices as enshrined in the Constitution.

2) Where an industrial action or any other disturbance leading to stoppage of work occurs:

a) the teacher shall ensure the safety of all the learners, colleagues, members of the public and the property and facilities within the educational institution; and

b) the administrative staff shall continue to undertake such duties as are necessary to ensure the safety and security of school property and to safeguard the welfare of learners;

c) a teacher is expected at all times during an industrial action to conduct himself in a manner that befits the dignity of the teaching profession and avoid behaviour that may bring the profession into disrepute.

The recognition agreement between the parties and exhibited by the petitioner shows that the agreement was made on 15.05.1968 between the petitioner and the respondent and prior to the preamble the agreement states thus, "**Whereas the Union is the organisation appearing to the Minister for Education to represent teachers in the teachers' service.**" In the preamble, "**Manager means any person or body of persons responsible for management and conduct of a school including a Board of Governors**" The recognition agreement provides, ***inter alia***, as follows:

"**2.This agreement shall enter into force on the date thereof and shall remain in force for a period of one year and shall continue in force thereafter unless either party gives to the other party two months' notice in writing of a proposal to rescind or by mutual agreement to modify the terms of this agreement.**

5.The Commission hereby affords full recognition of the union as a representative body and the sole professional organisation representative body the interests teachers in the teaching service.

6. The union undertakes to submit to the Commission without delay the names of all National Officials and of all relevant local officials and of the union, appointed in accordance with the union's constitution, and any changes of such officials

from time to time as they occur. The Commission undertakes not to enter discussions or negotiations with any person purporting to represent the union other than an accredited representative of the union who has been provided by union with proper credential setting out inter-alia his position in the union.

7. The union undertakes that no teacher shall be compelled to become a member of the union and the Commission undertakes that no teacher shall be penalised on membership. The union likewise undertakes that no teacher, account of his union who is not a member of the union, shall be penalised on that account, provided that nothing in this Agreement shall preclude the introduction of a closed shop system, if jointly agreed upon by the parties thereto as being in the best interest of both parties.

8. The union undertakes that accredited representatives of the union will carry out the duties assigned to them by the Manager of the school in which they are serving during the prescribed hours of duty and that such representatives will not leave their work during such hours for any union activities whatsoever without the written permission of the Commission or its agents.

9.The Manager of each school has the sole right and duty to manage the school, and through the Principal, headmaster or headmistress, to assign the teachers in the school to such teaching and other duties as fall to be performed by a teacher in the school and to determine the times at which duties shall be performed.

10. In the event of a strike, or any other disturbances leading to a stoppage of school work, the staff of a school shall continue to undertake such duties, as are necessary to ensure the safety and security of school property and, in the case of a boarding school, to safeguard the welfare of the pupils. Such duties shall be defined from time to time by both parties.

11. The Commission recognises the right of the union to deal directly with the Minister of Education on all matters which are not legal delegated to the Commission under the Teachers Service Commission Act, 1965 (No.2 of 1977).”

The CBA signed between the petitioner and the respondent dated 25.10.2016 defines “**head of institution” means the lead educator or administrator in a public educational institution appointed by the Commission as such and responsible for the implementation of the educational policy and professional practices.**” Further, the CBA defines “**teacher” shall have the meaning assigned to it under the Teachers Service Commission Act.**” Clause 18 of the CBA on industrial action provides that in event of an industrial action, parties shall adhere to Part VIII and Part X of the Labour Relations Act. Further, it provides that with a view to maintain nobility of the teaching profession, parties agree that in event of an industrial action, they shall conduct themselves with dignity, civility and decorum.

Further and as submitted for the petitioner, section 2 of the Labour Relations Act, 2007 defines “**unionisable employee” in relation to any trade union means the employees eligible for membership of that trade union.**” Further, as submitted for the respondent, section 4 of the Labour Relations Act, 2007 confers the employee’s right to freedom of association. Section 4(1) provides that every employee has the right to:

a) participate in forming a trade union or federation of trade unions;

b) join a trade union; or

c) leave a trade union.

Section 4(2) of the Act provides that every member of a trade union has the right, subject to the constitution of that trade union to:

a) participate in its lawful activities;

b) participate in the election of its officials and representatives;

c) stand for election and be eligible for appointment as an officer or official and, if elected or appointed, to hold office; and

d) stand for election or seek for appointment as a trade union representative and, if elected or appointed, to carry out the functions of a trade union representative in accordance with the provisions of the Act or a collective agreement.

Section 5 (3) of the Act provides thus, **"(3). No person shall give an advantage or promise to give an advantage, to an employee or person seeking employment in exchange for the person not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act; Provided that nothing in this section shall prevent the parties to a dispute from concluding an agreement to settle the dispute**." Section 5(1) of the Act provides that no person shall discriminate against an employee or any person seeking employment for exercising any right conferred by the Act.

Under section 8 of the Act the respondent is entitled, subject to provisions of the Act, to determine its own constitution and rules and, to hold elections to elect its officers. The Court observes that the recognition agreement between the parties upholds the provisions of that section. Section 27 of the Act provides for procedure for changing the name of a trade union or constitution of a trade union and it entails a resolution by the trade union in that regard and notifying the Registrar of Trade unions as prescribed in the section. Section 34 (1) of the Act provides that election of officials of a trade union shall be conducted in accordance with the registered constitution of the trade union. Section 54 of the Act provides that the terms of recognition of a trade union by an employer shall be in a recognition agreement. The section further provides that an employer may apply to the labour board to terminate or revoke a recognition agreement.

With respect to the present dispute the Court has considered the enumerated provisions of the CORT, the recognition agreement between the parties, the cited provisions of the Labour Relations Act, 2007, and the CBA and finds as follows:

a) The Court finds that the parties have agreed as per the recognition agreement and the CORT that all persons employed by the petitioner including principals or head-teachers in the teaching service shall be members of the respondent trade union. In that regard, the CORT and the recognition agreement have put in place measures to manage any conflict of interest that may emerge taking into account the special role played not only by the principals or head-teachers but also by the teachers generally. As cited in the judgment, the CORT and the recognition agreement are clear on the actions to be taken by principals or head-teacher or persons playing their roles in event of a strike or other disturbance in schools. Accordingly, there is no established basis for this Court to interfere with the parties' conscious, voluntary, lawful, constitutional and binding recognition agreement, CBA and the provisions of the CORT in that respect as relates to membership in the respondent by principals or head-teachers and persons playing their roles in the schools. The Court returns that the parties are bound by their recognition agreement and the CBA accordingly together with applicable legislative provisions in that regard.

b) The Court finds that in view of the cited provisions of the Labour Relations Act, 2007 and parties having agreed that all teachers will be members of the respondent including a head of institution as defined in CORT (principals and head-teachers). The Court returns that principals and head-teachers must enjoy equal rights like other members of the respondent including participation in the respondent's elections as candidates or voters as prescribed in the cited provisions of the Labour Relations Act, 2007. In particular the Court finds that once a head of institution is a member of the union as already agreed between the petitioner and the respondent in the recognition agreement and the CBA and as provided for in the CORT, the head of institution must then enjoy equal membership rights as other members and as conferred by relevant statutory provisions and in line with the mandatory provisions of Article 27(1) of the Constitution thus, "**Every person is equal before the law and has the right to equal protection and equal benefit of the law.**" Thus the Court considers that it was misconceived in submitting for the petitioner that heads of institution or institutional administrators if found to be unionisable then the Court should nevertheless find that they may remain such ordinary members of the respondent trade union but should not hold any elective position in the union, in the petitioner's submissions, "...**to avoid conflict of interest.**" The Court finds that the heads of institutions once they are members of the union they thereby enjoy full rights like other members of the trade union as conferred in Article 41 of the Constitution and in line with the mandatory provisions of Article 27(2) thus, "**(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.**" Further, the Court finds that the conferment upon the head-teachers, principals and other senior teachers what the petitioner called super scale salaries under the CBA cannot justify denial of union membership or election rights to such teachers as the parties did not agree as much in the CBA and the same would amount to a disadvantage or advantage on account of not being a member of the union or not participating in union activities. The Court finds that such are matters carefully and decisively addressed against in the cited provisions of the Labour Relations Act, 2007 and no unionisable employee can be conferred or denied a benefit by the employer as a consideration or ground for withdrawal of union membership or not participating in union elections or other lawful activities.

c) The recognition agreement is clear that the respondent determines its union officials and appoints them in accordance with its constitution and notifies the petitioner accordingly. The provision is in line with the relevant and cited provisions of the Labour

Relations Act, 2007 that the trade unions carry out elections in accordance with the provisions of their respective constitutions. Thus, eligibility of a head of institution to be a candidate in the respondent's election is a matter which can only be determined by the respondent's constitution and the Court will respect and uphold the statutory provision and as agreed upon by the parties in the recognition agreement, in that regard.

d) The Court returns that the recognition agreement has clear provisions on the amendment of its provisions and the Labour Relations Act, 2007 has elaborate provisions on the revocation of a recognition agreement. The Court finds that the contractual and statutory provisions apply and parties are bound accordingly including on the issue of the scope of unionisable employees who are subject of the recognition agreement. The Court considers that it cannot vary or alter the lawful provisions of the recognition agreement on the scope of eligible union membership or scope of unionisable teachers.

e) The petitioner's case is that a head of institution (principal or head-teacher or teachers playing one or other role of a head of institution) are managers of the school or learning institution and therefore they should not be unionisable. The Court has considered that submission and returns that in the complex structure of management of schools and similar learning institutions in the public service, there is a deliberate structure whereby teachers are carefully subjected to appropriate managers of the schools or institutions. Thus the recognition agreement states that the manager of a school is the Board of Governors. In that regard the Court follows the holding by Ngugi J. in **Elimu Yetu Coalition –Versus- Teachers Service Commission and 2 Others, High Court Petition No. 131 of 2015 at Nairobi .** The High Court, in that case, considered sections 55, 56, 59, and 62 of the Basic Education Act, 2013; section 2 of the Teachers Service Commission Act on definition of head teacher and principal; Article 237 of the Constitution on the mandate of the Teachers Service Commission, and the Court stated, thus, **"52. It seems to me that the effect of the above provisions is to ensure that the Boards of Management, in which the head teachers and principals sit as secretary, play a major role in promoting the best interest of learning institutions while ensuring their development. It is the Boards of Management, that are in charge of administration and management of resources of the institutions. It is my view therefore that the administration and management of resources in learning institutions is carried out by the Boards of Management."** The Court returns that the Boards of Management are the ones who manage schools and they may assign teachers such responsibilities through the head of institution (principal or head-teacher) as may be appropriate or necessary and as envisage in the recognition agreement. Needless to repeat, any emerging conflicts of interest in the role played by the head of institution in the process and in view of the membership in the trade union have been properly conceived in the CORT, the recognition agreement and the CBA and managed accordingly. The Court considers that the operative arrangements in the CBA, the CORT, and the recognition agreement is not avoidance of the apparent conflict of interest but management of the conflict of interest as may attach and which is already mutually known to the petitioner and the respondent to exist so that measures for handling the same have been instituted accordingly.

f) The Court reckons that conflict of interest may exist but the law provides for its management and it cannot therefore constitute a valid ground for locking out all heads of institutions (principals and head-teachers) and teachers playing such roles one way or the other from trade union membership and participation. The Court holds that in the concept of conflict of interest, avoidance of the conflict of interest is desirable but in practice the primary focus is not avoidance but managing or handling situations of conflict of interest through measures such as declaration of interests; disqualification where appropriate; and undertaking remedial or mitigating measures as appropriate. In particular Section 12 of the Public Officer Ethics Act, 2003 provides thus, **"12. (1) A public officer shall use his best efforts to avoid being in a position in which his personal interests conflict with his official duties.(2) Without limiting the generality of subsection (1), a public officer shall not hold shares or have any other interest in a corporation, partnership of other body, directly or through another person, if holding those shares or having that interest would result in the public officer's personal interests conflicting with his official duties. (3) A public officer whose personal interests conflict with his official duties shall-(*a*) declare the personal interests to his superior or other appropriate body and comply with any directions to avoid the conflict; and(*b*) refrain from participating in any deliberations with respect to the matter.(4) Notwithstanding any directions to the contrary under subsection (3)(*a*), a public officer shall not award a contract, or influence the award of a contract, to-(*a*) himself;(*b*) a spouse or relative;(*c*) a business associate; or(*d*) a corporation, partnership or other body in which the officer has an interest.(5) The regulations may govern when the personal interests of a public officer conflict with his official duties for the purposes of this section.(6) In this section, "personal interest" includes the interest of a spouse, relative or business associate."**Pursuant to subsection 12 (5) of the Act, regulation 11 of the Public Officer Ethics Regulations, 2003, provides thus, **"11.The personal interests of a public officer do not conflict with the official duties with respect to a matter, for purposes of section 12 of the Act, if the following are satisfied-**

a) the personal interests of the public officer are not specific to the public officer but arise from the public officer being a member of a class of persons who all have personal interests in the matter;

b) it would be impractical for the public officer and all other public officers who have personal interests in the matter to refrain from participating in deliberations with respect to the matter; and

c) either the personal interests of the public officer are obvious or the public officer declares his personal interests to his superior or other appropriate body or person." In the present case the Court returns that the heads of institutions satisfy all the three prescribed grounds nullifying the conflict of interest in the circumstances of the present case and as was alleged for the petitioner so that the petitioner's submissions in that regard would not be upheld.

Thus, to answer the **1st issue** for determination the Court returns that the institutional administrators or heads of institutions (principals or head-teachers) or teachers performing roles of a head of institution one way or the other are unionisable employees under the recognition agreement in place and are entitled to participate as candidates or voters and to be elected and appointed as trade union officials in accordance with the respondent's constitution and the relevant provisions of the Labour Relations Act, 2007; and when being so elected as respondent's officials, they will therefore be liable to be transferred only within respective geographical areas they are elected as such to represent.

While making that finding, the Court has considered the submission made for the petitioner that under Article 249 (2) (a) and (b) the petitioner is subject only to the Constitution and the law; and is independent and not subject to direction or control by any person or authority. The Court, in view of that petitioner's submission, has also considered and upheld the submission by Mr. Paul Muite, SC that the Constitution must be read as a whole and in harmony. In that regard, the Court returns that the petitioner is indeed subject only to the Constitution and law, and, "**law**" in that respect includes statutory provisions that are not inconsistent with the Constitution. Thus, the Court holds that the respondent is bound by statutory provisions on employment and labour relations unless if it is established that such provisions are inconsistent with the Constitution or their application to the respondent is expressly barred. Thus section 3(1) of the Employment Act, 2007 provides that the Act shall apply to all employees employed by any employer under a contract of service and section 3(2) thereof provides that the Act binds the Government. Section 3 of the Labour Relations Act, 2007 provides that the Act shall not apply to any person in respect of his employment or service in the armed forces or any reserve force thereof; and in the Kenya Police, the Administrative Police Force, the Kenya Prisons Service and the National Youth Service, or in any reserve force or service thereof (and the Court holds that the petitioner not having been expressly exempted, the Act obviously applies). The statutes are replete with provisions that impose upon the employers the obligation or duties to consult, negotiate, inform, and confer employees due process as opposed to making of unilateral or arbitrary decisions in the employment environment and relationship so that the Court returns that the petitioner is bound accordingly and the respondent was entitled to participate and raise concerns about the transfer decisions or change in the transfer policies by the petitioner – and raising such concerns within the prevailing recognition agreement, CORT, and CBA that are binding upon the parties. The Court follows its holding in **Okiya Omtatah Okoiti –Versus- The Attorney General and 8 Others [2019]eKLR,** thus "**The Court has considered the provisions and returns that by reason of Article 249(2) (a) legislative or statutory provisions may prescribe matters touching on the Commission's discharge of its constitutional functions and powers and provided such provisions are consistent with constitutional provisions, the Commission is bound accordingly.**" And further, "**The Court further reckons that the enumerated Parliamentary authority to legislate about the Commission is also aimed at appropriately chaining the discretion of the Public Service Commission in the performance of its functions for the obvious reason and fear that all are fallible and therefore amenable to some kind of checks and balances that is always desirable in a true civilised democracy that is subject to rule of law and constitutionalism.**" The Court returns that the holding apply to the present case accordingly and by way of relevant and constitutional statutory provisions, the petitioner's discretion is chained and the petitioner is bound accordingly. The Court finds that it is by such statutory provisions and as partly flowing from the national values and principles of governance in Article 10 and the values and principles of public service in Article 232 of the Constitution that the petitioner is bound to involve the respondent by way of information, consultation, negotiation and agreement so that such involvement is not founded on the petitioner's tokenism or mere gesture of goodness and goodwill as was suggested for the petitioner; not so! –it is a constitutional imperative that evolves into an obligation on the part of the petitioner. Thus the Court returns that in establishing or instituting or changing the transfer policy or other human resource policies within its constitutional and statutory mandate, the petitioner is enjoined to inform, consult, negotiate in good faith and reach an agreement or otherwise resolve the matter as envisaged in the provisions of the Labour Relations Act, 2007 and other relevant legislation and tenets of fair labour practices as envisaged in Article 41 of the Constitution and other enabling statutory provisions.

The **2nd issue** in dispute was about promotion of teachers. The parties are in agreement that the promotion of teachers be undertaken by the petitioner in accordance with the provisions of the CORT and schemes of service. The only line or point of dispute is that the petitioner takes position that the promotions based on the provisions of the CORT and schemes of service be applied only to the respondent's members. The following matters are not in dispute:

a) Clause 4 of the CBA provides that the CORT and the Code of Conduct and Ethics for Teachers shall form an integral part of the CBA.

b) Part VI of the CORT from regulation 73 to 81 has elaborate provisions on the promotion of teachers. Regulation 73 in particular provides for promotion of teachers in accordance with the existing schemes of service and in particular merit and ability as reflected in the teacher's work, performance and results; seniority and experience as set out in the scheme of service; existence of a vacancy; academic and professional qualifications; and any other criteria the Commission may consider relevant. Regulation 74 provides that the promotions shall be in accordance with the schemes of service which provide for common cadre establishment promotion; and competitive promotion. Part VI of the CORT provides for other criteria and considerations in undertaking teacher promotion.

c) Clause 12 of the CBA on career progression provides that the parties agree that career progression in the teaching service shall be implemented as provided under Part VI of the CORT.

d) Clause 19 of CBA provides that parties shall be bound by provisions under regulation 16 of the CORT on non-discrimination. Regulation 16 provides that the petitioner shall not discriminate on any ground against any person in respect to employment.

e) Section 5 of the Employment Act, 2007 provides for equality of opportunity and elimination of discrimination in employment. Section 5(2) provides that an employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice. Section 5(4) provides that an employer shall pay his employees equal remuneration for work of equal value.

The dispute was that the respondent by the policy circular of 02.05.2018 introduced Career Progression Guidelines and purported to abolish and replace the prevailing three schemes of service. The respondent's case is that the circular contravened the undisputed provisions of the CBA and CORT.

The Court has considered the provisions of section 5 of the Employment Act, 2007, the CBA, the recognition agreement and the provisions of the Labour Relations Act, 2007 that no employee may be disadvantaged on account of joining or not joining a union and participating or not participating in union activities. On that account the Court returns that the petitioner will undertake teacher promotion in accordance with the relevant provisions of the CORT and the schemes of service with respect to all unionisable teachers eligible to join the respondent trade union.

While making that finding the Court observes that the parties may seriously consider reviewing the prevailing schemes of service with a view of bringing them into alignment with the prevailing CBA pay structure as will be necessary and without derogating from the provisions of the CORT on teacher promotion. The Circular in issue is clearly outside the CORT on teacher promotion and is liable to revocation with respect to all unionisable teachers eligible to join the respondent trade union and is revocable generally for inconsistency with the CORT.

The **3rd issue** in dispute is on implementation of the performance management tools. The respondent admits that the petitioner is entitled to develop strategies and tools for performance and appraisal of the teachers in its employment as provided in the Teachers Service Commission Act and CORT. Clause 11 of the CBA on performance management and evaluation provides that annual performance evaluation shall be undertaken by the employer through tools to be developed with the participation of the parties to the CBA. The respondent admits that it participated in the initial meetings to develop the tool including benchmarking studies. The respondent says that the tools were subjected to a pilot but the ensuing report on the pilot was not shared towards improving the tools. The respondent's concern is that the appraisal process should not impose costs and inconveniences to individual teachers such as a requirement to download the forms at their own expense and sending the form back to the petitioner online at the expense of the individual teachers. The respondent's further case is that like was held in **Ronnie Odiwuor Asino –Versus Nyanza Reproductive Health Society [2013]eKLR**, thus, "**A credible performance appraisal process must be evidently participatory. A comment made by a supervisor without the participation of an employee cannot pass for a performance appraisal. Even where there may be a disagreement between an employee and their supervisor on the verdict of a performance appraisal, the disagreement must be documented to show that an appraisal did indeed take place.**"

The respondent submits that even if there was participation in the development of the tool or the process leading to its roll out as a pilot, the implementation mode adopted by the petitioner is unlawful and the tool should be withdrawn forthwith.

The petitioner's case and which is not disputed is that performance management is consistent with prudent use of public funds so that there is evidence of value for money as provided for the teaching service. The petitioner relies on the holding in **Banking Insurance & Finance Union (Kenya) –Versus- Baclays Bank of Kenya Ltd & Another [2016]eKLR** and **Banking Insurance & Finance Union (Kenya) –Versus- Baclays Bank of Kenya Ltd & Another [2019]eKLR** that performance development plans and performance improvement plans are internal and management prerogatives of an employer. The petitioner submits that the performance management tools are its management prerogative and cannot be stopped by employees. The Court has already made a finding on the petitioner's constitutional and statutory obligation to inform, consult, negotiate in good faith and reach an agreement or otherwise resolve the matter as envisaged in the provisions of the Labour Relations Act, 2007 and other relevant legislation and tenets of fair labour practices as envisaged in Article 41 of the Constitution and other enabling statutory provisions. The Court will therefore not go back to that matter and in any event, the parties agreed upon participation of the both parties in developing the tools. The respondent cannot therefore turn around and abandon the agreement as the provision in the CBA is binding accordingly.

In the joint memorandum the petitioner's position is that the respondent has failed to give its input to improve the performance management tools and the petitioner should continue implementing the tools to all teachers including members of the respondent. The respondent's position is that the petitioner should stop the implementation of the tools until the tools are developed afresh.

The Court has considered the material on record. It is clear that the respondent participated in the development of the tools by way of meetings and benchmarking studies. The only remaining aspect was final validation and issuance of final performance tools. The Court further considers that the respondent will put in place through its administrative channels appropriate measures of availing the tools to individual teachers and returning completed tools at the petitioner's resources. Thus the Court returns that the petitioner shall convene validation meetings for finalising the performance measurement tools by 01.12.2019 for a roll out in January 2020; and the petitioner shall institute administrative steps for availing the tools to the individual teachers and returns being made at the petitioner's resources.

The **4th issue** in dispute is about Teacher Professional Development (TPD) modules. The respondent says it was not involved in the development of the modules and the petitioner says it introduced the modules as a regulator and not employer in the teaching service and therefore there was no need to involve the respondent. The respondent's case is that the term "**regulator**" is the petitioner's own making as is not provided for in any statute so that the respondent is arrogating to itself a power not enshrined in law. The petitioner's case is that the respondent as a trade union has no ***locus standi*** in regulation of the teaching service. The petitioner says it engaged all stakeholders in the teaching service based on Article 10 and not Article 41 of the Constitution and the respondent declined or ignored the invitation to the stakeholder meeting. As the regulator, the petitioner says that it is ready to educate the respondent on the TPD modules.

It is not in dispute that section 35 of the Teachers Service Commission Act, 2012 provides for compliance with teaching standards as follows:

1) The Commission shall take all necessary steps to ensure that persons in the teaching service comply with the teaching standards prescribed by the Commission under this Act.

2) For purposes of subsection (1), the Commission shall:

a) require every registered teacher to undertake career progression and professional development programmes as may be prescribed by regulations made under this Act;

b) require every registered teacher to take out a teaching certificate as prescribed by regulations made under this Act;

c) enter into agreements with any institution, body, department or agency of the Government pursuant to its functions and powers prescribed under this section; and

d) appoint an agent or designate a member or staff of the Commission who may enter any educational institution and make an enquiry in that regard.

3) A teacher who fails to:

a) undertake a prescribed career and professional development programmes; or

b) take out a teaching certificate under section 35(2) (b) of this Act, shall be dealt with in accordance with the regulations.

Regulation 48 of the CORT provides:

1) Every teacher shall undertake the professional teacher development programmes prescribed or recommended by the Commission from time to time.

2) The Commission shall approve training institutions to conduct teacher development programmes.

3) The approved institutions shall issue certificates to teachers upon completion of the programme.

Regulation 49 of the CORT provides:

1) Every teacher who successfully completes a professional teacher development programme under regulation 48 shall be issued with a teaching certificate by the Commission in the manner prescribed under the Ninth Schedule.

2) A certificate issued under this regulation shall indicate the effective date and shall be valid for five years or such period as may be prescribed by the Commission.

3) A teacher who fails to take out a teaching certificate under section 35(2) (b) of the Act shall have the certificate of registration suspended until the teacher obtains the teaching certificate provided that the teacher shall take out the teaching certificate within two years in default of which the teacher will be terminated from service.

4) All newly registered teachers will be issued with a teaching certificate which shall be valid for five years from the date of issue.

5) Where the name of a person registered as a teacher is removed from the register, the teaching certificate of that person shall be invalid.

Clause 11.1 of the CBA provides, "**In recognition of the fundamental shift in policy in public employment and with a view to promote, enhance and maintain high performance standards in the teaching service, parties hereby agree to ensure continuous professional development and annual performance evaluation system.**"

The petitioner's case is that TPD is squarely within its mandate as a regulator. The petitioner admits that the word "**regulator**" is not used in the statutory provisions but such regulatory function is clearly discernible from the provisions of section 35 of the Teachers Service Commission Act. The petitioner urges that its functions under the section is founded upon its constitutional functions in Article 237 (2) (a) to register trained teachers; and 237 (3) (a), (b) and (c) to review the standards of education and training of persons entering the teaching profession; review the demand for and the supply of teachers; and advice the national government on matters relating to the teaching profession. Accordingly the petitioner submits that as a regulator it is not in any business with the respondent since their relationship is that of employer-employee as governed by the Labour Relations Act, 2007. Thus as a regulator, the proper role of the petitioner is to educate the respondent about TPD programmes to bring the respondent on board to ensure continuous professional development in the teaching service.

The petitioner further submits that the Teachers Service Commission Act, 2012 came into operation on 31.08.2012 and under the Act the teaching service was professionalised for the first time in the history of the service. The Act requires registered teachers to attend professional courses organised by the petitioner leading to taking out of a teaching practice certificate. Prevailing and previous teacher capacity building courses financed by the Ministry of Education and the petitioner, in the petitioner's opinion and submission, do not amount to such professional courses as prescribed for under section 35 of the Act. The petitioner submits that the TPD programmes are not promotional but are to lead to issuance of the teaching practice certificate as a basis for the petitioner as an employer should continue to engage a teacher to teach for the period of validity of the certificate issued upon the teacher's compliance. The same cannot be substituted with academic certificates and is not for promotional purpose. The petitioner submits

that in that regard each teacher will have to pay for his or her practicing certificate which enables him or her to practice the profession. Thus, it is submitted that the cost of attending TPD programme squarely falls on the individual registered teacher who wish to continue to practice the teaching profession. It is the duty of every registered teacher, being a member of the respondent or not, to pay for and attend TPD programme.

The respondent's case is that the TPD programmes will alter the terms and conditions of service for its members and the respondent should be engaged prior to rolling out the TPD programmes. Further the respondent submits that TPD programmes should not be used to replace certificates, diplomas, degrees, masters and PhDs qualifications which have over time and as per schemes of service been used to upgrade and promote teachers. The respondent submits that the petitioner cannot rely on CBA and recognition agreement and at the same time say the two agreements do not apply but should be consistent in its assumptions in that regard – the petitioner cannot be allowed to approbate and reprobate at the same time as was held in **Sammy M. Makove, Commissioner of Insurance & Another –Versus- Kiragu Holdings Limited [2013]eKLR**, and in **George S. Onyango OGW –Versus- Board of Directors of Numerical Machine Complex Limited & 2 Others [2012]eKLR**. The respondent further submits that section 35 of the Teachers Service Commission Act, 2012 does not mandate the petitioner to be a regulator and the petitioner cannot be an employer and a regulator at the same time.

The Court has considered the parties' respective positions and submissions. Article 232 (1) (a) of the Constitution provides that the values and principles of public service include high standards of professional ethics. Section 9 of the Public Officer Ethics Act, 2003 on professionalism sets out standards of professionalism to be upheld by public officers like the teachers serving in the petitioner's teaching service. The Court therefore returns that the TPD programmes are a positive initiative that is already aligned to the relevant constitutional and statutory provisions.

The Court has considered section 35 of the Teachers Service Commission Act, 2012. Section 35 (2) (a) is clear that the petitioner shall require every registered teacher to undertake career progression and professional development programmes as may be prescribed by regulations made under the Act. The Court returns that the TPD programmes are to be prescribed by regulation. The Court considers that the TPD programmes in dispute in the instant case have not been issued by way of a regulation as no such regulation has been exhibited. In making that finding the Court considers that the provisions of section 35(2) (a) are not satisfied when the CORT in regulation 48 (1) simply provides that every teacher shall undertake the professional teacher development programmes prescribed or recommended by the Commission from time to time. Regulation 48(1) cannot take away the intelligible principle in section 35(2) (a) by giving the petitioner a wide discretion to prescribe the TPD programmes otherwise by way of the regulations prescribed in the enabling statute. Thus, regulation 48(1) must be read to mean that the petitioner is reminded that it is to prescribe the TPD programmes and when the petitioner comes to do so, it must comply with the intelligible principle or safeguard that it shall do so by regulation. The Court holds that the delegation doctrine applies that the Parliament does not delegate its legislative powers unless there is a clear safeguard in the enabling statutory provision for the authority exercising the delegated power to comply with in putting flesh or filling the gaps in the law made by Parliament by way of subsidiary legislation. Section 35(2) (a) is clear that it is by regulation that the petitioner may issue the TPD programmes and the Court holds that it is the making of regulations that is the parliamentary safeguard within the intelligible principle that the petitioner must comply with in exercising the parliamentary delegated power to make the TPD pragrammes. As submitted for the petitioner, the TPD programmes apply to all registered teachers and not only the members of the respondent or the teachers in the employment of the petitioner and the more reason the safeguard by way of regulations must be complied with.

The Statutory Instruments Act, 2013 is an Act of Parliament providing for the making, scrutiny, publication and operation of statutory instruments and for matters connected therewith. Under section 2 of the Act, "**statutory instrument" means any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorised to be issued.**" The Court holds that the petitioner is expressly authorised to issue the TPD programmes by way of a regulation and such regulations are a statutory instrument as provided in the Statutory Instruments Act, 2013. Part II of the Act makes it mandatory for consultations to be undertaken before making statutory instruments. Section 8 (1) of the Act provides that before a regulation making authority (such as the petitioner in the instant case) makes a statutory instrument, the regulation-making authority shall make consultations with persons who are likely to be affected by the proposed instrument. Section 8(2) thereof provides for a test for determining if consultations undertaken are appropriate to include the extent to which the consultation drew on the knowledge of persons having expertise in fields relevant to the statutory instrument; and if the consultations ensured that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed content. For the purpose of the consultations, section 8(3) thereof provides that the consultation shall involve notification, either directly or by advertisement, of bodies that, or organisations representative of persons who, are likely to be affected by the proposed instrument; or invite

submissions to be made by a specified date or might invite participation in public hearings to be held concerning the proposed instrument.

Section 6 of the Statutory Instruments Act, 2013 provides that if the proposed statutory instrument is likely to impose significant costs on the community or a part of the community, the regulation making authority shall, prior to making the statutory instrument, prepare a regulatory impact statement about the instrument. Contents of regulatory impact statements are provided for in section 7 of the Act and section 8 of the Act provides for notification of the impact statements. Part IV of the Act provides for Parliamentary scrutiny of the statutory instrument and section 22 of the Act provides that every statutory instrument shall be published in the Kenya Gazette. Section 23 of the Act provides that a statutory instrument comes into operation on the date specified in that behalf in the instrument or if enabling legislation is in operation and no effective date is specified in the instrument, the instrument comes into operation on the date it is published in the Gazette. Section 25 of the Act provides that a statutory instrument may provide for the imposition of fees and charges in respect of any matter with regard to which provision is made in the enabling legislation. Further, a power to impose fees or charges shall include power to provide for all or any of the following matters, specific fees or charges; minimum fees or charges; maximum fees or charges; ***ad volorem*** fees or charges; the payment of fees or charges either generally or under specified conditions or in specified circumstances; and the reduction, waiver or refund, in whole or in part, of any fees or charges either upon the happening of a certain event or in discretion of a specified person.

The Court has elaborated the relevant provisions of the Statutory Instruments Act, 2013 to show the kind of undertaking the petitioner must show to have taken place for the TPD programmes to be said to have been established by way of regulation as envisaged in section 35 (2) (a) of the Teachers Service Commission Act, 2012. The Court holds that consultation with the affected community or representatives of those affected (such as the respondent) and the experts in the area is mandatory. The Court returns that there being no regulation promulgated by the petitioner on the TPD programmes as envisaged in section 35 (2) (a) of the Teachers Service Commission Act, 2012, there is no valid TPD programme for implementation by the petitioner. Further, section 25 of the Statutory Instruments Act, 2013 is clear that a statutory instrument can provide for the imposition of fees and charges in respect of any matter with regard to which provision is made in the enabling legislation. The petitioner has not shown a provision in the Teachers Service Commission Act, 2012 or other law permitting it to impose fees and charges against teachers with respect to TPD programmes and as was submitted for the petitioner. Thus the Court further returns that in developing TPD programmes pursuant to provisions of section 35 (2) (a) of the Teachers Service Commission Act, 2012, there would be no authority to impose fees and charges for want of enabling statutory provisions in that regard. For avoidance of doubt, section35 (2) (a) of the Act refers to **"...career progression and professional development programmes...."** and the findings by the Court as relates to TPD programmes apply to the career progression and regulations the petitioner may make in that regard. The Court further holds that if the TPD programmes are envisaged to have significant costs on the teachers as envisaged in section 6 of the Statutory Instruments Act, 2013, then the petitioner will mandatorily be required to prepare regulatory impact statement about the regulations on TPD programmes. Needless to repeat, again, the petitioner is bound by the Statutory Instruments Act, 2013 as a regulation making authority and pursuant to Article 249 (2) (a) that the petitioner is subject only to the Constitution and the law – the Act being one such law the petitioner is subject to.

Further, the Court returns that if it is desired that any charges or fees are deducted from the salary payable to teachers with respect to partial or full funding of TPD programmes as may be necessary or appropriate, then such deductions will have to be shown to be in compliance with the provisions of Part IV of the Employment Act, 2007 on protection of wages. Under section 17(1) of the Act, the general principle is that an employer shall pay the entire amount of the wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service. Section 19 of the Act provides for instances and permissible deductions an employer may deduct from a wage or salary. Section 19(f) is clear that an employer may deduct, "**any amount the deduction of which is authorised by any written law for the time being in force, collective agreement, wage determination, court order or arbitration award.**" Accordingly, the Court returns once again that a statutory provision expressly permitting the petitioner to deduct out of teachers' salaries towards partially or fully funding of TPD programmes as may be necessary or appropriate would be mandatory in that regard. Under section 25 of the Act, it amounts to a criminal offence to deduct salaries except as provided in Part IV of the Act.

So, to answer the 4th issue in dispute, the Court returns that Teacher Professional Development (TPD) modules in dispute shall not be implemented as they fall short of professional development programmes as may be prescribed by the petitioner by regulation and pursuant to section 35 (2) (a) of the Teachers Service Commission Act, 2012; and in prescribing the professional development programmes by way of regulation, the petitioner shall comply with the provisions of the Statutory Instruments Act, 2013. The Court finds accordingly.

To answer the **5th issue** the Court returns that the dispute at hand having been resolved by way of the conciliation proceedings, the

bipartite negotiations, the parties points of agreement in the joint memorandum filed on 08.04.2019 and the findings in this judgment, the parties are entitled to a declaration that the Notice of Withdrawal of Labour by teachers in the public service dated 19.12.2018 is set aside or spent.

To answer the **6th issue** for determination the Court returns that in furtherance of cordial industrial relations between the parties and the cooperation the parties showed to negotiate in good faith throughout the proceedings, each party shall bear own costs of the petition.

Finally, the Court holds that by reason of the findings in this judgment, the delegation doctrine and the intelligible principle apply under the Constitution of Kenya, 2010 and the Parliament has not given out its constitutional legislation making powers and functions to constitutional commissions, independent offices and indeed any other authority. Conferment of one or other constitutional power and function to such commissions, independent offices or other authorities does not amount to conferment of the legislative powers and functions that are constitutionally vested in the Parliament. Subsidiary legislation must therefore comply with and be within the confines of the delegation doctrine and the intelligible principle. Within that holding, the Court advises that every constitutional commission, independent office and indeed any other authority should consistently caution themselves that administrative policy cannot substitute a prescribed statutory instrument such as regulations in the instant case.

In conclusion judgment is hereby entered for the parties on the petition filed on 31.12.2018 and the joint memorandum filed on 08.04.2019 for orders:

a) The petitioner shall undertake transfer of teachers being members but non-officials of the respondent in accordance with the provisions of the Code of Regulations of Teachers (CORT).

b) The teachers being non-institutional administrators and being the respondent's officials shall be transferred within respective geographical areas they are elected as such to represent.

c) The institutional administrators or heads of institutions (principals or head-teachers) or teachers performing roles of a head of institution one way or the other are unionisable employees under the recognition agreement in place and are entitled to participate as candidates or voters and to be elected and appointed as trade union officials in accordance with the respondent's constitution and the relevant provisions of the Labour Relations Act, 2007; and where they are so elected or appointed and serving as respondent's officials, they will therefore be liable to be transferred only within respective geographical areas they are elected as such to represent.

d) The petitioner will undertake teacher promotion in accordance with the relevant provisions of the CORT and the schemes of service with respect to all unionisable teachers eligible to join the respondent trade union; and parties may within the CBA and recognition agreement consider reviewing the prevailing schemes of service with a view of bringing them into alignment with the prevailing CBA pay structure and related matters as will be necessary and without derogating from the provisions of the CORT on teacher promotion – as the policy circular of 02.05.2018 on Career Progression Guidelines and purporting to abolish and replace the prevailing three schemes of service will not apply accordingly.

e) The petitioner shall convene validation meetings for finalising the performance measurement tools by 01.12.2019 for a roll out in January 2020; and the petitioner shall institute administrative steps for availing the tools to the individual teachers at their respective stations of deployment and returns of completed tools being made at the petitioner's resources.

f) The Teacher Professional Development (TPD) modules in dispute shall not be implemented as they fall short of professional development programmes as may be prescribed by the petitioner by regulation and pursuant to section 35 (2) (a) of the Teachers Service Commission Act, 2012; and in prescribing the career progression and professional development programmes by way of regulation under section 35(2) (a) of the Act, the petitioner shall comply with the provisions of the Statutory Instruments Act, 2013.

g) The dispute at hand having been resolved by way of the conciliation proceedings, the bipartite negotiations, the parties' points of agreement in the joint memorandum filed on 08.04.2019 and the findings in this judgment, a declaration is hereby issued that the Notice of Withdrawal of Labour by teachers in the public service dated 19.12.2018 is set aside or spent.

h) Each party shall bear own costs of the petition.

Signed, dated and**d delivered** in court **at Nairobi** this **Friday 12th July, 2019.**

BYRAM ONGAYA

JUDGE