Is the right to strike under a threat? : The ply of injunctions to pulverize teacher strikes in Kenya.

By Joshua Malidzo Nyawa

"*Heads, I win; Tails, you lose*.[1]"

Harper Lee, in her most cited novel, *To kill a mockingbird*, describes the habits of the people living in Maycomb, Alabama, an old town in which was inhabited by both the whites and the blacks (niggers). Atticus finch, a renowned lawyer in the city is appointed to represent *Tom Robinson* who was accused of allegedly having raped *Mayella*. *Atticus* is able to prove that *Robinson* could not have raped *Mayella*, showing that her attacker was left-handed with two good arms, whereas *Robinson* had lost the use of his left arm in a cotton gin accident. *Jem*, a son of Atticus smiled and said 'don't fret, we've won it, don't see how any jury could convict on what we heard but *Reverend Sykes* replied 'now don't you be so confident, Mr Jem, I aint never seen any jury decide in favour of a colored man over a white man'' and truly to his words, Robinson is convicted nevertheless. *Mr Underwood* writes an editorial and *Jean* describes its meaning in the following terms

> Atticus had used every tool available to free men to save Tom Robinson, but in the secret courts of men's hearts Atticus had no case. Tom was a dead man the minute Mayella Ewell opened her mouth and screamed"

Tom was convicted because he had been tried not in a court of law but "in the secret courts of men's hearts." These courts were governed not by presumptions of equality and innocence, but by prejudice and bigotry. Atticus's plea to the jury had been ignored and Tom had been

[1] U.S. Comm'n On Industrial Relations, Final Report And Testimony Submitted To Congress By The Commission On Industrial Relations, S. DOC. NO. 64-415, at 10,895 (1st Sess. 1916) (Additional Statement of Theodore Schroeder, May 27, 1915).

convicted. Similarly, when teachers threaten to go on a strike, its employer does nothing, it sits and waits for the notice to end and goes to the court. In the industrial court which can be equated to the secret courts of men's hearts, the right to strike is already dead once the employer steps into the court, the employees are to be stopped from exercising their constitutional right no matter the evidence of non-compliance that may be adduced by the employees. In *Teachers Service Commission*[2], despite the respondent adducing evidence to the effect that the applicant had not acted since the strike notice was issued and the court agreeing that

> In any event, what role did the Claimant play to ensure that those rights are not infringed" They simply ignored all the threats of industrial action by the 2nd Respondent …….This is a case of employees who have decided to exercise their constitutional right to strike against an employer who has turned a deaf ear to their requests to harmonize their remuneration with those of other civil servants.

Despite all this, the court ended up issuing an injunction ordering the teachers to go back to work, but this is not shocking, whereas racism as per *Atticus* is the Maycomb's usual disease, prejudice and favoritism is the Industrial court disease and as *Reverend Sykes* warned that he had never seen any Jury decide in favour of a coloured man over a white man, we can replace the word coloured man and white man with employee and employer respectively. From the abominable ruling in *Teachers Service Commission* (2012)[3] to the loathed decision in *Teachers Service Commission [2013]*[4] and later the loathsome granting of injunction in *Teachers Service Commission[2015]*[5], the chorus has been the same ***"Heads, I win; Tails, you lose''.*** It is notable that the granting of injunctions leaves the employees with no power, they are left at the mercy of the employers, and the industrial court actually ends up making the teachers slaves at the hands of TSC. Injunctions are inhibitions to the right to strike which is the only defence to ensure that

[2] *Teachers Service Commission V Kenya National Union Of Teachers (Knut) & Another* [2012] eKLR
[3] ibid
[4] *Teachers Service Commission v Kenya National Union of Teachers & another* [2013] eKLR
[5] *Teachers Service Commission v Kenya National Union of Teachers & 2 others [2015] eKLR*

workers are not treated as coerced employees.[6] Teachers are oftenly "at the mercy of bureaucracies" which appear to them to be "irrational, unpredictable and unresponsive" and they feel that the system, and even their own principles, are disempowering them.[7]

In this article, the writer seeks to show that whereas the industrial court assumes that the TSC as the employer are equal parties with the Teachers as the employees, the employer has an upper hand and they cannot be equal parties, secondly, a strike is the only arsenal that these employees have, thirdly the right to strike is essential and forms part and parcel of the bargaining process, fourthly, when these injunctions are issued, no meaningful agreement can be reached and hence the unending teacher strikes in kenya and fifthly balancing the children's right to education does not mean that it overrides the right to strike.

The right to strike as an arsenal: the self defence of a worker

> If you are willing to undertake the pressures that go with a strike, then get in it and get in it to win. If you are not willing to take those pressures, if you feel you will buckle under them, then settle before the strike begins[8].

A right to strike has in a long time been referred to as "a right to self-defense"[9] or a self-help mechanism[10], this is the only power that a worker has and it cannot be delinked from the process of collectively bargaining[11]. Collective bargaining and the right to strike can therefore be compared to the birds of a feather which are inextricably linked[12] , when the right to strike is

[6] *SA Transport and Allied Workers Union and Others v Moloto NO and Another*: 2012) 33 ILJ 2549 (CC) At Para 13.
[7] Coombe C "Unleashing the power of Africa's Teachers" 1997 *International Journal of Educational Development* 113-117
[8] Colton L and Grabber E, *Teacher strikes and the courts* (Library of congress press 1982) at P.g 61
[9] Professor Dr. Bernd Was, Goethe University Frankfurt*, , Strike as a Fundamental Right of the Workers and its Risks of Conflicting with other Fundamental Rights of the Citizens* –XX World Congress, Santiago de Chile, September 2012, General Report III
[10] Colton L and Grabber E, *Teacher strikes and the courts* (Library of congress press 1982) at P.g 13
[11] *Kenya Ferry Services Limited v Dock Workers Union [Ferry Branch] [2015] eKLR* Para 49
[12] In *SA Airways (Pty) Ltd v SA Transport and Allied Workers Union*

taken away, workers and their trade unions have been said to be lame ducks[13]. A right to strike is the only means of balancing the powers of the employer and the employees[14]. Whereas an employer has a right to a lock out[15], the only weaponry that the employees have is the right to strike. The right to strike is the only torpedo that every employee has, it has been recognised as a crucial and a sacred weapon in the armoury of organised labour[16].The right to strike has the power and the potential to compel every employer to come to the bargaining table, *Marshall et al* have argued that a strike plays the same role in labour negotiations that warfare plays in diplomatic negotiations.[17] The purpose of a strike has been recognised under Section 2 of the Labour Relations Act which is ***''to compel an Employer, or an Employers' Organization, to accede to any demand in respect of a trade dispute***.'' [18] A right to strike cannot therefore be a toy to every potential employer[19], employers know the purpose and effect of a strike and this explains the rush into courts to obtain the injunctions to stop every strike because it is a threat to their hard lines in the bargaining process.

Further, the right to strike is a cornerstone of any modern industrial society[20]. It is an indispensable component of a democratic society and a fundamental human right[21]and a society

[13] O. V. C. Okene, *The Status Of The Right To Strike In Nigeria: A Perspective From International And Comparative Law*, Available at: http://works.bepress.com/ovunda_v_c_okene/17
[14] see Abuodha J in *petition No. 75 of 2015*
[15] *Teachers Service Commission v Kenya National Union of Teachers & 2 others [2015] eKLR* Para 46
[16] Okene supra note 9
[17] J. G. Getman and F. R. Marshall, *The Continuing Assault on the Right to Strike,* 79(3) Texas Law Review (2000-2001) 703- 735, at 703–704.
[18] *Mohamed Yakub Athman & 29 others v Kenya Ports Authority* [2016] eKLR
[19] See generally Ralph Chaplin, *The General Strike The Industrial Workers of the World* - 1933
[20] O. V. C. Okene, *The Status Of The Right To Strike In Nigeria: A Perspective From International And Comparative Law*, Available at: http://works.bepress.com/ovunda_v_c_okene/17
[21] See O. Kahn-Freund and B.A. Hepple, *Laws Against Strikes,* Fabians Research Series (1972), p. 4. See also R. Ben-Israel, *International Labour Standards: The Case of the Freedom to Strike,* Kluwer (1988), pp. 13; V.A. Leary, *The Paradox of Workers Rights as Human Rights*, in L.A. Compa, and S.F Diamond (eds.), *Human Rights, Labour Rights and International Trad*e (1996); J. Gross, (ed.) *Workers' Rights as Human Rights,* Cornell University Press (2003)

which lacks that right cannot be said to be democratic[22]. According to *Worugji and Archibong*[23] "*strike is accepted as an indispensable component of a democracy and a stimulus to social dialogue in industrial relations…, workers have continued to use strikes in expressing their grievances*. Therefore any society which seeks to become a democratic must then secure the right to strike.[24]

The right to strike is essential in a bargaining process. *Lord Wright* once observed that **"**where the rights of labour are concerned, the rights of the employers are conditioned by the rights of the men to give or withhold their services. The right of workmen to strike is an essential element in the principle of collective bargaining. It is, in other words an essential element not only of the union's bargaining process itself, it is also a necessary sanction for enforcing agreed rules."[25]

The constitutional court of South Africa also recognised this fact in Bader *Pop*[26], it held that:

"[The right to strike] is of both historical and contemporaneous significance. In the first place, it is of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees. Secondly, it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system."

The U.S. Supreme Court confirmed this coexistence in its 1960 decision in the *Labor Board v. Insurance Agents International Union* case:

The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. . . The two factors—necessity for good faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side.

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[22] L. MacFarlane, *The Right to Strike,* (London, Penguin Books, 1981) 12

[23] Worugji I, Archibong JA 2009. The Repressive Face of Law to Strike in Nigeria: Hope for Industrial Peace? *Journal of Commonwealth Law and Legal Education*, 7(2): 113-132.

[24] L. MacFarlane, *the Right to Strike* London, Penguin Books (1981), p. 12.

[25] *Crofter Hand Woven Harris Tweed Co. v. Veitch* (1942) I ALL E.R. 142 at p. 158–9; (1942) A.C. 435 at p. 463.

[26] See *NUMSA v Bader Pop (Pty) Ltd* 2003 (3) SA 513.

The right to strike is thus not an end in itself but a means to an end[27] which is the mechanism used by employees to assert their position in the collective bargaining process[28]. The right to strike has thus been described as the sharp end of the stick of collective bargaining on the part of the employees[29]

Yavuz traces the history right to strike to the industrial revolution of the late 18th and early 19th centuries.[30] *Brand* argues that strikes were born out of the need to address the power imbalance between employees and employers.[31] Employers have bigger muscles than the employees and this is inherently in the employer-employee relationship, these muscles include the financial muscle to advance their interests.[32] *Rycroft and Jordan* [33] have noted to this effect that 'it is only through collective action, by combining the power of the labour against the combined power of the capital, that workers can ensure a fair regulation of the employment relationship". The strike is therefore the equalizing power and it establishes the rules of the game, the collective bargaining process.[34] In *South African Transport and Allied Workers Union (SATAWU) and others v Moloto and Another* the court held that

"The right to strike is protected in the Constitution at least partly in recognition of the fact that there are disparities in the social and economic power held by employers and employees. Employers have far more power than individual employees and in order to redress the inequality

[27] PIKITUP (SOC) LTD v SAMWU and others Case no: J 1641 / 2013 at para 32, see also *SA Airways (Pty) Ltd v SA Transport and Allied Workers Union*
[28] *SA Federation of Civil Engineering Contractors on behalf of Its Members v National Union of Mineworkers and Another*
[29] R*e Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC)
[30] E Yavuz 'The Industrial Revolution and Consequences' 2 available at *https://www.yeditepe.edu.tr/dotAsset/74101.pdf*
[31] J Brand 'Strikes in Essential Services' paper presented to the South African Society for Labour Law (SASLAW) (2010) 1 available at *http://www.saslaw.org.za/papers/Strikes%20in%20Essential%20Services.doc*
[32] E Manamela & M Budeli 'Employees' Right to Strike and Violence in South Africa' (2013) 46 *CILSA* 308, 308.
[33] Rycroft, A and Jordaan, B (1990) *"A Guide to South African Labour Law"* Juta & Co Ltd: Cape Town Wetton, Johannesburg
[34] Romeyn J 2008. Striking a balance: the need for further reform of the law relating to industrial http://aphnew.aph.gov.au/binaries/library/pubs/rp/2007-08/08rp33.pdf .

in social and economic power in employer/employee relations, employees are granted the right to strike to even out the playing field."

The right to strike therefore must be present "if the battle is to be carried out in a fair and equal way."[35]This battle is between the employer and the employee.

finally, According to *Mcllroy*[36] , strikes are inevitable in a place where the society is divided between those who own and control the means of production and those who only have the ability to work, because strikes '*are the ultimate means workers have of protecting themselves*."

The use of Injunctions to stifle the right to strike; using a sledgehammer to crack a nut?

> "It was not the soldiers that ended the strike; it was not the old brotherhoods that ended the strike; it was simply the United States courts that ended the strike."[37]

The industrial court has assumed the role of a strike-breaker[38], by acting as a court of equity and issuing an injunction, the court ends up ensuring that the ''employee's hands are shackled, his mouth gagged, and renders him incapable of doing anything for his self-protection."[39] The employees, trade unions and human rights activists have criticized the courts arguing that the courts have ' arbitrarily assumed an authority in these matters which does not belong to them, and, through sheer love of power and desire to favor the rich, have conspired to oppress the

[35] Vegelahn v. Guntner, 44 N.E. 1077, 1081 (Mass. 1896) (Holmes. J., dissenting).
[36] Mcllroy J 1984. *Strike! How to fight. How to win.* From http://www.getcited.org/pub/102404729
[37] See Frankfurter and Greene, *The Labor Injunction*, Appendix Viii. Testimony Of Eugene V. Debs, United States Strike Commission, Report On The Chicago Strike, (1895) 143 -144:
[38] See *Puget Sound Traction Light and Power Co. v. Whitley* (1907), 243 Fed. 945, 947, where the court warned that :
"The court may not be used as a strike-bearer by either party, by withholding from one party orders or decrees to which it is clearly entitled, or granting orders ex parte, where it is not made clearly to appear that the rights of the complainant are being infringed by the defendants."
[39] Frey, The *Labour Injunction : An Exposition of Government by judicial conscience and its menace* at page 81 available at https://doi.org/10.1086/253515

people'.[40] The industrial court has always favored the employers, the rich. The court is therefore seen by the employee to be in the ranks of the employers[41];

Frankfurter, one of the most outspoken critics of the labor injunction argued that labor injunctions are usually issued in aid of, the employers. The courts are seen as instruments of this partisan policy.[42] These injunctions have been said to endow the owner of a business or of the company with a militant power, little short of sovereignty;"[43] **Douglas J** regretted the majority argument and argued that the court should not be dragged to the level of being a stamping authority of the government (a primary employer), he held that:

If the federal court is to be merely an automaton stamping the papers an Attorney General presents, the judicial function rises to no higher level than an IBM machine. Those who grew up with equity and know its great history should never tolerate that mechanical conception[44].

He added that the injunction unfairly curbed the economic rights of union workers.[45]And that

Labor injunctions were long used as cudgels– so broad in scope, so indiscriminate in application as once to be dubbed a scarecrow device for curbing the economic pressure of the strike [citation omitted]. . . . [T]he same indiscriminate leveling of those within and those without the law is present. . . It is not confined to the precise evil at which the present Act is aimed.

[40] Wm. G. Peterkin, *Government by Injunction*, The Virginia Law Register, Vol. 3, No. 8 (Dec., 1897), pp. 549-563 Available at https://www.jstor.org/stable/1097724
[41] Witte, *Social Consequence of Injunctions in Labor Disputes* (1930), 24 Ill. L.R. 772, 783 at pg 120
[42] Frankfurter, *Labor Injunctions Must Go*, unsigned editorial, 32 New Republic 109, 110 (1922), reprinted in Law and Politics 218, 220-21.
[43] *Truax v. Corrigan* (1921), 257 U.S. 312, Brandeis J. dissenting, at p. 368, see also Bora Laskin, "Labour Injunctions in Canada: A Caveat," *Canadian Bar Review,* 1937, 272-4.
[44] Justice William O. Douglas in *United Steelworkers of America v. U.S.*, 361 U.S. 39, 71 (1959)(Douglas, J., dissenting)
[45] *United Steelworkers of America* Douglas J at 71

Once an injunction is issued, it leaves the employee powerless and cannot bargain with his employer.[46]And further, a denial of the right to strike as a result of injunctions would lead to economic injustice.[47] This can be seen in the following comment that:

Labor has but one weapon in its constant fight for a decent share of the fruits of its toil– it is the right to strike. . . . Yet with tongue in cheek you would restore in one fell swoop the most evil chapter in the story of industrial relations by placing the hated antilabor injunction in the hands of industrialists who will not hesitate to use it to pin back the ears of any man who will dare to speak out against injustice in a factory or shop. You say these men and women should not strike– they should bargain and bargain and bargain interminably– all the while prices climb and climb and the struggle for food and clothing becomes more and more desperate.

Can effective bargaining proceed when an injunction has been issued? What powers then would the employee or trade union have to force the employer to the bargaining table?, when an injunction has been issued, nothing meaningful happens, an employer can decide to stick to his earlier decision and the employee would be left powerless, As was noted by the department of labour that:

Negotiation during the greater part of most injunction periods are usually fruitless in any event. An injunction frees both parties from the threat or reality of a work stoppage and at the same time removes all economic pressure for a settlement. The usual experience is that negotiating sessions during an injunction period are little more than a reiteration of disagreement until such time as the parties are once again faced with the threat of a stoppage. Then they develop a renewed enthusiasm for bargaining and search for agreement[48].

More evidence of the inactivity during the injunction period ,and the fact that no negotiation can happen where there is no potential pain can be found in the argument of *Cameron et al*[49] that:

"The guarantor of the institution of collective bargaining is the threat of industrial action. No threat is effective unless there is a real possibility of its eventuality. Strikes and lock-outs are integral features of collective bargaining and unless they are afforded protection ... the threat

[46] Michael H. LeRoy & John H. Johnson IV, Death by Lethal Injunction: National Emergency Strikes under the Taft-Hartley Act and the Moribund Right to Stri*ke, 43 ARIZ. L. REV. 63, 64 (2001).*

[47]*See* 93 CONG. REC. 3594, *reprinted* in NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 463, 472 (1948) (Vol. 1), at 710.

[48] U.S. DEP'T OF LABOR, COLLECTIVE BARGAINING IN THE BASIC STEEL INDUSTRY: A STUDY OF THE PUBLIC INTEREST AND THE ROLE OF GOVERNMENT (Jan. 1961), at 222.

[49] Brassey, M; Cameron, E; Cheadle, H and Olivier, M (1987) *The New Labour Law* Juta CT

becomes non-existent. Without the potential for pain, there would be no serious endeavour to negotiate and conclude a collective settlement."

Frankfurter et al have argued that "In labor cases, the injunction cannot preserve the so-called status quo: the situation does not remain in equilibrium awaiting judgment upon full knowledge. The suspension of activities affects only the strikers; the employer resumes his efforts to defeat the strike, and resumes them free from the interdicted interferences'[50] Injunction is a heavy handed tool that has been used to fight strikes[51],injunctions are usually ignorant of the inequality in the employer-employee context. It is therefore not deniable that Injunctions suppresses the right to strike and leaves the employees at the mercy of the employer.[52]

Rhomberg[53] compares the process of collective bargaining to a Friday night poker game among friends while both sides play their hands as best as they know how, strikes are shown as another tactic that union leaders use to win gains at the bargaining table. Strikers "gamble" on the success of the strike, and bear the full risks of a losing bet[54], the strike is therefore shown as the gambling weapon to force the employers to a bargaining table and as such without the strike the employer can decide to even fail to turn up at the bargaining table. A court should not therefore intervene by injunction in a labour dispute unless it is absolutely necessary to do so[55]. *Radido* J[56](as he then was) held that the right to strike is guaranteed by the Constitution and the Court ought not to lightly

[50] Frankfurter And Greene, The Labor Injunction (1930), 53 at p. 201

[51] Michael J. Healey, *Injunctions In Labor Disputes Issuance, Enforcement, And Contempt* , Presented At The Afl-Cio Lawyers Coordinating Committee Union Lawyers Conference New York City April 27-29, 2004

[52] Otto Kahn-Freund & Bob Hepple, *Laws Against Strikes* 8 (Fabian Research Series No. 305, 1972), see also Jared S. Gross, *Yet Another Reappraisal Of The Taft Hartley Act Emergency Injunctions* U. Pa. Journal Of Labor And Employment Law [Vol. 7:2]

[53] Rhomberg, Chris (2012) "The Return of Judicial Repression: What Has Happened to the Strike?," *The Forum*: Vol. 10: Iss. 1, Article 8. DOI: 10.1515/1540-8884.1492.

[54] Gould, William B., IV. 1993. *Agenda for Reform: The Future of Employment Relationships and the Law.* Cambridge, MA: MIT Press.

[55] Mr. Justice Challies in *Hyde Park Clothes Limited **V.** The Amalgamated Clothing Workers of America et al* Unreported Judgment **C.S.** Montreal 442,402 rendered 20 May **1958.** See also *Noe Bourassa Ltie v. United Packinghouse Workers* [1961] **C.S.** 604 at 609.

[56] *Moi Teaching & Referral Hospital v Kenya National Union of Nurses* [2016] eKLR at para 29

intrude in the power play dynamics between social and economic power when a legal stalemate has been reached'

Further a strike is normally resorted to when there is a deadlock that has been reached during the negotiation process[57], what is the purpose of this injunction then? Where there is already a deadlock, issuing of the injunction is equivalent to the outlawing of the strike and putting the employees under slavery.

The Right to strike vis-à-vis the right to education: the balancing act

When teachers exercises their right to strike, this would intrinsically amount to an infringement of the children's right to education[58], whereas Article 41 of *the Constitution* expressly gives an employee the right to go on strike, Article 43(1) (f) gives every person the right to education and article 53(1) (b) gives a child the right to education and mandates the state to ensure that basic education is free and mandatory. Further article 53(2) provide that a child's best interests are of paramount importance in every matter concerning the child, courts have relied on this provision as a fall back mechanism to grant the undesired labour injunctions, but Should teachers worry only about fulfilling their instructional duties without concern for their wages or working conditions?[59]

Teachers being employees, enjoy labour rights[60].The right to strike and the right to education are not sacrosanct and in particular the right to strike is not absolute[61] are all limitable under the

[57] , Koboro J Selala, *The Right to Strike and the Future of Collective Bargaining in South Africa: An Exploratory Analysis*, International Journal of Social Sciences Vol. 3/No. 5/special issue/2014
[58] J P Rossouw, The feasibility of localised strike action by educators in cases of learner misconduct, *South African Journal of Education* Vol 32:133-143 available at http://dx.doi.org/10.4314%2Fsaje.v32i2 .
[59] Spring J *American Education* (McGraw Hill Higher Education New York 2010)
[60] Rossouw JP 2012 supra note 57
[61] *County Government of Uasin Gishu v. Kenya National Union of Nurses* [2014] e-KLR, see also *Mohamed Yakub Athman & 29 others v Kenya Ports Authority* [2016] eKLR

constitution[62], however when limiting a right, the conditions and requirements of article 24 are not to be taken as a mere instruction to a judge, they are mandatory in nature. One's right can be limited by another's right, however when a court is faced with a scenario where two rights are in a conflict, it is not right for it to declare that one right is superior over the other.it is not to establish a hierarchical approach.

Sachs J's dictum in *Port Elizabeth Municipality v Various Occupiers*[63] is illustrative in demonstrating the the role of courts in balancing constitutional rights:

"is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, vice versa… it is to balance out and reconcile the opposed claims in as just a manner as possible, taking account of all the interests involved and the specific factors relevant in each particular case.[64]

Dracon[65] provides the relationship between a teacher and a student, that

The education process essentially involves two parties: the learner and the educator. One receives education, and the other provides it. One pays to be provided with education (through parents in the form of school fees or tax), and the other is paid to provide it. One undergoes compulsory education, and the other follows a career choice to educate. One has expectations, the other has responsibilities. One has no collective voice, and the other is organised in a union, or even unions. This is an oversimplified way of stating that we are dealing with two opposites within the education sector (each with its own complex constitutional, educational, labour and political issues).

But what are these best interests of a child?, is it in the best interest of a child that he/she should go to a school where the teachers are demotivated?, is it in the best interests of a child that he/she should go to a school that has no roof, in a school where the conditions are deplorable, in a school where there are only 2 teachers? Is there another basis for quality of an education system

[62] They are not provided for under article 25 of the constitution
[63] [2004] ZACC &; 2004 (12) 1268 (CC); 2005 (1) SA 217 (CC).
[64]ibid at para 23
[65] H J (Jaco) Deacon, *The balancing act between the constitutional right to strike and the constitutional right to education*, available at http://www.sajournalofeducation.co.za

if not the quality of its teachers, and moreover to the most fundamental question can education be possible without the educator?[66], furthermore ,is it really in the best interest of the child that teachers should work in extremely difficult conditions where they face overcrowded classrooms, unsafe and unsanitary schools, shoddy housing and a shortage of the most basic classroom resources[67]

It is the right to strike that ensures that the best interests of a child are achieved, the right to strike is therefore not an enemy of the child but it should be seen as the best friend of a child[68], it is the strike that helps the child go to a better school, the courts should realise that the enemy to the best interests of a child is not the strike nut the government. The government that does not remunerate its workers, a government that is consistent on replying to striking notices is the demon fighting the children's best interests but not the teacher's right to strike. A government that has made several comments on **'can't pay, won't pay'**[69] is such a serpent. Whereas it is true that every time teachers down their tools the children under their "watch and tutelage suffer immeasurably'[70]. This should not be used to push the rights of the teacher underfoot. The employer of the teachers and by extension the Government of Kenya must secure and protect the rights of the teachers in order to safeguard the rights of the children[71].

[66] McKinsey & Company 2007. *How the world's best performing school systems come out on top*. Available at http://mckinseyonsociety.com/downloads/reports/Education/Worlds_School_Systems_Final.pdf .
[67] Horsten D & Le Grange C 2012. The limitation of the educator's right to strike by the child's right to basic education. *Southern African Public Law*, 27(2):509-538. Available at http://reference.sabinet.co.za/webx/access/electronic_journals/sapr/sapr_v27_n2_a12.pdf . Accessed 15 August 15, 2018.
[68] Myron Lieberman, ''Teachers' strikes: an analysis of the Issues,'' *Harvard Educational Review 26 (winter 1956) at pp 67*
[69] *Teachers Service Commission v Kenya National Union of Teachers & 2 others* [2015] eKLR
[70] *Teachers Service Commission v Kenya National Union of Teachers & another* [2013] eKLR
[71] ibid at para 15

Teaching has not been listed as an essential service[72], the right of teachers' to strike is therefore not prohibited, and even if it would have been listed as one, the prohibition strikes in the essential services by section 81 of the labour Relations act has already been declared to be unconstitutional as it derogates from the core-essential of the right to strike[73].

A court should not therefore read unnecessary restrictions to the right to strike[74] especially where a stalemate has been reached, the employee is usually the weaker part in the employer-employee relationship, the granting an injunction means that the employee is now a slave of the employer, what is the remedy that an employee has when a court grants an injunction? I doubt if there is another way of compelling an employer to come to the bargaining table apart from the threat of a strike. In *Moi Teaching & Referral Hospital*[75], the court refused to grant an injunction and held that

> The Court should not easily read implicit restrictions to the right to strike where attempts to resolve issues or grievances of the weaker partner in the employment relationship have hit a brick wall. Such an approach would mean there will be no legal or lawful strike in this country and would adversely impugn a fundamental right available to workers…..The right to strike should not be hindered by the Courts unnecessarily…..I am also unable to fathom what alternative remedies unions and employees whose right to strike is impeded at the interlocutory stage might have.

Conclusion

In collective bargaining the balance of power is between the employer (who holds to purse strings) and the employee (who holds the right to strike). When this balance is taken away the employee feels disenfranchised[76].

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[72] *Teachers Service Commission v Kenya National Union of Teachers & another* [2013] eKLR

[73] *Okiya Omtatah Okoiti v Attorney General & 5 others* [2015] eKLR, see also *Federation of Women Lawyers (FIDA) Kenya v Kenya National Union of Nurses & 4 others* [2018] eKLR, see also Rika J in *Kenya Ferry Services Limited v Dock Workers Union [Ferry Branch]* [2015] Eklr

[74] *South African Transport and Allied Workers Union (SATAWU) and Others v Moloto N.O and Another*

[75] *Moi Teaching & Referral Hospital v Kenya National Union of Nurses* [2016] eKLR at para 30-33

[76] The History Of Teachers' Unions In Ontario: Gaining The Right To Strike In Emilie Gauthier, Kimberly Howald, Jennifer Parker, Josh Wilson, And Sarah Wolinsky Curr 335: Introduction To Teaching History

The right to strike remains as the only arsenal that the employees have against their employers, it is the massive weaponry in the armoury of industrial action. Strike is the only last defence that employees turn to in case of a stalemate. The threat by employees to take up in arms and go on strike is sufficient to wake up the ignorant employer, this is not a lullaby to the employer, it is a 'Banzai' by the employees, and it is the 'Horst-Wessel-lied' of the employees to the employers.

When these injunctions are issued, they are issued to destroy the weapons that the employees hold, all through the Kenyan's history, From the days of **Tom Mboya , Dennis Akumu** to the days of **Francis Atwoli and Wilson Sossion** , workers have formed trade unions which have been able to champion for the rights of the workers, these unions have been powerful and had the right to strike as the only powerful weapon, today the employers have identified ways of ensuring that these weapons are perished, the courts have devised a way of perishing the powerful weapon, the devised way is the labour injunction!.

"How are the mighty fallen, and the weapons of war perished!"

II Samuel, 1:26-27