



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

PETITION NO 5 OF 2016.

IN THE MATTER OF ARTICLES 2(4), 10, 22(1), 23(1) &(3). 41, 47(1)&(2), 50(1), 259(B), 163(5) (B), 260 AND 232 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF RULES 4,13 AND 23(1) OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2010

AND

IN THE MATTER OF CONTRAVENTION OF ARTICLES 10, 41, 47(1)&(2), AND 50(1), OF THE CONSTITUTION OF KENYA 2010

BETWEEN

EVANS MUTISO.....PETITIONER

VERSUS

KENYA NATIONAL UNION OF NURSES.....1ST RESPONDENT

KENYA NATIONAL UNION OF NURSES, MACHAKOS BRANCH....2ND RESPONDENT

NATIONAL ELECTION BOARD.....3RD RESPONDENT

SAMWEL M KWEYU.....4TH RESPONDENT

RULING

Introduction

The Petitioner is a male adult who applied for an elective post as the branch secretary of the 2nd Respondent. The 2nd Respondent is a branch of the 1st Respondent, which is a registered national union for all nurses. The 3rd Respondent is the body in charge of the elections of the 1st Respondent, while the 4th Respondent is the chairperson of the 3rd Respondent.

The Petitioner alleges that he was informed that he could not stand as a candidate in elections of the 1st Respondent’s branch officials which were to be held on 14th March 2016 , and appealed the decision, but

that he has not been given audience by the 3rd and 4th Respondents on his appeal. He thereupon filed the Petition herein and an application by way of Notice of Motion on 10th March 2016, seeking to restrain the 1st to 4th Respondents from conducting the elections of the 2nd Respondent.

The Preliminary Objection

The 1st Respondents through the Secretary General of the 1st, 2nd and 3rd Respondents, one Seth Panyako, thereupon filed a Preliminary Objection dated 14th March 2016 seeking that the Petition be dismissed on the grounds that this Court lacks jurisdiction to hear and determine the matter; the Petitioner has no *locus standi* to institute the proceedings, and that the Petition and application were frivolous vexatious and an abuse of the court process.

The parties were directed by the Court to canvass the Preliminary objection by way of written submissions. The Respondents filed submissions on the preliminary objection dated 30th March 2016. On the issue of jurisdiction, the Respondents submitted that the dispute raised by the Petitioner in his Petition and application was an employment and labour relations dispute, which falls under the jurisdiction of the Employment and Labour relations Court, pursuant to Article 165 (5) and 162 (2) (a) of the Constitution and section 12(1)(i) of the Labour Relations Act.

On the issue of *locus standi*, it was submitted that the Petitioner is not a member of the 1st Respondent and cannot therefore participate in its activities and elections. Sections 12(1)(g), 4(2) and 33 of the Labour Relations Act were cited in this respect. Further, that the Petitioner has not provided any evidence of his membership.

Lastly, it was contended that the Petitioner has admitted to the existence of another suit pending in the Employment and Labour Relations Court, and should have sought remedy in that Court, hence this Petition is frivolous and *sub-judice*.

The Petitioner did not file any submissions on the Preliminary Objection.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made herein. There are two issues for determination, the first is whether the Respondents' preliminary objection raises pure points of law, and if so, whether the said preliminary objection has merit and should be upheld. The circumstance in which a preliminary objection may be raised was explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, as follows:

“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary.

A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the present objection, the issues raised of the Petitioner's *locus standi* and the existence of other suits in the Employment and Labour Relations Court are issues of facts that require to be established by way of evidence, and are therefore not questions of law.

The only question of law raised is that of this Court's jurisdiction, with the argument made by the Respondents that this Court has no jurisdiction on account of jurisdiction being expressly given to the Employment and Labour Relations Court in matters of trade union election disputes. Article 165(3) and (5) of the Constitution which provides for the jurisdiction of the High Court in this regard expressly limits

the jurisdiction of this Court with respect to matters that fall within the jurisdiction of the Courts established to hear and determine disputes relating to employment and labour relations under Article 162 (2)(a) of the Constitution.

The Labour Relations Act which establishes the Employment and Labour Relations Court details the jurisdiction of the said Court as follows in section 12(1):

“(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

- (a) disputes relating to or arising out of employment between an employer and an employee;**
- (b) disputes between an employer and a trade union;**
- (c) disputes between an employers’ organisation and a trade union’s organisation;**
- (d) disputes between trade unions;**
- (e) disputes between employer organisations;**
- (f) disputes between an employers’ organisation and a trade union;**
- (g) disputes between a trade union and a member thereof;**
- (h) disputes between an employer’s organisation or a federation and a member thereof;**
- (i) disputes concerning the registration and election of trade union officials; and**
- (j) disputes relating to the registration and enforcement of collective agreements.**

Section 12(1)(i) is specific and clear that disputes concerning the election of trade union officials are to be heard by the Employment and Labour Relations Court. The Petition and application herein is one such dispute as shown in the foregoing. This Court must therefore down its tools in deference to the Constitution and the law. The Respondent’s Preliminary Objection is therefore found to have merit and succeeds for the foregoing reasons.

The Petition and Notice of Motion filed herein on 10th March 2016 are accordingly struck out with costs to the Respondents.

Orders accordingly.

Dated Signed and Delivered at Machakos this 20th day of September 2016

P. NYAMWEYA

JUDGE