



**Kadukha & 3 others v Kenya National Private Security Workers Union (KNSPSWU) & 2 others; Yongo & 11 others (Interested Parties) (Employment and Labour Relations Petition E163 of 2023) [2024] KEELRC 1073 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1073 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E163 OF 2023**

**MN NDUMA, J**

**MAY 9, 2024**

**BETWEEN**

**PATRICK SAKWA KADUKHA ..... 1<sup>ST</sup> PETITIONER  
FRANCIS MADEGWA ABURAGA ..... 2<sup>ND</sup> PETITIONER  
PETER ODUOR ODIMA ..... 3<sup>RD</sup> PETITIONER  
ANTHONY ODHIAMBO SAOKE ..... 4<sup>TH</sup> PETITIONER**

**AND**

**KENYA NATIONAL PRIVATE SECURITY WORKERS UNION  
(KNSPSWU) ..... 1<sup>ST</sup> RESPONDENT  
REGISTRAR OF TRADE UNIONS ..... 2<sup>ND</sup> RESPONDENT  
ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**LINCOLN YONGO ..... INTERESTED PARTY  
THOMAS KIPTOO ..... INTERESTED PARTY  
MARTIN KIPTOO ..... INTERESTED PARTY  
GLADYS OGOLA ..... INTERESTED PARTY  
DOMINIC NYAMEINO ..... INTERESTED PARTY  
BENJAMIN OSILWA ..... INTERESTED PARTY  
TIMOTHY LUGULU ..... INTERESTED PARTY  
PATRICK MUKONYELO MALOBA ..... INTERESTED PARTY  
ANDREW OKUMU ..... INTERESTED PARTY**



HELLEN MWIKALI ..... INTERESTED PARTY  
SAMSON OMOSA ..... INTERESTED PARTY  
JANE MUNYI ..... INTERESTED PARTY

## JUDGMENT

- I. An order of declaration does issue, declaring that the 1<sup>st</sup> respondent's constitution, amended on 13<sup>th</sup> March 2021 and registered by the 2<sup>nd</sup> respondent on 16<sup>th</sup> August 2021, offends the law, *the Constitution* of Kenya, *Labour Relations Act*, 2007, and therefore invalid, null and void, ab initio;
- II. An order of declaration does issue, declaring that the conduct and actions employed by the 1<sup>st</sup> respondent prior to the alleged repeal of its constitution registered by the 2<sup>nd</sup> respondent on 30<sup>th</sup> January 2017 did not meet the constitutional cum statutory requirements needed for amending and/or repealing its constitution, as such, the outcome was/is unlawful.
- III. An order does issue, revoking and quashing the registration of the 1<sup>st</sup> respondent's constitution (2021) executed by the 2<sup>nd</sup> respondent on 16<sup>th</sup> August 2021.
- IV. An order of declaration does issue, declaring that the 1<sup>st</sup> respondent's appointment of officers made on 8<sup>th</sup> October 2021 and 4<sup>th</sup> February 2022 to fill vacancies created under the alleged new constitution of the 1<sup>st</sup> respondent were/are unlawful.
- V. An order to issue to reinstate the 1<sup>st</sup> respondent's constitution, 2016, registered by the 2<sup>nd</sup> respondent on 30<sup>th</sup> January 2017.
- VI. An order of prohibition does issue, to prohibit the 1<sup>st</sup> respondent, its officers, servants or whosoever acting on its instructions from interfering with operations and proper management of the 1<sup>st</sup> respondent activities as per the 1<sup>st</sup> respondent's constitution registered by the 2<sup>nd</sup> respondent on 30<sup>th</sup> January, 2017.
- VII. Costs for this petition be provided for.

### DIVISION - Facts of the Matter

1. The suit dated 16/8/2023 was prompted by amendments made to the union constitution which was registered on 30/1/2017 on 16/8/2021 by creating the following new positions:-
  - i. 3<sup>rd</sup> Deputy National General Secretary.
  - ii. 4<sup>th</sup> Deputy National General Secretary.
  - iii. 2<sup>nd</sup> Deputy National Organizing Secretary
  - iv. National Secretary for Gender and Youth Affairs.
  - v. 2<sup>nd</sup> Deputy National Secretary for Gender and Youth Affairs and
  - vi. Six (6) National Executive Committee members.

### In addition, new amendments were made regarding:-

- a. Application of new members



- b. Discipline of members
  - c. Termination of membership and consequences
  - d. Conferment of honorary membership; founder membership and corporate membership.
  - e. Right to recall
  - f. Age limit of officials
  - g. National Delegates Conference (NDC) and matters appertaining to holding of NDC and
  - h. National Executive Council (NEC) and matters appertaining thereof.
2. The petitioners are aggrieved by the said amendments which they state amounted to a repeal of the union constitution unlawfully, without following due process and in violation of the rights of the petitioners set out in the petition as hereunder: -

#### SUBDIVISION - Violations

3. The petitioners allege that the unlawful amendment/repeal of the union constitution violated Articles 10, 19, 20, 21, 27, 32, 33, 36, 37, 38, 41, 47 and 232 of *the Constitution* of Kenya 2010.
4. That the petitioners in further violation of the petitioners' rights appointed officials of the 1<sup>st</sup> respondent on 13/3/2021, 8/10/2021 and 4/2/2022 to fill the impugned positions.
5. That the said actions of creating unlawful positions and filling them violated the petitioners' right to fair administrative action protected under Article 47 of *the Constitution* read with section 4(1) (2) and (3) (a) to (g) of the Fair Administrative Actions Act, 2015.
6. Furthermore, the action by the respondents violated sections 41, 88, 27, 34, 39, 48 and 55 of *Labour Relations Act*, 2007 (LRA).
7. The petitioners allege in the conclusion clause of the petition that the 1<sup>st</sup> respondent while procuring the union constitution failed to:
  - i. Take into account the provisions of the LRA, 2007, which were promulgated before the 2010 Constitution hence there was need to bring the provisions of LRA into conformity with *the Constitution* in terms of section 7 of the 6<sup>th</sup> schedule of *the constitution*.
  - ii. Issue notice carrying the draft proposed constitution to the members and the
  - iii. 2<sup>nd</sup> respondent proceeded to register the said constitution on 16/8/2021 while aware that the said constitution contained unlawful offensive and discriminative clauses capable of compromising petitioners' and members' constitutional and statutory rights hence the 2<sup>nd</sup> respondent violated provisions of Articles 10, 19, 20, 21(1), 27, 28, 31(1), 33, 36, 38, 41, 47 and 232 of *the Constitution* of Kenya, 2010.
8. That the action by the 1<sup>st</sup> respondent was arbitrary, discriminatory and unlawful and was unjust and unreasonable. That the actions by the 2<sup>nd</sup> respondent of registering the impugned constitution be declared unconstitutional and quashed on grounds set out herein before for violating constitutional principles; being outright unlawful; contrary to law, offensive, discriminatory and undemocratic.
9. The petition is supported by affidavit of the petitioners to which the union constitution is attached and other relevant documents.

#### DIVISION - Preliminary objection



10. The respondent filed notice of preliminary objection dated 14/09/2023 to wit:-
1. The petition is misconceived and an abuse of the process of the court in that the petitioners have not exhausted mechanisms provided in section 27(4) of LRA.
  2. The 1<sup>st</sup> respondent and the 1<sup>st</sup> to 12<sup>th</sup> interested parties apply that the petition be struck out with costs.
11. In terms of the case of Owners of the motor vessel 'Lilian s' v Caltex oil, Civil Appeal 50 of [1989], Klr, a preliminary objection is to be dealt with at the first instance before delving into the merits of the case. In the present matter parties filed submissions in respect of all matters arising from the petition. The court will therefore dispose of the objection together with the merits of the case.

Section 27(4) of LRA reads:-

“27(a) upon receipt of the notice of change of name or constitution, the registrar shall give a notice of at least twenty-one days in the Gazette and in three daily newspapers of national circulation inviting any objections to the proposed change of name or constitution by members of the trade union and where any such objection is raised, the Registrar shall investigate complaint and grounds upon and may:

- a. Refer the matter to the industrial court.
- b. Refuse to accept the proposed amendments; or
- c. Make any orders that he may deem fit in the circumstances 7(5) The Registrar may approve a change of name or *the constitution* if the applicable requirements of registration of a trade union, employer's organization or federation are met.”

#### SUBDIVISION - Replying affidavit of 1<sup>st</sup> Respondent

12. The General Secretary of Kenya National Private Security Workers Union (KNPSWU) Mr. Isaac G. M. Andabwa deposed to a replying affidavit dated 14/9/2023 in response to the petition and the notice of motion dated 16/8/2023.
13. The deponent deposes that the petitioners have not exhausted the mechanism provided for in section 27(4) (a) of LRA which provides for filing of objection to the Registrar of Trade Unions within 21 days. The notice was gazetted on 23/7/2021. No objection was made by the petitioners to date.
14. Further, there is no constitutional issue raised in the petition. The complaint about amendments to a union constitution is a purely labour matter and not constitutional. The dispute must be resolved in terms of the procedure set out under section 27 of LRA and not by filing a constitutional petition.
15. That the 1<sup>st</sup> respondent followed the union constitution in the making of the amendments and filing the positions created vide the said amendments.
16. That the procedure followed was that on 4/1/2021, the General Secretary issued a notice to all branch secretaries notifying them of the National Delegates Conference (NDC) to be held on 13/3/2023. The agenda of the conference was stated in the notice as follows:-
1. Amendment or alteration of rules in the union constitution.
  2. Election of national officials, trustees and members of National Executive Council.



3. Any other business (AOB)
17. That notices dated 24<sup>th</sup> February 2021 to the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> petitioners' branches and Nairobi branch were sent allocating 1st petitioner's branch, 5 slots, 3<sup>rd</sup> and 4<sup>th</sup> petitioners' branches four (4) slots each and 13 slots to Nairobi branch at the NDC. The allegations of non-participation by the petitioners at the NDC is therefore false. The petitioners attended the NDC at Soy club on 13/3/2021. A true copy of the attendance list and the notice to each branch are attached to the affidavit.
  18. The three petitioners' names are no. 5; no. 6 and no. 14 in the attendance list. The record show the petitioners fully participated in the NDC as shown by exhibits 7 and 8 of the replying affidavit.
  19. The proceedings of 13/3/2021 were presided over by not less than three senior labour officers. Their names are captured in the letter dated 15/3/2021 forwarding form Q to the Registrar of Trade Unions.
  20. The Acting Commissioner of Labour was the returning officer and she forwarded the outcome of the election to the Registrar by a letter dated 15/3/2021.
  21. The Registrar published a notice of the impending amendments in three daily newspapers being the standard, nation and star on 11/6/2021 giving notice of 21 days for anybody with an objection. A true copy of the said notice is annexed to the affidavit. The notice was also ran in the Kenya Gazette issue of 17/7/2021 annexed to the affidavit.
  22. There were no objections made to the amendment notice issued by the Registrar.
  23. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> petitioners were branch secretaries who fully participated in the NDC.
  24. There is no public interest in the petition which is self-serving, that the same be dismissed and the petitioners be condemned to costs of the suit.

**SUBDIVISION - Replying affidavit by 2<sup>nd</sup> and 3<sup>rd</sup> respondents.**

25. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed a replying affidavit dated 9/4/2023 in which the Registrar set out the elaborate procedure she followed in this matter in terms of sections 27(4) (5) and (6) of the LRA. The Registrar annexed all the correspondence from her office already set out in the replying affidavits of the 1<sup>st</sup> respondent.
26. The Registrar also pointed out the fact that no objection was raised at all to the published intended changes in the national newspapers and Kenya gazette. The Registrar concluded by referring to forms L and Q in respect of changes to the union constitution and registration of elected officials of the union respectively which she received and effected the required changes in terms of the minutes of the NDC held on 13/3/2021 at Soy club Uasin Gishu County and minutes of the National Executive Council meeting held at Tom mboya Labour College Kisumu on 8/10/2021.

**SUBDIVISION - Further and supplementary affidavits**

27. The petitioners filed a further affidavit sworn to by the petitioners dated 26/9/2023 and supplementary affidavit dated 11/12/2015 in which they object to the preliminary objections raised by the respondents and other factual matters.
28. The petitioners join issue with the respondents on the lawfulness or otherwise of the changes made to the union constitution and the appointments made pursuant thereof. The petitioners also challenge the lawfulness of the elections that were conducted at the NDC.
29. The petitioners do not specifically deny having participated in the NDC held on 13/3/2021.



30. The petitioners state that the notice of the NDC should have carried the specific amendments intended to be made at the NDC but not issue a notice of a general nature as happened. That the publications in the daily newspapers and in the Gazette, notice were not specific and were therefore totally defective, null and void.
31. That the petition raises constitutional matters and in particular violation of rights of petitioners and members that warrant attention of the court.
32. That there are no pleadings by the respondents refuting that the amendments made were unlawful, discriminatory and unfair. The court should treat those matters as non-contested issues.
33. That the NDC itself had strangers who ought not to have participated in the amendment of the constitution and this was contrary to the circular issued by the 2<sup>nd</sup> respondent to all unions dated 25/9/2020 prohibiting registered unions from performing some specific functions including registering/deregistering a branch alteration of the constitution among others.
33. That amendment/repeal of a union constitution is not a one-day event but is a process that is preceded by the full participation and deliberation of the intended changes prior to the issues of final notice of the intended amendments at the NDC. That the respondents violated this requirement and by so doing disenfranchised the members.
34. The strangers included participant no. 7 and 41 in the register who represented non-existent Bungoma Branch.
35. Petitioners traverse each and every averment in the replying affidavits of the respondents. The petitioners also reiterate the facts and law set out in the supporting affidavits and put the respondents to strict prove thereof.

#### DIVISION - DETERMINATION

36. The parties filed written submissions which the court has carefully considered together with the depositions by the parties and has delineated the following issues for determination:
  - (i) Whether the petition was filed prematurely.
  - (ii). Whether the petition violates the principle of constitutional avoidance.
  - (iii) Whether the petition lacks merit
37. The court shall deal with the issues seriatim.  
We have set out the provisions of section 27(4) of LRA, herein before.
38. The section directs the 2<sup>nd</sup> respondent, the Registrar, in mandatory terms to give a notice of at least 21 days in the Gazette and three daily newspapers of national circulation inviting any objections to the proposed change of name or constitution by members of the trade union.
39. The court makes a finding that the respondents have proved to the satisfaction of the court that the 2<sup>nd</sup> respondent issued a notice in terms of section 27(4) of the LRA.
40. The court finds that no objection to the proposed changes to the union constitution and procedure followed was received by the 1<sup>st</sup> respondent within 21 days from the date the Registrar issued the notice.
41. The court finds that section 27(4) mandates objections to be made as indicated by the use of the word 'shall' thereof.



42. The court therefore has come to the conclusion that a member of a trade union who is aggrieved by any proposed amendment to the union constitution or to the procedure followed must first raise the objection to the proposed changes including the manner in which the notice to the proposed changes have been issued within 21 days of the notice given by the Registrar announcing the intended change.
43. The petitioners failed to raise any objection with regard to the manner in which the proposed changes were made or to the content of the proposed changes as they were mandated to do by the provisions of section 27(4) of LRA.
44. The court notes in particular that section 27(4) (a) provides for the manner in which this court is to be approached in respect of a dispute arising from proposed changes of the union constitution.
45. In particular, the Registrar is bound to commence investigations of any complaint raised by members of the union regarding the proposed changes and grounds relied upon in the complaint.
46. The Act, then gives the Registrar the discretion to refer the matter to this court.
47. The court finds that the Registrar has a discretion to either make a reference to this court to have the dispute adjudicated upon by the court, or refuse to accept the proposed amendments or make any directions that the Registrar may deem fit in the circumstances.
48. In the absence of any objection by members of the union to the proposed changes, the Registrar in terms of section 27(5) of LRA may approve the proposed changes as happened in this case and issue a certificate of any changes made to *the constitution* in the prescribed form as happened in this case.
49. The petitioners evidently failed completely to follow the mandatory procedure set out under section 47(4) of the LRA.
50. The court finds that the petition was not only filed prematurely but also the petitioners are guilty of violating the doctrine of avoidance raised as issue no 2 above.
51. The complaints made by the petitioners are labour issues that are amenable to full resolution in terms of the provisions of LRA and the provision of the union constitution itself.
52. These issues need not at all be elevated to constitutional issues as has happened in this petition.
53. The court is satisfied that the petitioners were given opportunity firstly to object to the proposed amendment in terms of section 27(4) of LRA by the 2<sup>nd</sup> respondent, which they failed to do.
54. The court further finds that the petitioners were given opportunity to participate in the NDC where the proposed amendments were discussed and passed.
55. Accordingly, the 1<sup>st</sup> and 2<sup>nd</sup> respondents are not guilty of violating any of the constitutional provisions set out by the petitioner in the petition and supporting documents.
56. The threshold of pleadings and prove set out in **Mumo Matemu versus Trusted Society of Human Rights Alliance (2013) ECLR and Annarita Karimi Njeru versus Republic (1979) KLR 154** have not been satisfied at all by the petitioners in this matter.
57. The court refers to the decision in **Civil Appeal No. 522 of 2019 the Chief Justice and President of Supreme Court of Kenya versus Brian Mandila Khaemba [2021] eKLR**, where the Court of Appeal held that the doctrine of exhaustion notwithstanding, the courts still retain residual jurisdiction in exceptional circumstances despite existence of alternative jurisdiction.



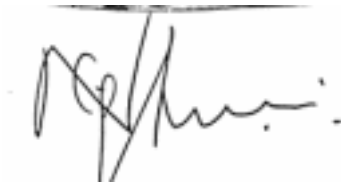
58. In this respect, the court finds that the mandatory procedure set out under section 27(4) LRA is not just another alternative dispute resolution. It is a procedure that must be followed by any aggrieved member of a union before the Registrar gets the mandate to refer the matter to this court for resolution. The statute has specifically ascribed the manner in which the court may be approached to resolve a dispute arising from amendments or changes proposed to be made to the union constitution. This is a procedure that cannot be simply wished away by aggrieved member(s).
59. Furthermore, it was stated in the said judgement that: -

***Exhaustion of alternative remedies is now a constitutional and legal imperative under Article 159(2)(c) of the Constitution and sections 9(2) and 3 of the Fair Administrative Action Act.***

#### SUBDIVISION - MERITS

60. This court having considered all the facts before it makes a finding on the merits of the petition that the shortcomings in the process leading to the amendment of the union constitution have not been demonstrated by the petitioners to be factual.
61. The petitioners were notified of the intended changes at the NDC and did not state that the intended changes were unclear as they allege before court upon receipt of the notice of the meeting and agenda of the NDC.
62. Clearly the petitioners did not object to the content of the proposed changes and/or the alleged shortcomings upon notification in the national newspapers and in the Kenya Gazette by the Registrar.
63. The allegations by the petitioners do not represent what actually took place at the NDC.
64. The court further makes a finding that the changes made to the union constitution do not violate the constitution of Kenya 2010 as set out in the petition and the same are lawful.
65. The appointments done pursuant to the amendments were also made in compliance to the union constitution and LRA and are therefore lawful.
66. Accordingly, the petition fails in its entirety and is dismissed with each party to bear their own costs of the suit.

Dated at Nairobi this 9<sup>th</sup> day of May, 2024.



**Mathews Nderi Nduma**

**JUDGE**

**Appearance:**

Mr. Onyore for petitioners

Mr. Wati for 1<sup>st</sup> respondent

Mr. Mwangi for 2<sup>nd</sup> and 3<sup>rd</sup> respondent

**Mr. Kemboi, Court Assistant**



<b>PCJJJJJUDGMENT ELRC PETITION NO. E163 OF 2023</b>	<b>0</b>
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