

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT NAIROBI

ELRC PETITION NO. E203 OF 2025

(Before Hon. Lady Justice Hellen Wasilwa, J)

NATHAN BRONZE ONSARE ASIAGA.....1ST
PETITIONER

MARTIN OKOTH OMWAYI2ND
PETITIONER

VS

ONESMUS MALUKI MUTIO (BEING THE
SECRETARY GENERAL, UNIVERSITY ACADEMIC
STAFF UNION (UASU) - MMU CHAPTER).....1ST
RESPONDENT

GILBERT MITEI KOECH (BEING THE
SECRETARY GENERAL, KENYA UNIVERSITIES
STAFF UNION (KUSU), MMU CHAPTER).....2ND
RESPONDENT

ALBERT KOCHEI (BEING THE CHAIRMAN,
UNIVERSITY COUNCIL, MULTIMEDIA
UNIVERSITY OF KENYA).....3RD
RESPONDENT

THE PRINCIPAL SECRETARY,
MINISTRY OF EDUCATION.....4TH
RESPONDENT

AND

PROF. ROSEBELLA ORANGI MARANGA.....INTERESTED
PARTY

RULING

1 In opposition to the Petitioners' Notice of Motion applications dated 8th October 2025 and 9th October 2025, and Petition dated 8th October 2025, the 1st Respondent filed Grounds of Opposition dated 27th October 2025 on the following grounds:

1. *That the Notice of Motion and Petition dated 8th October 2025 as well as the Certificate of Urgency and Notice of Motion dated 9th October 2025 are fundamentally flawed, bad in law and incurably defective.*
2. *That the Applications and Petition are based on mere allegations, conjecture, and speculation as the Petitioners have not furnished or annexed a copy of the alleged letter or petition said to disclose the medical status of the Interested Party, and which forms the premise of the Applications and the Petition.*
3. *That in the absence of the alleged letter or petition, the Honourable Court cannot verify the existence, authorship, content, or recipient of the purported disclosure; hence, no prima facie violation of any constitutional right has been demonstrated.*
4. *That the Petition fails to meet the constitutional test of precision as established in **Anarita Karimi Njeru v Republic [1979] 1 KLR 154** and affirmed in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR**.*
5. *That the alleged the email communication or electronic communication provided to the*

Honourable Court does not meet the requirements under the Evidence Act (Cap. 80), Laws of Kenya and the same are inadmissible.

6. That 1st Respondent is opposed to any attempts to introduce further evidence to cure the failure to comply with the requirements of the Evidence Act (Cap. 80), Laws

7. of Kenya.

8. That the Notice of Motion and Petition do not disclose the interest of the Petitioners on the subject matter and in their prayers, more so when the Interested Party has not demonstrated whether they have interest that they are incapable of litigating or defending, and further that the grounds of the Certificate of Urgency and the Notice of Motion dated 9th October 2025, is even more revealing of the intent of the Petitioners, when they assert at Ground 3 of the Notice of Motion that “the omission has created a loophole and exposed the subject matter of the Petition to potential violation thereby defeating the purpose and spirit of the conservatory orders”. The omission referred to is the fact that the Petitioners do not want the University Council to discuss the Vice Chancellor its employee.

9. That the Petitioners are merely litigating on behalf of the Vice Chancellor, yet the Vice Chancellor has legal capacity to litigate for herself.

10. *That the Petitioners have not provided any evidence of their membership to the Universities Academic Staff Union.*
11. *That the 1st Respondent is not the Secretary General of the Universities Academic Staff Union (UASU), and cannot be sued in that capacity.*
12. *That the Petition constitutes an abuse of the court process by inviting the Court to engage in conjecture in the absence of primary evidence, contrary to the established evidentiary and procedural principles.*
13. *That the Notice of Motion and Petition are incurably defective and ought to be dismissed with costs to the 1st Respondent.*

2 Additionally, the 2nd Respondent filed a Notice of Preliminary Objection dated 28th October 2025 seeking that the entire application and main petition both dated 8th October 2025 be struck out on the following grounds;

1. *That the 2nd Respondent is not the Secretary General of the Kenya Universities Staff Union (KUSU) MMU Chapter as stated by the Petitioners.*
2. *That the 2nd Respondent is the Chapter Secretary of the Kenya Universities Staff Union (KUSU) - MMU Chapter as set out in Article 14.1 of the KUSU Constitution.*
3. *That there is only one Secretary General of the Kenya Universities Staff Union (KUSU) as provided under Article 8.3 of the KUSU Constitution which is*

registered at the Office of the Registrar of Trade Unions.

- 4. That Article 8.3 of the said KUSU Constitution provides that 'in the exercise of the Union's legal matters, the Secretary General or his or her authorized officer shall be the sole representative.'*
- 5. That flowing from the said Article 8.3 of the KUSU Constitution, both the MMU Chapter and the MMU Chapter Secretary are deprived of capacity to sue or be sued in their own names.*
- 6. That the Petition is fatally defective, misconceived, and bad in law as it is founded upon evidence obtained in contravention of Articles 31 (d) and 50(4) of the Constitution of Kenya, 2010, and sections 106A, 106B and 107 of the Evidence Act (Cap 80 Laws of Kenya). The Petitioners are neither members of the Multimedia University Council nor officers at the Interested Party's office and therefore, the annexed memo from the 3rd Respondent marked as "NBOA-2" could only have been obtained illegally or through the aid of the Interested Party who is the Vice Chancellor and the Secretary to the Council of Multimedia University. The said constitutional provisions prohibit admission of illegally obtained evidence if the same would render the trial unfair or detrimental to justice.*
- 7. That the production of the said Memo marked "NBOA-2" in the Petitioners' bundles of documents offends Section 11 (1) and (2 'c') of the Public Officers Ethics Act which bars the Interested Party, as*

the Custodian of the Council documents, from conferring a benefit on herself or any member of the University.

- 8. That the electronic mails correspondences annexed to the Petition between the Interested party (Vice Chancellor) and the University Council are private and confidential, and their acquisition and publication by the Petitioners were unlawful, amounting to a violation of the right to privacy and fair administrative action under Article 31 of the Constitution.*
- 9. That the video evidence annexed to the Petition does not meet the admissibility threshold provided under sections 106A and 106B of the Evidence Act, having not been authenticated or certified in accordance with the law, and therefore is inadmissible in these proceedings.*
- 10. That the Petition offends the doctrine of clean hands and the equitable maxim *ex turpi causa non oritur actio*, as the Petitioners rely on unlawfully obtained evidence to seek equitable reliefs from this Honourable Court.*
- 11. That both the Application and the Petition herein are defective, incompetent, misconceived, and an abuse of the due process of this Honourable Court, having been instituted to stifle legitimate union activity and public interest advocacy, contrary to Articles 33, 41, and 258 of the Constitution.*
- 12. That the Petition, being premised on illegally obtained and inadmissible evidence, disclosing no*

reasonable cause of action against the Respondents is thus incompetent, vexatious, and liable to be struck out with costs and

13. *That Orders issued by this honourable Court on 8th October, 2025 be vacated.*

Petitioners' Submissions

- 3 The Petitioners submitted that the law governing Preliminary Objections is settled in ***Mukisa Biscuit Manufacturing Company Ltd v West End Distributors (1969) EA 696***, where Law J.A stated: “*a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration*”. Further reliance was placed on the holding by Sir Charles Newbold P. that: “*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.*”
- 4 It was submitted that flowing from these principles, a valid preliminary objection must arise from the pleadings, must not be dependent on disputed facts, and must be capable of disposing of the matter without the aid of evidence.

Where an objection requires the Court to interrogate facts, interpret contested documents, or weigh competing versions of events, it ceases to be a preliminary objection in law. The Petitioners thus argue that against this settled legal backdrop that the Respondents' objections fall to be considered.

- 5 On *locus standi*, the Petitioners submitted that the objection on locus standi under Articles 22 and 258 of the Constitution cannot be sustained as a pure point of law. The Petitioners submitted that Article 22(1) grants every person the right to institute proceedings alleging violation of the Bill of Rights, while Article 258(1) similarly permits institution of proceedings for contravention of the Constitution. They argued that whether a party properly invokes these provisions depends on the factual context, including the capacity in which the party approaches the Court and the nature of the alleged violations, matters which cannot be determined without examining the pleadings and evidence.
- 6 The Petitioners also submitted that Articles 22(2) and 258(2) expand standing to include proceedings brought on behalf of another person, in the public interest, or in the interest of a group. It was contended that determining whether the Petition falls within these categories requires substantive inquiry beyond a preliminary objection.
- 7 On whether the Respondents' capacity and status can be determined at this stage; the Petitioners submitted that the Respondents' contention that they are not the holders

of the offices pleaded and therefore cannot be sued in the capacities described in the petition introduces a factual dispute. The question of who holds office within a trade union depends on internal processes and documentation which require evidentiary interrogation and cannot be properly resolved through a Preliminary Objection.

- 8 It is the Petitioners' submission that the issue of whether the MMU Chapter of KUSU or its officials have the capacity to sue or be sued cannot be determined in isolation. Section 12 of the Employment and Labour Relations Court Act vests this Court with jurisdiction over disputes involving trade unions and their officials. They argued that whether such jurisdiction is properly invoked depends on the factual role played by the Respondents, a matter that cannot be resolved without evidence.
- 9 The Petitioners submitted that the 2nd Respondent's objection regarding the alleged illegality of the document annexed as "NBOA-2" and its admissibility under Article 50(4) of the Constitution raises evidentiary issues. The Petitioners submitted that Article 50(4) requires the Court to determine whether admission of evidence would render the trial unfair or be detrimental to the administration of justice, a determination that can only be made upon consideration of the circumstances under which the evidence was obtained; and the effect of its admission, matters that lie squarely outside the remit of a Preliminary Objection.

- 10 It is the Petitioners' submission that the allegation of breach of the Public Officers Ethics Act, including Section 11, is founded on contested facts relating to how the document was obtained and whether any improper benefit was conferred. These are matters requiring proof and cannot be presumed, and therefore cannot properly found a Preliminary Objection.
- 11 On whether the objections are properly before Court, it was submitted that the Respondents' objections invite the Court to determine disputed facts and substantive issues at an interlocutory stage, contrary to the principles set out in ***Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696***.

1st Respondent's Submissions

- 12 The 1st Respondent submitted that a Preliminary Objection must be capable of disposing of the entire suit and must raise a pure point of law. It was submitted that the Preliminary Objection meets the threshold enunciated by Law JA in ***Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696***: *"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."*
- 13 The 1st Respondent submitted that he has been wrongly described and sued in the wrong capacity, contrary to

Section 2 of the Labour Relations Act, 2007 and the Constitution of the Universities Academic Staff Union (UASU). Section 2 of the Labour Relations Act, defines an “authorised representative” as the General Secretary of a trade union. Further, Article 10(c) of the UASU Constitution, provides that the Secretary General is the Chief Executive Officer, spokesperson, and the person mandated to represent the Union before various bodies.

- 14 It is the 1st Respondent’s submission that the Petition erroneously describes the 1st Respondent as the Secretary General of UASU, whereas he was merely the Chapter Secretary of the Multimedia University Chapter. Under the Labour Relations Act, 2007, and the UASU Constitution, a Chapter Secretary is not the authorized representative to be sued in this case.

- 15 The 1st Respondent submitted that this misdescription and lack of capacity renders the suit incompetent. Reliance was placed on ***Consumer’s Pride Cafe v King’ori [2023] KEELRC 2131 (KLR)***, where the Court held: *“In my view, the claimant who was represented by counsel squandered a good chance to redeem his suit by way of amendment and joinder of the correct party. The case before the court is not about non-joinder which is a procedural question but rather legal capacity of the defendant which goes to the substance of the suit. Where there is no competent defendant, the suit is a nullity and it amounts to abuse of the process of the court.”*

- 16 It was submitted that the 1st Respondent is no longer the Chapter Secretary, during the elections of the officials of the Universities Academic Staff Union at the Multimedia University in March 2026, Mr. Onesmus Mutio was not elected as an official of the UASU Multimedia University Chapter, and he is no longer an official at the Chapter or Branch
- 17 They argued that any orders issued by the Court would therefore be in vain, as they would be directed at a person who no longer holds office. This fortifies the lack of legal capacity of the 2nd Respondent as held by Makau J in Consumer's Pride Cafe Supra.
- 18 On *locus standi*, the 1st Respondent submitted that the Petitioners lack *locus standi* under Articles 22(2)(a) and 258(2)(a) of the Constitution, which permit a person to institute proceedings on behalf of another only where that person is unable to act in their own name.
- 19 The 1st Respondent submitted that the Interested Party, being the Vice Chancellor of the University, is a senior officer capable of instituting proceedings in her own name and has in fact been sued and represented by counsel in the same proceedings. Therefore, the Petitioners lack the legal capacity to institute the Petition on her behalf.
- 20 On whether the Petition amounts to an abuse of the Court process, it was submitted that the Petition is unsupported by evidence, as the alleged letter or petition disclosing the

Interested Party's medical information has not been produced before the Court. The Petition therefore invites the Court to speculate on unproven facts.

- 21 The 1st Respondent further submitted that the Petition is intended to pre-empt a legitimate University Council meeting, thus, it is an abuse of the Court process. He cited **Muchanga Investments Ltd V Safaris Unlimited (Africa) Ltd & 2 others [2009] eKLR**, where the Court of Appeal stated: *"The person who abuses process is interested only in accomplishing some improper purpose that is collateral to the proper object of the process, and that offends justice."*

2nd Respondent's Submissions

- 22 The 2nd Respondent submitted on three issues: whether this preliminary objection meets the threshold of what constitutes a preliminary objection; whether the 2nd Respondent is clothed with legal capacity to sue or be sued in his own name; and whether Memo from the 3rd Respondent marked as "NBOA-2" was obtained procedurally.
- 23 On the first issue, it was submitted that the Preliminary Objection satisfies the threshold set out in ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] E.A 696***, as reiterated in ***Martha Akinyi Migwambo v Susan Ongoro Ogenda [2022] eKLR***, where a three-judge bench restated a

preliminary objection as follows; *“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit”*.

- 24 On the second issue, the 2nd Respondent submitted that he has been wrongly described by the Petitioners as the Secretary General of the Kenya Universities Staff Union (KUSU) - MMU Chapter, whereas he is merely the Chapter Secretary of the Kenya Universities Staff Union (KUSU) - MMU Chapter whose existence is set out in Article 14.1 of the said KUSU Constitution.
- 25 It is the 2nd Respondent's submission that there is only one Secretary General of KUSU)as provided under Article 8.3 of the KUSU Constitution which is registered at the office of the Registrar of Trade Unions as set out in section 2 of the Labour Relations Act. Article 8.3 of the said KUSU Constitution, provides that *“in the exercise of the Union's legal matters, the Secretary General or his authorized officer shall be the sole representative”*. Therefore, the mandatory requirement has not been met as the 2nd Respondent is neither the Secretary General nor the said sole agent.
- 26 On this basis, the 2nd Respondent submitted that neither the MMU Chapter nor its Chapter Secretary has the legal capacity to sue or be sued in their own name without authorization from the Secretary General. The 2nd Respondent is neither the Chief Executive Officer nor the

spokesperson of the Union and is therefore improperly enjoined in the proceedings.

- 27 On the final issue, it was submitted that the memo annexed as “NBOA-2” was irregularly and unlawfully obtained. The memo was official communication sent by the 3rd Respondent through his official email akochei@mmu.ac.ke to the Interested Party’s official email vc@mmu.ac.ke. Therefore, the Petitioners, not being members of the University Council or officers in the Interested Party’s office, could not lawfully have accessed the same.
- 28 He argued that the only plausible inference is that the document was obtained illegally or through improper means, possibly with the involvement of the Interested Party.
- 29 The 2nd Respondent submitted that admission of the said document would offend Article 50(4) of the Constitution, which prohibits the admission of evidence obtained in a manner that would render the trial unfair or be detrimental to the administration of justice.
- 30 The 2nd Respondent further submitted that the production of the impugned Memo would offend Section 11 (1) and (2 ‘c’) of the Public Officers Ethics Act which bars the Interested Party, as the custodian of the Council documents, from using resources including documents that come to her in the course of her duties to benefit herself or any member of the University.

- 31 It is the 2nd Respondent's submission that the Petition is in substance being advanced by the Interested Party through proxies, contrary to the spirit of Articles 22 and 258 of the Constitution. These provisions were not intended to facilitate litigation by proxy where the person concerned is capable of instituting proceedings in their own name. Reliance was placed on ***Kenya Railways Corporation & 2 others v Okoiti & 3 others [2023] KESC 38 (KLR)***, where the Supreme Court clarified: *"We find it necessary to caution that, whereas article 22 of the [Constitution](#) entitles every person to institute court proceedings claiming that a right or a fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened, and article 258 entitles every person to institute court proceedings claiming that the [Constitution](#) has been contravened or is threatened with contravention, these provisions ought not to be abused in the name of 'public interest.' This is, more so, where the litigants seek to advance private or political interests or other considerations through proxies. Attractive as it may sound, public interest litigation must abide by laid down rules of procedure and the law, and must be aimed at addressing genuine public interests and not used for personal gain or vendetta."*
- 32 On that basis, it was submitted that the memo marked "NBOA-2" be considered as "fruit of sins" whose source, the Interested Party, is tainted by mala fide and illegality,

should be treated as generally inadmissible and be struck out.

33 I have examined the averment and submissions of the parties herein. The respondents have raised a preliminary objection in this matter raising various issues pertinent being who the 2nd respondent is in relation to the KUSU constitution and other matters flowing from the KUSU Constitution. Other issues raised in the preliminary objection relate to factual issues in relation to admissibility of certain evidence which the respondents aver is not admissible.

34 Issues of which evidence is admissible or not in any matter relates to facts at play and which the court cannot ascertain without delving into the facts or evidence presented to it. It is therefore true that issues of evidence which is admissible or not go beyond the purview of **Mukisa Biscuit** case as submitted by the respondents.

35 Issues of capacity of the 2nd respondent are also issues of evidence and which the respondents have invited this court to interrogate as a preliminary objection and which can also only be determined after considering facts that will be presented before this court.

36 This being the case, I believe matters that the respondents have raised as a preliminary objection go beyond the principle of law of preliminary objections and cannot be entertained at this state. I will therefore dismiss the preliminary objection and direct the parties to proceed

with the main application pending before court. Costs in the petition.

Dated, Signed and Delivered Virtually at Nairobi this 13th Day of April, 2026.

**HELLEN WASILWA
JUDGE**