



**Otieno & 37 others v Union of Kenya Civil Servants & 3 others (Petition E027 of 2023) [2024] KEELRC 99 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 99 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**  
**PETITION E027 OF 2023**  
**S RADIDO, J**  
**JANUARY 31, 2024**  
**IN THE MATTER OF THE CONSTITUTION OF KENYA**  
**AND**  
**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES**  
**10, 41, 50, 232 AND 258 OF THE CONSTITUTION OF KENYA**  
**AND**  
**IN THE MATTER OF ALLEGED CONTRAVENTION OF**  
**SECTION 44 AND 47 OF THE LABOUR RELATIONS ACT, 2012**  
**AND**  
**IN THE MATTER OF ALLEGED CONTRAVENTION OF**  
**ARTICLES 1 (A), 3 (H), 5 (D) 8 (B), (E), (G) (J), 20 (2) AND 25 (2)**  
**OF THE UNION OF KENYA CIVIL SERVANTS CONSTITUTION**

**BETWEEN**

**BENARD OTIENO ..... 1<sup>ST</sup> PETITIONER**  
**MALICK M SHANGUYA ..... 2<sup>ND</sup> PETITIONER**  
**PATRICK ODERO & 35 OTHERS ..... 3<sup>RD</sup> PETITIONER**

**AND**

**UNION OF KENYA CIVIL SERVANTS ..... 1<sup>ST</sup> RESPONDENT**  
**TOM MBOYA ODEGE ..... 2<sup>ND</sup> RESPONDENT**  
**ALISOKOR MUHAMUD ISHAQ ..... 3<sup>RD</sup> RESPONDENT**  
**ABDULMALIK A ABDALLA ..... 4<sup>TH</sup> RESPONDENT**



## JUDGMENT

1. The Petitioners sued the Respondents on 3 October 2023, alleging violation of the Constitution of the Union of Kenya Civil Servants and their Constitutional rights.
2. The remedies sought by the Petitioners were:
  - (a) An order be issued declaring that the 2<sup>nd</sup> – 4<sup>th</sup> Respondents are in contravention of their fiduciary responsibilities and duties under the Labour Relations Act as well as the rules of the 1<sup>st</sup> Respondent and are unfit to hold office.
  - (b) An order be issued to suspend the 2<sup>nd</sup> – 4<sup>th</sup> Respondents herein for their contraventions of the Constitution of the Union.
  - (c) An order for the convening of an Advisory and National Delegates Conference (ADC) of the 1<sup>st</sup> Respondent within sixty (60) days of the judgment with all members and delegates of the two organs allowed to attend in line with the Constitution of the 1<sup>st</sup> Respondent (the Union) for members to discuss the affairs of the Union and take appropriate measures thereto.
  - (d) The cost of this application (sic) be borne by the Respondents.
3. The Petitioners also filed a Motion with the Petition and when the parties appeared for directions on 9 October 2023, the parties agreed that the Motion be abandoned in lieu of an expeditious determination of the Petition, with judgment reserved for 6 December 2023.
4. On 16 October 2023, some 5 Petitioners filed Notices to Withdraw from the proceedings.
5. However, the Respondents filed a Motion dated 23 November 2023, which scuttled the delivery of the judgment.
6. The Court delivered a Ruling on the Motion on 11 December 2023 after which it issued further directions.
7. Pursuant to the further directions, the Petitioners filed a further affidavit and submissions on 14 November 2023.
8. The 2<sup>nd</sup> Respondent filed a replying affidavit on behalf of the Union and himself on 27 November 2023.
9. The Petitioners identified the Issues in Dispute in their submissions as:
  - i. Financial probity of the Union and unlawful processes by the Respondents to bar members' inspection of books of accounts.
  - ii. Poor leadership and despotic approaches of the Union.
10. The Respondents had identified the Issues in Dispute in the replying affidavit as:
  - i. Whether the Petitioners' inaccurate financial documents can be relied upon in prosecuting this suit?
  - ii. Whether the Petitioners have made out a case to warrant grant of the orders sought?



- iii. Whether the Registrar's ratification of the Union's audit report shall be disregarded by this Honourable Court?
  - iv. Costs for this suit.
11. Pursuant to leave granted by the Court on 11 December 2023, the Petitioners filed further a supplementary affidavit and submissions on 24 December 2023.
12. The Respondents filed joint submissions on 21 January 2024 in which they put their case as:
- i. The Petitioners' Petition is founded on wrong and non-existent grounds.
  - ii. The Petitioners have not proven their case to the required standard.

### **Petitioners' Case**

13. First, the Petitioners alleged that the Respondents had breached their fiduciary duty to the membership by failing to meet the statutory obligation(s) placed upon them by failing to remit Pay As You Earn (PAYE) on behalf of the Union's employees to the Kenya Revenue Authority, the last payments having been made in November 2021. The Petitioners produced a copy of a General Ledger Report from the Kenya Revenue Authority to support the assertion.
14. Second, the Petitioners also alleged that the Respondents had failed to disburse funds to the Union's branches for over 10 months and that upon the filing of the Petition, the Respondents made disbursements to cover one month and thereafter made an unsuccessful attempt to recover the disbursements sent to Kakamega branch.
15. The Petitioners stated that the failure to disburse the funds had led to rent payment defaults leading to debilitating arrears and closure of some branch offices.
16. Third, the Petitioners further alleged unauthorized expenditures/payment of allowances to the National Administrative Council and National Executive Board in 2022, and on public relations and payment of rent.
17. Four, the Petitioners alleged that despite a written request on 23 January 2023, the Respondents had declined to allow them to inspect the books of accounts in violation of section 44 of the [Labour Relations Act](#) and Article 25 of the Union's Constitution.
18. According to the Petitioners, the Respondent had declined to show or give them for inspection copies of certified bank statements from 10 October 2021 to 19 January 2023, payroll from 1 January 2022 to 31 December 2022, summary of monthly expenditure for January, February, October, November and December 2022, payment schedule of allowances for national officials from January to December 2022, schedule of bank loan recoveries for employees and national officials from January to December 2022.
19. Citing Article 35(1)(b) of the [Constitution](#), the Petitioners contended that the Respondents had breached their right to access information.
20. Five, the Petitioners also indicted the Respondents for failing to convene meetings of the Advisory Council and Annual National Delegates Conference by 31 August as demanded by Article 15(1.2) of the Union's Constitution while budgetary allocations had been made.
21. The effect of the failures, the Petitioners urged, was that the membership had been denied the right to join and participate in the activities and programs of the Union.



## **Respondents' Contentions**

22. Responding to the complaints about returns to the Kenya Revenue Authority, the Respondents indicated that the iTax system had failed in 2021 and that the issue was pending mediation between the Union and the Authority.
23. The Respondents asserted that the allegation concerning the failure to disburse funds to the branches was vague as the affected branches had not been disclosed and that the records relied on by the Petitioners to contend that funds were available were mere budgetary projections, and that the Union's revenue majorly came from National Government funding and that it took up to 4 months after approval of the national budget by Parliament before the national government disbursed funds to the Union.
24. Still on the budget, funding and inspection of books of accounts, the Respondents deposed that the Union had filed returns on the audited financial statements with the Registrar of Trade Unions every year as required by sections 42 and 43 of the *Labour Relations Act*.
25. According to the Respondents, it was open to the Registrar of Trade Unions who had unfettered powers under sections 44 and 46 of the *Labour Relations Act*, to inspect or query the financial statements and, therefore, the Petitioners should have approached the Registrar in the first instance.
26. The Respondents also challenged the validity of the Financial Statements, Revenue Flow, Monthly Payment Schedules for March to May 2022, Funds Analysis from July to September 2022, and the Creditors List produced by the Petitioners on the ground that they were drafts which had not been approved by the Union's Accountants. They contended that the minutes produced by the Petitioners were not signed.
27. With respect to allegations of unauthorized expenditures in relation to the National Advisory Council, it was deposed that the expenditure had been authorized by the National Executive Board.
28. The Court has considered the Petition, affidavits and submissions.

## **Breach of fiduciary duties**

29. Section 44 of the *Labour Relations Act*, 2007 allows any member of a trade union to inspect the accounts and records of the Union as may be stipulated in the trade union's constitution.
30. In this regard, Article 25 of the Union's Constitution, 2015 provides that the books of account shall be open for inspection at the Union's offices during working hours by any member after giving a week's notice to the Secretary-General.
31. On 23 January 2023, the 1<sup>st</sup> Petitioner (the Branch Secretary of the Union's Kakamega branch) gave written notice to the Secretary-General of the Union seeking to inspect the following records: certified bank statements of accounts held with cooperative bank of Kenya from 10 October 2021 to 19 January 2023, bank statements for the same period for accounts with any other banks, payment schedules of monthly allowances for the 17 national officials for previous 12 months, bank cheque-books, payment schedules for National Administrative Council members for previous 11 months, schedule of monthly allowances for members of the National Executive Board for previous 11 months, list of employees and copies of contracts and records of remuneration paid, list of creditors and payment records from 10 October 2021 to 30 December 2022, list of fixed and current assets, master cash book for period ending 31 December 2022 and schedule of remittances to the branches.



32. The request prompted the Respondents to apply for certified copies of bank statements from Cooperative Bank of Kenya Ltd on 24 January 2023. Thereafter, on 31 January 2023, the National Treasurer responded positively to the request by the 1<sup>st</sup> Respondent and invited him to inspect the records on 2 February 2023.
33. The 1<sup>st</sup> Petitioner visited the Union's offices but he alleges he was not given all the records he requested for inspection forcing him to see the Deputy Secretary-General who gave him a few more records for inspection.
34. The 1<sup>st</sup> Petitioner further asserted that he prepared a report after the inspection, and on 27 February 2023, 10 March 2023 and 3 April 2023, he requested the Secretary-General to give him an opportunity to share the outcome of the inspection and to also provide more records for inspection.
35. The Respondents did not respond and on 20 June 2023 and 3 July 2023, the 1<sup>st</sup> Petitioner sought the intervention of the National Administrative Council and National Executive Board.
36. The two organs did not intervene and on 17 July 2023, the 1<sup>st</sup> Petitioner requested the Registrar of Trade Unions to invoke section 46 of the [Labour Relations Act](#) and direct the Respondents to avail the records for his inspection.
37. The Registrar did not act and the 1<sup>st</sup> Petitioner caused an advocate to make a formal demand, but the demand led to warnings and threats from the Respondents and the suspension of the Deputy Secretary-General who had allowed him to inspect some of the records and himself.
38. The Respondents, through the replying affidavit of the Secretary-General asserted that they had made all the records available to the 1<sup>st</sup> Petitioner for inspection and that the 1<sup>st</sup> Deputy Secretary-General was not an official custodian of records and that the records he availed to the 1<sup>st</sup> Petitioner were not accurate copies kept by the Union.
39. According to the Respondents, the official custodians of records were the National Treasurer, Deputy National Treasurer and the Secretary-General.
40. The Respondents asserted also in the replying affidavit that a call was made to the 1<sup>st</sup> Petitioner to go and inspect all the records, but he did not honour the invitation but instead moved to Court.
41. The 1<sup>st</sup> Petitioner, relying on the strength of his membership of the Union, section 44 of the [Labour Relations Act](#) and Article 25 of the Union's Constitution made a written plea to the Respondents to be allowed to inspect the books of account of the Union.
42. He asserted that the Respondents did not make available all the requisite records.
43. As a member of the Union, the 1<sup>st</sup> Petitioner and indeed all the Petitioners, are entitled to inspect the said books of accounts.
44. The Respondents have not demonstrated any justifiable reason why they did not fully make the books of accounts available for inspection by the Petitioners.
45. In that respect, the Court finds that the Respondents were in breach not only of the Union's Constitution and their fiduciary duties as office holders in the Union, but the statute that governs the operations of trade unions and that the Petitioners are entitled to relief.



## Financial mismanagement

46. The Petitioners alleged that a review of the few records availed to the 1<sup>st</sup> Petitioner revealed financial mismanagement in that there was a revenue inflow of Kshs 221,723,370/48 against a projected budget of Kshs 214,980,775/- yet the branches had not received their monthly disbursements of Kshs 11,844,000/- leading to rent defaults; there was a budget allocation for County Conferences of Kshs 3,885,000/- yet no such Conferences had been held; there was a payment schedule indicating the branches had received Kshs 8,300,000/- in June 2022 yet the remittances had not been made; that the records show Kshs 8,230,000/- had been paid to the branches while in actual fact, the branches had only received Kshs 4,115,000/-; unauthorized expenditure of Kshs 6,344,400/- in respect to the National Administrative Council for meetings in 2022 against a budget allocation of Kshs 2,520,000/-; unauthorized expenditure of Kshs 8,315,000/- for meetings and trainings; payment of Kshs 8,500,000/- as rent for 16 months instead of the 7 months' rent due and an expenditure of Kshs 5,155,000/- on public relations against an approved budget of Kshs 1,591,800/-.
47. The Respondents assailed the allegations of financial mismanagement by asserting that the allegations were based on budget projections made on draft documents and assumptions influenced by several factors such as inflation, government allocations and payment of subscriptions.
48. The Respondents also contended that part of the Union's revenue depended on parliamentary approval of the national budget and that it took up to 4 months after the approval to receive the funds.
49. The Respondents further maintained that pursuant to sections 42, 43 and 44 of the [Labour Relations Act](#), 2007, they had caused the books of accounts of the Union to be audited and a report presented to the Registrar of Trade Unions and that the external auditor had given a clean bill of health to the accounts for the year 2022.
50. The allegations of financial mismanagement, the Respondents argued, should have been reported to the Registrar of Trade Unions in the first instance, and not the Court.
51. Responding to the allegations of unauthorized expenditures, the Respondents stated that all the expenditures by the National Administrative Council were authorized by the National Executive Board.
52. With respect to complaints on payment of taxes to the Kenya Revenue Authority, the Respondents admitted that there were issues arising from the failure of the iTax system in 2021 and the dispute was undergoing mediation
53. The Respondents placed before this Court audited financial statements of the Union. The financial statements are said to have been shared with the Registrar of Trade Unions.
54. The Petitioners relied on raw records in impeaching the Respondents running of the financial affairs of the Union.
55. One of the agenda items when a trade union holds an annual delegates conference is the presentation and discussion of the financial statements.
56. The Respondents had called an Annual Delegates Conference which the Court stopped from meeting pending the determination of this Petition.
57. In the view of the Court, that would be the opportune time for the Petitioners to raise the allegations they have presented in Court on financial mismanagement so that the plenary of the membership of the Union can take appropriate action.



58. The Court is therefore unable, based on affidavit evidence not subjected to interrogation to find that the Respondents are culpable for financial mismanagement.

### **Holding of Conferences**

59. The Respondents indicated that the Advisory Council and National Delegate Conferences could not be held as contemplated by the Union's Constitution because of lack of funds and the transition from one financial year to another and that the practice since 2021 was to hold the Conferences in December.
60. Subsequently, the Respondents sent out invitations for the meetings but the Court stopped them. Subject to further orders by the Court the question of holding of the Conferences has been overtaken by events.

### **Threats and intimidation**

61. The Respondents denied threatening the Petitioners but admitted that the 1<sup>st</sup> Petitioner had been suspended and the suspension was the subject of a Court case, Kisumu JR Misc Appl No. E013 of 2023, *R v Tom Odege & 3 Ors.*
62. The Petitioners have also placed before the Court records and pleadings suggesting that the suspensions of branch officials and threats have become the subject of litigation before other Courts. Those Courts are best placed to interrogate the claims of threats and intimidation.

### **Appropriate remedies**

63. The Court set out at the beginning of this judgment the remedies which were sought by the Petitioners. The remedies included the suspension of the 2<sup>nd</sup> to 4<sup>th</sup> Respondents and holding that they were unfit to hold offices in the Union.
64. the Constitution of the Union has provisions for the suspension and removal of national as well as other officials. the Constitution gives the function to defined organs of the Union.
65. The Petitioners have not attempted to make use of the route availed to them by the Union's Constitution to have the 2<sup>nd</sup> to 4<sup>th</sup> Respondents suspended and or removed by the relevant organs of the Union.
66. The Petitioners still have an opportunity to interrogate the financial statements during the National Delegates Conference and move appropriate motions including the suspension and removal of the 2<sup>nd</sup> to 4<sup>th</sup> Respondents from office, if found guilty of financial mismanagement by the delegates.
67. The orders suspending and or declaring these Respondents unfit to serve would therefore be out of place at this stage.
68. The Petitioners also sought orders directing the Respondents to call for and hold Advisory and National Delegates Conferences (ADC) of the Union within sixty (60) days of the judgment.
69. The Respondents issued notices convening the meetings in the course of the hearing and determination of this Petition, and it would be of no legal utility to grant such orders.

### **Conclusion and Orders**

70. In light of the above, the Court grants the following orders:



- i. An order is hereby issued declaring that the 2<sup>nd</sup> – 4<sup>th</sup> Respondents are in contravention of their fiduciary responsibilities and duties under the *Labour Relations Act* as well as the *Constitution* of the 1<sup>st</sup> Respondent by failing to make all the books of account of the 1<sup>st</sup> Respondent available for inspection.
- ii. An order is hereby issued directing the Respondents to make available all the books of accounts sought by the Petitioners for inspection within the next 15 days.
- iii. An order is hereby issued that the Petitioners will be at liberty to raise the agenda of financial management of the Union if need be at the National Delegates Conference.

71. Costs in the cause.

**DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 31<sup>ST</sup> DAY OF JANUARY 2024.**

**RADIDO STEPHEN, MCIArb**

**JUDGE**

Appearances

For Petitioners Otieno Aluoka & Co. Advocates

For Respondents Nyamweya Mamboleo Advocates

Court Assistant Chrispo Aura

