



**Kenya Union of Water and Sewerage Employees v Registrar of Trade Unions; Olwalo (Interested Party) (Judicial Review E008 of 2023) [2024] KEELRC 13 (KLR) (24 January 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
JUDICIAL REVIEW E008 OF 2023  
NJ ABUODHA, J  
JANUARY 24, 2024**

**BETWEEN  
KENYA UNION OF WATER AND SEWERAGE EMPLOYEES ..... APPLICANT  
AND  
REGISTRAR OF TRADE UNIONS ..... RESPONDENT  
AND  
GEORGE OLWALO ..... INTERESTED PARTY**

**RULING**

1. By a Notice of Motion dated 11<sup>th</sup> January, 2024 the applicant sought orders among others that:
  - a. The respondent be ordered to present in Court the extract containing the officials of the applicant as per the elections conducted on 11<sup>th</sup> February, 2021 pursuant to the Court orders issued on 21<sup>st</sup> December, 2023 in the next mention date given by the Honourable Court to enable the applicant union operate and or conduct its day to day functions.
  - b. The Honourable Court be pleased to grant leave to the applicant in the interim to have two of its registered trustees to operate as the Bank Signatories in place of the National Chairperson and the National Treasurer to assume specific functions in the applicant’s bank account number 011202xxxxxxx held at Cooperative Bank of Kenya Buru Buru Branch, Nairobi to enable the applicant access the Union funds to enable it operate its day to day functions including payment of its office rent and salaries and allowances as well as convene NEC meetings among others.
2. The application was supported by the affidavit of Elijah Otieno Awach in which he deponed among others that:



- i). That I am an adult of sound mind, resident in Nairobi within Nairobi County in the Republic of Kenya, and the applicant General Secretary herein, aware of the matters in issue and duly competent to swear this Affidavit.
- ii). That the Honorable court on 21<sup>st</sup> December 2023 made Orders to the effect that the union officials as elected on 11th February 2021 and registered by the registrar shall remain the bona fide officials with full powers to discharge their day to day functions as such including operating Unions Bank Account.
- iii). That the Order given on 21<sup>st</sup> December 2023 was physically served upon the Respondent, the interested party, the chairman and treasurer of the union on 21st December 2023 were as well served via their respective Whatsapp.
- iv). That Respondent was in compliance with the orders given on 21<sup>st</sup> December 2023 required to issue a fresh extract of officials of the Applicant to reflect the changes ordered upon service.
- v). That despite service of the Order given on 21<sup>st</sup> December 2023 the Respondent has to date failed, ignored and /or declined to issue a fresh extract making the execution order of 21.12.2023 impossible and by extension grounding the operations of the applicant union to halt.
- vi). That at the time I was serving the Registrar of trade unions with the said court orders, I drafted a letter requesting for the new extract of our headquarters based on the said court orders and served the same on the respondent on the same day and at the same time.
- vii). That the National Treasurer and the National chairman who are both signatories to the applicant Union's Bank account number 011202xxxxxxx held at Buru Buru Branch of Co-operative Bank were required to co-operate to operationatize the Bank Account by signing cheques to enable union pay court decree issued on 31st October 2023. Copy of the order in ELRC cause number 18 of 2015 issued on 31st October 2023 which payment of Kshs 300,000/= is due on 16th January 2024 and a similar amount on 16th February 2024.
- viii). That it is likely that the court decree and the Order issued on 31st October 2023 will be rendered nugatory if orders sought are not granted and I might be cited for contempt of court since I am a bank signatory in union bank account number 01120xxxxxxx held at cooperative Bank of Kenya, Buru Buru Branch Nairobi and the Chief Executive Officer of the union.
- ix). That after service of the order given on 21.12.2023, upon the chairman and treasurer of the Applicant Union, on 21.12.2023 the union General Secretary wrote to the two official requiring them to come to the Union head office and sign cheques to enable withdrawal of funds to pay salaries, office rent, suppliers legal fees, Decree of this court and other union obligation but have to date refused and or neglected to attend and sign the said cheques as a result of which the union operations have been grounded.
- x). The law under section 37 of *Labour Relations Act* vests the Union property both movable and immovable upon the union trustees and it is for this reason that I on behalf of the union seeks that two of union trustees be appointed as signatories to union's bank account number 011202xxxxxxx held at Buru Buru Branch of Co-operative Bank in place of the National Chairman and the National Treasurer respectively.
- xi). That it is in the interest of justice that the respondent be ordered to urgently present to Court an extract of officials of the Applicant reflecting the directions given by the Court on 21st



December 2023 and the Applicant be allowed to introduce two of its trustees as signatories to the union bank account in place of the National chairman and National treasurer respectively.

3. The application was initially placed before Honourable Justice Manani as the Recess Duty Judge on 11<sup>th</sup> January, 2024 and the learned Judge ordered that the application be served on the respondent and the Interested Party and the same be placed before the trial court on 23<sup>rd</sup> January, 2023.
4. According to the affidavit of service filed before the Court, the respondent and interested party herein was served with the Motion on 16<sup>th</sup> January, 2024. The respondent did not file any response to the application, however the interested party on 22<sup>nd</sup> January, 2024 (eve of the hearing of the application), filed a Notice of Preliminary Objection contending among others that:
  - i. The Court had no jurisdiction to entertain the application dated 11<sup>th</sup> January, 2024 as it had become *functus officio* having fully discharged its duty in the matter.
  - ii. The application is hopelessly incompetent, fatally defective and inadmissible and the same ought to be dismissed forthwith, even *suo motu* [*sic*].
  - iii. The applicant lacks the requisite *locus standi* to institute this suit on behalf of the trade union, having been suspended on 14<sup>th</sup> October, 2023 and as per the extract issued as at 1<sup>st</sup> December, 2023 hence, the application flies against the dictates of section 55 of the [Labour Relations Act No. 14 of 2007](#) as read together with the [Constitution](#) and Regulations of the Kenya Union of Water and Sewerage Employees. The Interested Party therefore asked for the application to be struck out in limine and costs and/or incidental to the objection be borne and paid by the applicant.
5. When this matter came before me on 23<sup>rd</sup> January, 2024, The Court very quickly recalled that it delivered a Judgment on 21<sup>st</sup> December, 2023 in which the Court decried the unnecessary and sometimes avoidable wrangles that quite often, some Unions are notorious for.
6. The principle of freedom of association is at the core of the ILO's values. It is enshrined in the [ILO's Constitution \(1919\)](#), the [ILO's Declaration of Philadelphia \(1944\)](#), and the [ILO Declaration on Fundamental Principles and Rights at Work \(1998\)](#). It is also a right proclaimed in the [Universal Declaration of Human Rights \(1948\)](#). At municipal level this right is recognised under article 41 of the [Constitution](#). This right to organize and form employers' and workers' organizations is the prerequisite for sound collective bargaining and social dialogue. Nevertheless, and regrettably, there continue to be challenges in applying these principles. Unions in Kenya continue to face challenges in internal democracy and good governance. It is not uncommon to come across a union so fiercely divided in its leadership that the warring factions would rather spend the entire five-year election circle fighting each other in Court. This state of affairs is not only unfortunate but greatest impediment to workers representation which is one of the core mandates of a trade union.
7. Whereas it is conceded that it is the Court's Constitutional responsibility is to resolve disputes, the same Constitution confers on the Court the power to encourage parties to use alternative forms of dispute resolution including alternative forms of justice in resolving such disputes leaving the Court as a last and unavoidable arbiter in the process. I say so because it has been tested and recognised internationally that disputes resolved outside the Court process more often than not, last longer and serve to restore and build relationships a lot more than a decree by a Court of law.
8. Representation of Workers in a workplace through union officials and shop stewards is a critical element of Industrial Relations. [Convention 98 of the ILO](#) on The right to organise and collective bargaining", provides that measures appropriate to national conditions shall be taken, where necessary,



to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements. This is an involving imperative and continuous responsibility that requires active involvement of union officials. It cannot therefore be effectively discharged where elected union officials are forever involved in internecine factional wars in Court. This Court being a critical cog in the wheel of social justice and peaceful Industrial relations has a responsibility to encourage and where necessary make orders that with ensure the upholding of these fundamental principles. Further this Court as a matter of policy fast tracks the hearing and disposal of such disputes for the sake of good industrial relations.

9. The foregoing having been said, Ms. Rop for the respondent informed the Court that they had not appealed the judgment of the Court and that she will advise the Registrar of Trade Unions to comply with the order of the Court.
10. Mr. Kipchumba for the Interested Party on the other hand submitted in support of his preliminary objection that the National Delegates Conference resolved on 14<sup>th</sup> October, 2023 to dismiss Mr. Awach, the General Secretary hence he had no locus standi to bring the present application. Counsel relied on an extract from the register issued by the Registrar of Trade Unions dated 1<sup>st</sup> December, 2023 which showed that Mr. Awach as suspended. Mr Kipchumba further submitted that the Court became *functus officio* having rendered its judgment on 21<sup>st</sup> December, 2023. According to Counsel, the Motion seeks to revive a matter which the Court had determined by seeking to substitute signatories to the Union's account. It was further his submission that litigation must come to an end and a party can only at this stage approach the Court over the judgment by way of an application for review or an appeal to the Court of Appeal.
11. Mr. Othoo for the applicant on the other hand submitted that the issue raised in the preliminary objection were factual and not matters of law. According to him, the applicant sought the enforcement of the Court's judgment. Further that the issues raised in the preliminary objection were similar in nature to the ones raised in the preliminary objection dated 15<sup>th</sup> June, 2023 and the Court made a ruling thereon on 7<sup>th</sup> October, 2023. Counsel further submitted that the issue of suspension of the General Secretary was overtaken by the decision of the Court in the judgment delivered on 21<sup>st</sup> December, 2023 which reverted to the extract issued after the election on 11<sup>th</sup> February, 2022. No appeal has been filed against the judgment hence the same stands.
12. In rejoinder Mr. Kipchumba submitted that the issues raised in the preliminary objection were matters of law and that the previous preliminary objection was canvassed and a ruling made. Regarding response to the Motion, Counsel submitted that by its very nature, it required that it be heard first. The Interested Party would therefore be seeking time to respond to the Motion.
13. As rightly observed by the parties herein, the Court having considered the evidence and submissions by the parties, rendered its judgment on 21<sup>st</sup> December, 2023 restoring the *status quo* as at 11<sup>th</sup> February, 2022. The extract to the register as at 11<sup>th</sup> February, 2022 was annexed to further affidavit of Elijah Otieno Awach sworn on 3<sup>rd</sup> November, 2023 in support of the Judicial Review application. This extract showed the Union's elected officials as follows:
  - i. National Chairman Bashir Mohammed
  - ii. National Vice Chairman Susan Obara
  - iii. National General Secretary Elijah Otieno Awach
  - iv. National Deputy Secretary General George Olwalo



- v. National Assistant General Secretary Vacant
- vi. National Treasurer Walter Muga
- vii. National Assistant Treasurer Vacant
- viii. National Organising Secretary Daniel Muriithi
- ix. National Assistant Organising Secretary Patrick Kiambi Mburugu
- x. National Women Leader Jane Onyango
- xi. National Assistant Women Leader Vacant
- xii. 1<sup>st</sup> Trustee John Randa
- xiii. 2<sup>nd</sup> Trustee Mariam Barry Ashioya
- xiv. 3<sup>rd</sup> Trustee Nancy Siah
- xv. 4<sup>th</sup> Trustee Jared Nyawanda

This is the *status quo* that the Court restored in its Judgment delivered on 21<sup>st</sup> December, 2023.

14. The Interested Party's Counsel Mr. Kipchumba has submitted that the National General Secretary Mr. Elijah Otieno Awach was suspended pursuant to NEC resolution on 14<sup>th</sup> October, 2023 and that there was an extract from the Registrar of Trade Unions dated 1<sup>st</sup> December, 2023 indicating Mr. Awach as suspended. However at paragraphs 9-15 of the Replying Affidavit of Beatrice Mathenge (acting Registrar-Trade Unions) sworn on 8<sup>th</sup> May, 2023 on behalf of the respondent in opposition to the Applicant's Judicial Review application, she acknowledges that there was wrangling in the Applicant Union and therefore it was not safe to effect any changes to the register of elected officials and further that it would not have been prudent to register any changes as that would be sub judice. Further that it was not possible to predict the decision of the Court.
15. From the foregoing it would have not been possible for the Registrar ( the respondent) to turn around and purport to make changes in the register as claimed by the Interested Party by an alleged extract dated 1<sup>st</sup> December, 2023 purportedly issued by the respondent. Such a change if at all would not only be contradictory to the position clearly taken by the Registrar in her replying affidavit referred to above, but also in bad faith and partisan in a situation where the Registrar (respondent) ought to, by virtue of the office, maintain utmost neutrality. As at 1<sup>st</sup> December, 2023, this matter was still pending in Court and the substance of the dispute was over the bona fide officials of the Union authorised to transact its business. The Court pronounced itself on this issue by its judgment dated 21<sup>st</sup> December, 2023 restoring the registered officials as at 11<sup>th</sup> February, 2022. This so far remains the position and any other changes prior to the judgment of 21<sup>st</sup> December, 2023 would be null and void.
16. On the preliminary objection this Court observes that a preliminary objection was defined in the famous case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696. It was stated thus:

“...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 a contract giving rise to the suit to refer the dispute to arbitration”...Sir Charles Newbold, P. went further and stated: “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.”

17. The Interested party has contended that the issues raised in the application were dealt with in the Judgment delivered on 21<sup>st</sup> December, 2023 therefore the Court lacks jurisdiction to entertain the present application as it became *functus officio*. In [Telkom Kenya Ltd v John Ochanda \(suing on his behalf and on behalf of 996 former Employees of Telkom Kenya Ltd\)](#) [2014] eKLR. the Court of Appeal held as follows on the *functus officio* doctrine-

“*Functus officio* is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon....The rule applied only after the formal judgment had been drawn up, issued and entered...”

18. Further, the Supreme Court of Kenya in the case of [Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others](#) [2013] eKLR, cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, “[The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law](#)” (2005) 122 SALJ 832 which reads: -

“The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

19. Section 99 of the [Civil Procedure Act](#) provides exceptions to the doctrine of *functus officio* in the following terms-

“Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”

20. From the above it is clear that the doctrine of *functus officio* does not bar a court from entertaining a case it has already decided but prevents it from revisiting the matter on a merit-based re-engagement once final judgment has been entered and a decree issued.

21. The applicant before the Court seeks an order of this Court to compel the respondent to give the applicant an extract of the register as at 11<sup>th</sup> February, 2022 in order to effect the judgment of the Court delivered on 21<sup>st</sup> December, 2023. According to the applicant, the respondent has despite request, failed and or ignored their request to do so. The applicant further seeks from the Court an order allowing it to change the signatories to the Bank Account in order to enable it transact its day to day business. This aspect was as well covered in the Judgment of the Court delivered on 21<sup>st</sup> December, 2023.

22. From the foregoing, it would seem that all the applicant is seeking is to breathe life into the Judgment of the Court in order to enable it conduct its day to day affairs. The Court does not see any new re-engagement over issues decided in the judgment delivered on 21<sup>st</sup> December, 2023 in order breach the principle of *functus officio*. This Court has decried earlier in the ruling the unnecessary and sometimes obstructive wrangling in Unions that adversely affects their core function of championing workers’



rights. The Court therefore cannot stand helpless where it is evidently clear that the purpose of litigation before it is to make life difficult for the elected officials to transact business they were elected to transact.

23. The Court has considered the merit of the present application and the resistance by the Interested Party and is persuaded that in the interest of justice and in upholding the ILO Convention 98 on freedom of association and collective bargaining, it ought to be allowed. The Court in doing so also recognizes that clause K(b) of the Union's constitution confers on the National Trustees control over the funds of the Union but such power can be delegated to any officials of the Union to be signatories and operate the Union's Bank Account.
24. Further, the Union's constitution as well as section 44 read together with section 46 of the *Labour Relations Act* provide for mechanisms for dealing with allegations of misuse of Union funds. Besides, no evidence beyond mere allegations was placed before me when I heard and determined the substantive application to warrant disqualifying any elected official of the Union from discharging the mandate they were elected to discharge. I therefore made no finding in that regard.
25. In conclusion the Court makes the following orders:
  - i. The preliminary objection has no merit and is hereby dismissed.
  - ii. The orders sought by the applicant are administrative in nature as they are merely intended to operationalise the judgment of the Court delivered on 21<sup>st</sup> December, 2023 and therefore do not require merit hearing.
  - iii. In the interest of social justice and in order to enable the Union transact its day to day business, the Court hereby allows the applicant to substitute the National Chairman and the National Treasurer with any of its registered trustees.
  - iv. In the event that the National Chairman and Treasurer subsequent to this order agree to cooperate in the interest of social justice and in order to enable the Union transact its day to day business, order (iii) above will stand discharged.
  - v. The respondent and as indicated by the State Counsel shall forthwith issue the applicant with the extract of the registered union officials as at 11<sup>th</sup> February, 2022.
  - vi. Each party shall bear their own costs of the application.
26. It is so ordered.

**DATED AT NAIROBI THIS 24<sup>TH</sup> DAY JANUARY, 2024**

**DELIVERED VIRTUALLY THIS 24<sup>TH</sup> DAY JANUARY, 2024**

**ABUODHA NELSON JORUM**

**JUDGE**

