



Oloo v Ndege, Secretary General Union of Kenya Civil Servants & 2 others (Employment and Labour Relations Petition E013 of 2023) [2024] KEELRC 461 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 461 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

EMPLOYMENT AND LABOUR RELATIONS PETITION E013 OF 2023

HS WASILWA, J

FEBRUARY 29, 2024

IN THE MATTER OF CONTRAVENTION OF THE PETITIONERS RIGHTS AND OR FUNDAMENTAL FREEDOMS UNDER ARTICLES 22(1), ARTICLE 47 (1) AND 2 41, 2(D) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE PROVISIONS OF SECTION 34 (1) 2 OF THE LABOUR RELATIONS ACT AS READ TOGETHER WITH THE PROVISIONS OF THE FAIR ACTIONS ACT NO. 4 OF 2015

AND

IN THE MATTER OF THE PROVISIONS OF ARTICLE 15.1.1 AND 15.1.2 C ARTICLE 16.1.3 II OF THE CONSTITUTION OF THE UNION OF KENYA CIVIL SERVANTS.

BETWEEN

PATRICIA AKINYI OLOO PETITIONER

AND

TOM NDEGE, SECRETARY GENERAL UNION OF KENYA CIVIL SERVANTS 1ST RESPONDENT

UNION OF KENYA CIVIL SERVANTS 2ND RESPONDENT

THE REGISTRAR OF THE TRADE UNION 3RD RESPONDENT

JUDGMENT

1. By a petition dated 30th June, 2023, the Petitioner sued the Respondents, alleging that there was unfair participation by non-delegates of the union of Kenya civil servants, in the regional election of Rift valley held during the quinquennial conference held on 5th September 2021.



2. The Petitioner describes herself as a civil servant and a member of the union of Kenya civil servants.
3. The 1st Respondent is the current Secretary General of the Kenya Union of Civil Servants, while the 2nd Respondent is the Union of Kenya Civil servants. The 3rd Respondent on the other hand is the Registrar of Trade Unions of Kenya.

Petitioner's case.

4. The Petitioner stated that on the 5th September 2021, the respondent's union held their quinquennial delegates conference at Tom Mboya labour college in Kisumu, where the petitioner herein was one of the respondent's delegates and the union of Kenya civil servants Nakuru branch treasurer. Being accredited delegate she was invited to attend the conference.
5. It is averred that the union's secretary general published the list of delegates and the invitation letters were received by the delegates as required by the respondent's constitution.
6. After the elections of the main National Union officials, the national official advised regional delegates to converge in their respectful halls and elect their representatives. Whereas the Rift Valley delegates were 30 in number.
7. The regional delegates converged and elected Mr. Agaga to stand in as the returning officer. Thereafter 6 delegates being; Gilbert Langat, a delegate from Bomet, Charles Ng'eno, a delegate from Bureti, Reuben Njoroge, a delegate from Narok Dominic Otieno, a delegate from Narok, John Mangushal, a delegate from transmara and Linet Masai, a delegate from Uasin Gishu, left and did not participate in the election of Rift Valley representatives, where the petitioner was vying for the area representative.

Therefore, that only 24 participates voted.

8. It is averred that after elections, the petitioner realized that she did not succeed and she started to take stock of the events in that meeting and she realized there were non-delegates who also entered the voting hall and participated in the election contrary to the provisions of the *constitution* of the union of Kenya Civil Servants. These non-delegates include; Sebencia Ekwata, women representative for Baringo; Ellon Kibet, National Young Worker; Nancy Zacharia, the then outgoing Rift Valley representative and David Kimutai, Trustee.
9. It is stated that the four entered the voting hall and voted contrary to the requirement of paragraph 6(b) of the respondent's constitution.
10. Subsequently, the Petitioner wrote to the secretary general of the union registering her complains. However, she did not receive any response. Nonetheless, the Petitioner wrote another reminder on 14th February 2022 and another letter to the labour commissioner and Register of Trade Union, raising complaints on the same issue and gave a copy to the Secretary General.
11. The registrar of the trade unions responded to the petitioner's letter and gave a copy to the secretary of the union and on 15th February 2022, the 1st Respondent's secretary general responded to the petitioner's complaints, stating that he recognized the contents of the claimant's complaints and promised that the claimant's complaints were to be addressed through internally set up mechanism and it's outcome communicated to the petitioner in due course. However, no communication is received to date.
12. On 2nd March 2023, the petitioner's counsel wrote to the Hon. Secretary General giving notice to sue, but the respondents did not respond, leading to the filling of this Petition.



13. The petitioner stated that she acted swiftly, in raising the complaint however the Respondent have infringed on her right by promising to take action but failing to put into motion the machinery that would address her complaint. Therefore, that they have violated her rights under the constitution of Kenya and the constitution of the union of civil servants.
14. The petitioner therefore prayed for the following reliefs;
- i. That having notified the secretary general immediately she realized that the election was done with non-delegates which caused her to lose her intended position, she applied for and campaigned for with a lot of her resources, the secretary did not bother to put into motion a machinery as prescribed in the union's constitution articles 16 3(ii), 3(iii) and 3(iv).
 - ii. That having refused to cause the grievance handling mechanism to be operated and deliberate on the claimant's constitutional rights and by getting that much silent he even blocked the applicant from accessing justice through their own internal mechanism which could help lead to this matter being referred to the arbitrations, which now sounds clear that the respondent's secretary general was by intent, was blocking the petitioner from getting justice that she had been craving for hoping that the secretary general could have enabled the matter to be solved internally.
 - iii. That as this matter stands at the moment it cannot be construed that the petitioner sat on her case but after struggling to follow the internal process without success, her only recourse in this matter is only the Honourable court of justice.
 - iv. That given the above points and facts, the petitioner prays to the Honourable court to issue orders to the respondents and the registrar of trade unions to quash the Rift Valley regional delegates elections done on 5th September 2021. And register the petitioner as the Rift Valley Region elected representative.
 - v. That if that is not acceptable, then may the Honourable court issue orders for the nullification of the Rift Valley Regional officials' elections held on 5th September 2021 and a fresh Rift Valley Regional-representative elections to be held at the date appropriate and convenient to the parties concerned.
 - vi. That May the Honourable court put into consideration and issue orders to the respondents to pay the petitioner Kshs. 300,000 (Three Hundred Thousand) which the petitioner states she used to campaign with for the elections of the Rift Valley representative where she was rigged out by allowing non-delegates to participate in that election which really injured the petitioner's intended desires.
 - vii. That may the Honourable court also consider awarding the petitioner Kshs. 45,000 (Forty-Five Thousand Shillings) which is payable on a monthly basis for those who are properly elected regional representatives, as from 31st September 2021 up-to-date 24 months since the elections were held on 5th September 2021 = 45,000 X 24 months = Kshs. 1,080,000/-, since could the respondents have held elections fairly the petitioner could have been the Rift Valley regional representative of the union of Kenya civil servants and the respondents could have been paying the petitioner this money up to date.
 - viii. Any other compensation the court may deem necessary to award.
 - ix. That the respondents to pay costs of this petition.



Respondents' Case.

15. The Respondents opposed the Petition by filling a replying affidavit sworn on 2nd October, 2023 by Tom Mboya Odede, the 1st Respondent herein and the current Secretary General of the 2nd Respondent.
16. The affiant stated that the petitioner vied for the Position of the Rift Valley Region Representative on the election conducted on the sidelines of the Quinquennial Conference.
17. He stated that contrary to the allegations by the petitioner, all the 30 delegates from Rift Valley met at the election room and proceeded to vote. Further that no non-delegate entered the hall and voted in the Rift Valley Region Representative Elections of the Union of Kenya Civil Servants.
18. He stated that the list of delegates that allegedly left the hall is not true reflection of the fact, but is only meant to mislead this Honourable Court.
19. He denied the allegation that non-delegates voted and maintained that the Respondent has put in place strict election rules and mechanism to safeguard the integrity of all its elections which were complied with throughout the process. In any event that the petitioner has not indicated whether this alleged malpractice was brought to the attention of the Returning Officer or any other Union officials manning the elections during and/or after the election. In any case that the report from the Returning Officer on the material day indicated that the election was peaceful, free, fair, and verifiable. No single complaint was brought to the attention of the Returning Officer.
20. The deponent stated that it was not possible for the petitioner to conclude that non-delegates voted against her for the reason that the Petitioner has never scrutinized the ballot boxes. She has not shown she checked how the 28 people voted. In any event, even if this Honourable Court were to assume that she scrutinized the ballot box, she cannot tell which vote belonged to which specific person because voting was by secret ballot. Further that out of 7 candidates that vied for the claimed position, all but her were satisfied with the outcome of the election.
21. The 1st Respondent stated that he received the Petitioner's letter dated 5th September 2021, on 15th February 2022 and he expeditiously responded to it on the very date. Further, that the Petitioner cannot prove she was voted out by the alleged non-delegates because the voting was by secret ballot.
22. It is stated that the offense that the non-delegates allegedly did was tantamount to a criminal offence and therefore, the petitioner ought to discharge her burden beyond reasonable doubt.
23. Contrary to the allegations by the petitioner, the affiant herein stated that he kick-started the internal dispute resolution mechanism to deal with her grievance and the National Executive Board which sat on 7th April 2022 and appointed a committee to investigate the matter.
24. In a meeting held by the Committee on 6th and 7th June, 2022 and the committee found out the following
 - i. 7 candidates contested in the Rift Valley Region Representative elections;
 - ii. 30 delegates participated in the election and all of them voted.
 - iii. No evidence of non-delegates having participated in the election as alleged was found.
 - iv. The results were as follows: (a) Susan-9 votes (b) Patricia Akinyi Aloo 8 votes (c) Nancy Zachariah 6 votes (d) Leah Rotich-5 (e) 2-spoilt votes.



- v. She has not faulted the Returning Officer's report on the conduct of the election.
 - vi. She never raised the concern with the Returning Officer on 4 alleged strangers voting, despite knowing that the alleged strangers were about to Participate in the voting.
 - vii. She did not provide any evidence that she is not a beneficiary of the alleged 4 non-delegate votes.
 - viii. She cannot state with precision that indeed 6 delegates left before voting, its merely her word and her words only.
25. He reiterated that he received the Petitioner's letter dated 5th September 2021 in the morning of 15th February 2022 and referring the matter to NEB for constitution of the Union's Internal Dispute Resolution Mechanism available to Union official(s), member(s) or group of members faced with matters of such nature as ones raised in the Petition. The letter was forwarded to the National Executive Board which board, constituted a National Dispute Resolution Committee to address the matter and the findings thereof communicated to the Petitioner. However, that the Committee found the Petitioner's allegation to be without merit.
 26. The affiant stated that this Honourable Court's jurisdiction has been prematurely sought. Further that this suit offends the doctrine of exhaustion as founded at Article 159(2)(c) of the *constitution* of Kenya. As such, since the Petitioner has other avenues available to her within the administrative structures of the 2nd Respondent, this court is improperly ceased of jurisdiction since the internal dispute resolution mechanism available to the Petitioner are not yet exhausted.
 27. If anything, Article 16(3) of the Union's Constitution establishes a Dispute Resolution Committee at both the National and County levels, which interalia states that No Union Official(s), Member(s) or group of members shall refer any dispute(s) to a court of law before exhausting all the arbitration machinery and avenues as provided for in this constitution. In particular that any dispute concerning the interpretation or application of the Union's Constitution shall be settled through negotiations and conciliation and If no amicable solution is reached, any aggrieved party shall refer the matter to a tribunal of arbitrators that shall be constituted and operate as provided for by the Arbitration laws of Kenya.
 28. Accordingly, that the Petitioner ought to have raised her allegations with the Returning Officer before the voting exercise, during and/or immediately after the elections. Should she not have been satisfied with the decision of the Returning Officer, then she should have approached the Dispute Resolution Committee at National level; if dissatisfied, then she still has the option of making an appeal to the National Executive Board, then a further appeal to the Advisory Council, and another further appeal to the tribunal of arbitrators before approaching this Honourable Court.
 29. The Respondent stated that upon receiving the decision of the National Dispute Resolution Committee way back on 13th June 2022, the petitioner had the option of agreeing with it or appealing it to the National Executive Board but instead she waited to file this case a year later.

Rejoinder.

30. By an further affidavit sworn by the petitioner on 30th October, 2023, the petitioner stated that contrary to allegations that all the rift valley delegates voted, she has attached a witness statement by Mark Ekulam, one of the Rift Valley region delegates, who confirmed that 6 delegates listed indeed left after electing the national officials and hence did not participate in the Rift Valley Regional officials' election.



31. The petitioner stated that the 1st Respondent did not respond to its letter until when the Registrar of Trade Unions responded to the Claimants UKCS election appeal, that the 1st Respondent wrote to the Petitioner that her issue shall be addressed through internally set up mechanisms.
32. She stated that the Returning Officer, Rift Valley region representative's election letter dated 6th June 2022 is an afterthought and does not reflect the true picture of how the Rift Valley regional delegates voted on the 5th September 2021, because firstly, the report was given 9 months after the election. Secondly, the report does not contain the names of the delegates who participated in the meeting and their signatures or where they signed for an allowance, therefore that the report is disputed.
33. The petitioner maintained that non-delegates entered the voting hall and voted because 6 accredited delegates left the voting venue after electing the national official, however after election, the total votes were 28 instead of 24. This position was confirmed by the statement of Mr. Akulan and an affidavit by Dominic Otieno.
34. The petitioner admitted not making a complaint on the same day to the returning officer and instead stated that immediately after the elections on 5th September 2021, she wrote to the secretary general and sent the same letter to him through his email address, in recognition of the powers given to the secretary general by the *constitution* of the Union of Kenya Civil Servants at article 8. Further that she send a copy of the complaint through his WhatsApp number. Therefore, the allegation that he received my letter on 15th February 2022 is fictitious.
35. It is the petitioner's position, that the ballots only help to hide the identity of the person being voted for and the delegates names are properly recorded, therefore the Respondent is able to tell who voted and who did not.
36. She avers that the letter dated 7 April 2022 does not reflect the true picture of the authority which such letter should portray and is misleading if the alleged NEB sittings on the 7 April 2022 is not one person and such meetings are usually minuted. She stated that she was not invited in the said meetings and did not receive the letter of 13th June, 2022.
37. Contrary to allegations that 7 candidates contested in the Rift Valley Regional Representatives elections, she avers that the correct number was only 4 candidates namely Patricia Akinyi-8 votes, Susan Wangui-9 votes, Nancy Zacharia-6 votes and Leah Rotich-5 votes. Further that the allegation that there was spoiled votes was far from the truth.
38. The Petitioner maintained that the 1st Respondent never acted on her complaint and there were no mechanisms or investigations put in place to look into the said complaints.
39. She stated that even if the 1st Respondent set up a dispute resolution committee, she was not invited or given a chance to be heard. She added that it's the failure by the Respondent to set up a dispute resolution mechanism for more than 2 years and 1 month, an issue that forced her to institute this petition. Therefore, that the petition cannot be said to be premature.
40. Direction were taken for the Petition to be canvassed by written submission, with the petitioner filling on the 7th December, 2023 and the Respondent filed on 31st January, 2024.

Petitioner's Submissions.

41. The Petitioner submitted on three issues; whether the rift valley regional election done on 5th September 2021 was conducted in accordance with the principles laid down in the Union of Kenya Civil Servant Constitution and the law relating to elections, whether there were irregularities and



illegalities committed in the conduct of the regional election done on 5th September 2021, and what consequential orders, declarations and reliefs should this Court grant.

42. On the first issue, it was submitted that only 24 delegates voted for the Rift Valley Regional election, however that on announcement of result, the returning officer recorded 30 votes. This fact was confirmed by the attached witness statement by one Mark Akulam who was one of the Rift Valley region delegates, who reiterated that 6 delegates left after electing the national officials and thus the 6 did not participate in the Rift Valley Regional officials' election. Therefore, that the elections were not done in accordance with the law and the Respondent ought to have nullified. It is argued that despite raising a complaint with the Responded, the same was not acted upon properly as she was never invited to tender any evidence as such, the claimant was forced to file this suit.
43. It was submitted that this Court is empowered under Article 159(2) (d) of the *constitution* to administer justice without undue regard to technicalities. On that basis, the Petitioner urged this court to intervene since respondent's decisions and operations are in breach of their own internal rules, constitution and rules of natural justice generally because the dispute was not handled in a consultative manner by including the petitioner in accordance with the decision-making structures of the respondent rather than keeping mum about the same. Therefore, that the Respondent's rift valley regional officials are not properly and constitutionally elected.
44. On the second issue of whether there were irregularities and illegalities committed in the conduct of the regional election done on 5th September 2021, it was argued that the election was marred with irregularities which significantly affected the results to the extent that returning officer could not accurately and verifiably determine what results any of the candidates got. He added that, Mr Akulam, a delegate from Turkana region, stated that 6 accredited delegates left the voting venue after electing the national official's and that the accredited delegates for the rift Valley region remained 24. However, after the Rift Valley regional delegate's conference the number of votes was 28 instead of 24. This means that illegal votes were allowed that negatively affected the election.
45. It was argued further that the late submission of the report by the returning officer, 9 months after the election, is an afterthought. In any event that the report does not contain the names of the delegates who participated in the meeting and their signatures.
46. It was submitted that the petitioner tried the internal dispute resolution mechanisms by writing letter to the secretary General in line with Article 32(8) of the 1st Respondent's constitution that provides that all official correspondences to the union shall be addressed to the secretary General of the union. However that no repose was given, leading to escalating the matter to the Labour Commissioner and the Registrar of Trade Union's , when the 1st Respondent then responded to their letter. Therefore that the Court in determining this issue should look at the entire election as a process as was held in the case of *Karanja Kabage v Joseph Kiuna Kariambegu Nganga & 2 Others*; Election Petition 12 of 2013 [2013] eKLR, where the High Court held that:

“an election is an elaborate process that begins with registration of voters, nomination of candidates to the actual electoral offices, voting or counting and tallying of votes and finally declaration' of the winner by Gazettement. In determining the question of the validity of the election of a candidate, the court is bound to examine the entire process up to the declaration of results...The concept of free and fair elections is expressed not only on the voting day but throughout the election process...Any non-compliance with the law regulating these processes would affect the validity of the election of the Member”. And according to the



European Human Rights Committee, the process also includes the right to challenge the election results in a court of law or other tribunal.”

47. It was submitted that the 1st Respondent is the custodian of the union records but has not produce even the list of delegates where the 30 Rift Valley delegates signed when entering the voting hall. Further that no one interrogated the process beyond counting and tallying at the polling stations including the dispute resolution committee as no evidence is tendered before this Court to ascertained that auditing of the election was carried out.
48. On the third issue, it was submitted that he who alleges must prove as reiterated in the case of *Stephen Wasike Wakhu & Another v Security Express Limited* [2006] eKLR, where the court stated as follows: -
- “A party seeking justice must place before the court all the material evidence and facts which considered in the law would enable the court to arrive at the decision as to whether the relief sought is available. Hence the dictum that “he who alleges must prove.”
49. On that basis, it was submitted that It is evident that non-delegates voted on the 5/9/2021 which is contrary to the constitution of the civil servant. Further that voting was not conducted in accordance with the principles set out in constitution of the union of Kenya civil servant. Also that it flouted the union conduct of regional elections, therefore occasioning significant breaches which ultimately affected the final result hence the same ought to be nullified.
50. The Petitioner therefore urged this Court to quash the Rift valley Regional delegates election held on 5th September, 2021, order for fresh elections to be held and in the alternative order for reimbursement of Kshs 300,000 used by petitioner in the Campaign, Kshs. 1,080,000/= being amount payable to an elected regional representative for the period she could have been in the office.
51. The Petitioner also prayed to be awarded cost of the suit and interest. In support of this, the Petitioner relied on the case of *John Mwaniki Makenge & 7 Others v Secretary General of the Union of Kenya Civil Servant & another* [2016] Eklr.

Respondent’s Submissions.

52. The Respondent submitted from the onset that parties are bound by their pleadings and therefore the pleadings that are rightly before this Court is the Petition dated 30th June, 2023 and the Replying affidavit dated 2nd October, 2023. On that note, it was submitted that the witness statement by Mark Ekulan signed on 30th June, 2023 was served upon the Respondents on 20th December, 2023, 2 months, after close of pleadings, therefore the same should be struck off record as the Respondent did not have any opportunity to respond. In support of this, the Respondent relied on the case of *Philmark Systems Co. Ltd v Andermore Enterprises* [2018] eKLR, where the court of Appeal cited the case of *Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others* [2014] eklr, which cited the decision of the Malawi Supreme Court of Appeal in *Malawi Railways Ltd v. Nyasulu* [1998] MWSC 3, in which the learned judges quoted with approval from an article by Sir Jack Jacob entitled “The Present Importance of Pleadings.” The same was published in [1960] Current Legal problems, at P174 whereof the author had stated;

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties



as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to...”

53. Similarly, that a party must prove its case to the required standard as required under Section 107 to 109 of the Evidence Act, failure to which the claim must fail.
54. It was submitted that the burden of proof is on a balance of probability, as was held in the case of William Kabogo Gitau v George Thuo & 2 Others [2010] eklr and the case of D. T Dobie & Company (K) Ltd v Wanyonyi Wafula Chebukati [2014] eklr.
55. On that basis, it was submitted that the petitioner has filed this suit based on inaccurate facts, inaccurate evidence and without any legal basis, this he explained that the Petitioner alleged that the elections were not conducted in a secret ballot but failed to tender evidence in support of the allegations. Further that the petitioner alleged that the elections were not free and fair but did not show that the sovereign Will of the people was subverted and did not show how the the 1st and 2nd Respondents failed to act in accordance with the Unions Constitution, Labour Relations Act or the constitution of Kenya.
56. The Respondent submitted that the argument by the Petitioner that the report by the returning officer produced 9 months is an afterthought, cannot be relied upon because she also produced a witness statement of Mr. Mark Ekulan, which was signed 9 months after the event, which is the basis of her suit and want this court ton rely on it. He added that the petitioner has not in any way filed any evidence to challenge the Report by the returning officer.
57. The Respondent submitted that whereas they have discharged the burden placed on them, the Petitioner has failed to disprove that the elections held on 5th September, 2021 was flawed because she did not prove that the 6 delegates exited the voting hall without voting, that 4 non-delegates voted and they that all voted in favour of Susan Wangui. In any event that the Petitioner failed to scrutinize and or recounted the votes cast to ascertain her allegations of vote rigging. Further that the winning party and the returning officer were not joined to this proceedings, when adverse orders are likely to be made against non-parties to their detriment.
58. It was also submitted that the petitioner has not exhausted all internal dispute resolution mechanism available for members of the Union as is required under Article 159(2)(c) of the constitution and reiterated by a Three Judge Bench in Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eklr where the Court held that:-

“The reasoning is based on the sound Constitutional policy embodied in Article 159 of the constitution: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Justice J.B. Ojwang’ has felicitously called an “Ascendant Judiciary.” the constitution does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better suited mechanisms for comprehending and dealing



with the issues entailed. Instead, the constitution creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases. It expressly envisages that some of these regimes will be mainstreamed (and, hence, at certain prudential points intersect with the Judicial system) while some will remain parallel to the Judicial system...”

59. Similarly, that Article 159(2)(c) of the constitution has been operationalized by Article 47 of the constitution as read with section 9 of the Fair Administrative Actions Act, which is couched in mandatory terms as such internal dispute resolution mechanism must be exhausted. In this they relied on the case of Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] Eklr where the Court held that;-

“the word shall in section 9 of the Act cited above is worth noting. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of what effect should be given to their directions. There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.”

60. Accordingly, it was submitted that the Petitioner’s suit does not have any exceptional circumstances required under section 9(4) of the Fair Administrative Actions Act to allow the by-passing of the internal dispute resolution mechanism, neither has the Petitioner filed a formal application seeking to file this case in court before exhausting internal dispute resolution mechanism as stated by Justice Mativo in Dhow House Limited v Kenya Power and Lighting Company (Constitutional Petition E058 of 2021) [2011] KEHC 11840 (KLR).

61. In conclusion, the Respondent submitted that they have given this court several reasons to dismiss the Petition and prayed for the same to be dismissed.

62. I have examined all the evidence and submissions of the parties herein. The petitioner contends that the union elections held on 5th September, 2021 were irregular and so should be declared so for various reasons.

63. In determining this petition, I will determine the following issues;

1. Whether the regional elections held on 5th September, 2021 were conducted in accordance with the principles laid down by the Respondent union and the law.
2. Whether the Petitioner exhausted the laid down internal Dispute Resolution mechanisms of the Respondent.
3. What reminders are appropriate in the circumstances.

Issue no.1.

64. The Petitioner has contended that the election held on 5th September, 2021 were irregularly done as the Respondent allowed non-union delegates to vote during the said election.

65. The Petitioner has submitted that doing these elections, the delegates were expected to be 30.

66. That one Agaga, was the returning officer. She however denied that 6 delegates whom she named left and did not participate in the election of Rift Valley representative.

67. She submitted that only 24 participants voted. The Petitioner avers she took stock of the events of the day and discovered that non-delegates also participated in the elections contrary to the provision of the constitution of the Respondent.



68. She named the said non-delegates and was even surprised that while Rift Valley had 30 delegates in the hall and 6 left, 28 people were declared to have voted. In support of her case, the petitioner provided her letter of complaint to the Secretary General marked PAO3, a reminder -PA04, complaint to the Labour Commisisoner -PA05 complaint to the Registrar of Trade -PA05,(a) and a reply from the Registrar of Trade unions - PAO6.
69. The petitioner exhibited this and the list of delegates and the list of the 4 none delegates.
70. The petitioner also sought to rely on the affidavit of Dominic Gudu Otieno who stated that he was a delegate from Rift Valley and indicated that on 5th September, 2021, he participated in the election of national officials but not the regional ones as he had to rush home and attend to his child who was seriously sick in hospital.
71. With the affidavit of Dominic Gudu Otieno denying participation in the regional elections the burden of proof shifts to the Respondents, to prove he participated. The evidence of the returning officer would have sufficed with all of facts of the register showing who voted. This has not been submitted before this court.
72. The Respondents denied the averments of the Petitioner indicating that the burden of proof that 4 non-delegates voted lies upon the petitioner which burden has not been discharged.
73. The returning officer denied any mal-practices during the voting but has not produced the documents of the register and evidence of the voting pattern including the ballot documents.
74. It is evident that the processes applied during this voting raises eyebrows and especially in the face of the evidence of a delegate who denied participating in these election.

Issue no. 2.

75. The Respondents have submitted that even if there was a problem, the petitioner has not exhausted internal dispute resolution processes established by the Respondents before filing this Petition.
76. The Petitioner avers that she followed the internal processes which the Respondents ignored leading her to filing this petition.
77. the constitution of the Respondents at Article 16 states as follows.

“sub committee of the Advisory Council and of the National Executive Board (3),
Notwithstanding the provision in Article 16(1) and (2) there shall be a Dispute Resolution Committee at both the National and County levels;

- (i) The Dispute Resolutions Committee at the National level shall be appointed by the National Executive Board while the Dispute Resolutions Committee at the County Level shall be appointed by the County Executive Council;
- (ii). No Union Officials(s), Member(s) or group of members shall refer any disputes (s) to a court of law before exhausting all the arbitration machinery and avenues as provided for in this constitution;
- (iii). Any dispute concerning the interpretation or application of the Union’s Constitution shall be settled through negotiations and conciliation;



- (iv). If no amicable solution is reached, any aggrieved party shall refer the matter to a tribunal of arbitrators that shall be constituted and operate as provided for by the Arbitration laws of Kenya.”
78. This Article envisages that union member shall refer any matter to court before exhausting all the arbitration machinery and avenues available as provided in the constitution.
79. It is indeed true that this is what the constitution of the Respondent provides. When the petitioner perceived there was a problem with the election she was expected to refer the matter to Dispute Resolution Committee. She wrote her 1st complaint to the National General Secretary of the union the 1st Respondent herein on 5th September, 2021. She wrote a reminder on 14th February, 2022 and also wrote to the Commissioner of Labour and the Registrar of Trade Union.
80. The General Secretary had not moved to establish the Dispute Resolution Committee which is supposed to be appointed by the National Executive Board.
81. The General Secretary moved to have the National Executive Board constitute the Dispute Resolution Committee. He referred the matter to the Dispute Resolution Committee on 7th April, 2022 and the Committee decided the matter at its sitting of 6th and 7th June, 2022. The interrogation report from this committee nor its minutes and findings have been presented before court. It is therefore not clear whether the committee even sat or not.
82. The Petitioner moved to try and resolve the matter internally but it is apparent that the Respondent frustrated her efforts and didn't give her complaints the weight it deserved. She was thus justified to file this petition and the contention that she didn't exhaust the mechanism have no weight .

Issue no. 3. Remedies.

83. Having established malpractice in the election held on 5th September, 2021 with a delegate denying ever voting but with a report indicating that he voted, the only solution to remedy this position is to declare the election of the Rift Valley regional representative of the Respondent null and void and order fresh election for the region. These elections should be held within 60 days from the date of this Judgement.
84. The 2nd Respondent, will pay costs of this Petition.

JUDGEMENT DELIVERED VIRTUALLY THIS 29TH DAY OF FEBRUARY, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE.

In the presence of:

Mr. Ndeda holding brief for Awuor for the Petitioner. Present

Mr. Wangatia for 1st and 2nd Respondent. Present.

Fred Court Assistant.

