



**Ochieng v Kenya Union of Post Primary Education Teachers (KUPPET)
& 3 others; Nairobi County Branch of KUPPET (Interested Party) (Cause
953 of 2018) [2024] KEELRC 347 (KLR) (23 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 347 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 953 OF 2018
SC RUTTO, J
FEBRUARY 23, 2024**

BETWEEN

LEONARD RUFUS OCHIENG CLAIMANT

AND

**KENYA UNION OF POST PRIMARY EDUCATION TEACHERS
(KUPPET) 1ST RESPONDENT**

**MAURICE OKELLO (SUED AS SECRETARY GENERAL OF
KUPPET) 2ND RESPONDENT**

**WICKS MWETHI NJENGA (SUED AS THE NATIONAL TREASURER OF
KUPPET) 3RD RESPONDENT**

MOSES OWITI MBORA 4TH RESPONDENT

AND

NAIROBI COUNTY BRANCH OF KUPPET INTERESTED PARTY

JUDGMENT

1. The Claimant brought the suit herein through a Statement of Claim dated 4th April 2018. He avers that he was elected to the office of Executive Secretary of the Interested Party in 2006 for a period of five years in accordance with the registered Constitution of the 1st Respondent. Upon expiry of five years, he applied to the Interested Party of his intention to defend his position in an election which was held on 5th March 2011. He avers that the election proceeded and he was elected to the position of Executive Secretary of the Interested Party.
2. It is from the foregoing set of events that the dispute stems from, as the Claimant avers that the 2nd Respondent registered another set of purported officials in disregard to the Constitution of the 1st



Respondent. His claim against the Respondents is for declaratory orders as well as an order for payment of salary and allowances with effect from 1st January 2011 to 25th May 2016. The Claimant further seeks payment of withheld pension from 1st January 2011 up to 12th March 2016 at 31 % of the average salaries earned by the 4th Respondent and Benta Akinyi Opande.

3. The Respondents have opposed the Claim through a joint Response dated 12th July 2019 in which they aver that the Claimant wanted to contest in Nairobi County Branch in the elections scheduled to be held at the beginning of 2011. According to the Respondents, the Claimant did not qualify as he was a member of Kiambu County Branch since he was stationed at Kiambu Institute Science and Technology within Kiambu County.
4. The Respondents further aver that in disregard of the law and the Union's Constitution, the Claimant irregularly and illegally issued an election notice dated 9th February 2019 (sic) for branch elections. That on 5th March 2011, the Claimant alleged that together with other members, they were purportedly elected as officials of the Union's Nairobi Branch hence sought to be registered. The Respondents contend that fresh elections were held on 18th June 2018 and the Claimant was not successful.
5. It is the Respondents' further contention that the Claimant did not occupy office nor serve the Union in any capacity hence is not entitled to any compensation as claimed.
6. The matter proceeded for part hearing on 26th July 2023 and subsequently on 9th November 2023, when the defense side presented and closed its case.

Claimant's Case

7. The Claimant testified in support of his case and at the outset, sought to adopt his pleadings to constitute his evidence in chief. He further produced the documents filed alongside his Statement of Claim as exhibits before Court.
8. It was the Claimant's case that following his election to the position of the Executive Secretary of the Interested Party conducted on 5th March 2011, the then Secretary General of the 1st Respondent, Mr. Njeru Kanyamba filed Form Q dated 7th March, 2011 with the Registrar of Trade Unions.
9. He averred that some members of the Interested Party disputed the said elections hence the aforementioned Form Q was not registered. The dispute was dismissed and at that material time, the election of the National Office of the 1st Respondent had not been held.
10. The Claimant further stated that in accordance with the customs and practice of the 1st Respondent, before the registration of its amended Constitution of 2010, each branch was entitled to a monthly remittance of at least 60% of the members of that branch and which was enhanced with the operation of the 1st Respondent's amended Constitution to 65%.
11. He contended that with impunity and flagrant disobedience of the said Constitution, the 2nd and 3rd Respondents, being officers mandated by Section 39 of the Labour Relations Act and the Constitution of the 1st Respondent, stopped the remittance of monthly dues from April 2010 to June 2011 and the Claimant had no opportunity to get his allowances from the Interested Party.
12. According to the Claimant, members of the Interested Party duly appointed him and his appointment as a full Executive Secretary was with effect from January 2011.
13. He averred that immediately the 2nd Respondent assumed office as the Secretary General of the 1st Respondent on or around 28th May 2011, he proceeded and registered another set of purported officials in disregard to the constitution of the 1st Respondent, the Labour Relations Act, 2007 and the already



- filed Form Q dated 7th March 2011 as contained in the extract from the Register of Trade Unions dated 25th June 2013.
14. The elected officials as contained in Form Q dated 7th March 2011 having been aggrieved with the filing of the unlawful Form Q by the 2nd Respondent and the decision of the Registrar of Trade Unions to Register the said unlawful Form Q, filed a Claim in Cause No. 904 of 2011.
 15. In the meantime on 2nd June 2010, the 1st Respondent and the Teachers Service Commission signed a Recognition Agreement, in accordance with Section 54 of the *Labour relations Act*, 2007 and which provided at Clause 4.4 that the Union undertakes, after elections have been carried out in accordance with its Constitution, to present without delay the names of branch and national officials to the commission and to advise on any changes as they occur.
 16. That further, Clause 4.8 provides that; “The Commission undertakes to release without pay, teachers elected as National Officials and Branch Executive secretaries and undertake to redeploy such teachers when they cease being officials.”
 17. He thus contended that as per Clause 4.8 in the Recognition Agreement, all the elected National officials and Executive Secretaries, if elected in accordance with *the Constitution* of the 1st Respondent became automatic employees of the 1st Respondent.
 18. In the Judgment delivered on 5th March 2015, in Cause No. 904 of 2011, the Honourable Court declared any other elections held after the one of 5th March 2011 as null and void, and in the circumstances, nobody held the office of the Executive Secretary of the Interested Party lawfully in the purported successive elections including the purported elections of the 4th Respondent held on 25th May 2013.
 19. In the same Judgment, the Honourable Court proceeded to order the Registrar of Trade Unions to Register the Form Q dated 7th March 2011, thereby reinstating all the officials of the Interested Party elected on 5th March 2011 into office. The Registrar of Trade Unions complied with the Order and reinstated the said officials.
 20. To comply with the provisions of Clause 4.8 of the aforementioned Recognition Agreement, the National Governing Council of the 1st Respondent met on 28th August 2011 and gave guidelines for the payment of salaries and allowances to full-time Secretaries. This decision was communicated to all Executive Secretaries, vide the 2nd Respondent’s letter dated 8th September 2011.
 21. According to the Claimant, all Executive Secretaries who were elected pursuant to *the Constitution* of the 1st Respondent became its bona fide employees and in accordance with the Judgment delivered on 5th March 2015, he is the only one who was duly elected as the bona fide Executive Secretary pursuant to *the Constitution* of the 1st Respondent. That he is the only lawful Executive Secretary of the Interested Party for the term beginning 5th March 2011 to 12th March 2016 when another change was made.
 22. The Claimant maintained that the effect of the Judgment delivered on 5th March 2015 was that the elected officials as was contained in Form Q dated 7th March 2011 were reinstated, with effect from 5th March 2011. As a consequence, any lawful benefits accrued to them became due by the operation of the extract of the list of officials of the Interested Party from the Register of Trade Unions issued on 26th May 2016.



Respondents' Case

23. The Respondents called oral evidence through the 1st Respondent's National Treasurer, Mr. Wicks Mwethi Njenga who has also been sued as the 3rd Respondent. Mr. Mwethi who testified as RW1, adopted his witness statement and the list and bundle of documents filed on behalf of the Respondents to constitute his evidence in chief.
24. It was RW1's testimony that on 10th December 2010, the Registrar of Trade Unions directed that all Trade Unions together with their branches hold elections by 30th March 2011 for the Branches and by 30th June 2011 for the National Office.
25. That majority of the members disputed the elections purportedly held on 5th March 2011 and one of the members Benta Akinyi Opande, filed Cause No. 355 of 2011 in the Industrial Court at Nairobi (as it then was) against the Registrar of Trade Unions, the Union's Nairobi Branch and Union's Secretary General.
26. On 11th March 2011, the Court in Cause No. 355 of 2011 issued a restraining order and restrained the Registrar of Trade Unions from registering the members purportedly elected on 5th March 2011 as officials.
27. Further, the court ordered the Union's Nairobi Branch to hold elections on 19th March 2011. The case was slated for interpartes hearing on 23rd March 2011.
28. When the case came up for hearing on 23rd March 2019, parties had agreed to hold fresh elections and the matter was withdrawn with no orders as to costs.
29. On 7th June 2011, a fresh Notice of Elections was issued informing the members that the elections shall be held on 18th June 2011 and the Registrar of Trade Unions communicated that the previous elections held were inconsequential.
30. On 18th June 2011, elections were held and the Claimant was not successful and Benta Akinyoi Opande was elected as the new Branch Secretary.
31. RW1 further averred that due to massive irregularities that marred the elections held on the 5th March 2011, other elections were necessitated, arranged and held, wherein the Claimant and other members were not successful. The respective elective posts of leadership of the Interested Party were therefore taken over by the successful candidates as duly elected in the subsequent election.
32. He further stated that the Claimant lodged a suit against the Union through Milimani ELRC No. 904 of 2011, but failed to serve the suit papers upon the Union. He went ahead to procure an ex-parte Judgment against the Union, delivered by Justice Wasilwa on 5th March 2015.
33. The Union learnt of the said suit later and instructed the firm of Ashitiva Advocates LLP, who filed an application to set aside the judgment. An application dated 17th March 2015 was filed on 17th March 2015 and before the application could be heard and determined by the Court, other elections were held on 12th March 2016 following the lapse of 5 years since the last Union's elections were held. Therefore, the Claimant did not occupy office nor serve the Union in any capacity.
34. RW1 further stated that at the time Judgment was delivered on 5th March 2015, the Claimant had long been dismissed from the teaching service by the Teachers Service Commission and thus could not be an official of the teacher's union at the branch level, a fact that he never disclosed to the Court thus misleading the court and allowing it to engage in a moot exercise.



35. RW1 further contended that the Judgment of 5th March 2015 was not enforceable since the court was misguided in that there were by-elections that had been held in between the time of filing the suit and delivering the Judgment, a fact that was never disclosed to the court. Further, Benta Akinyi who was elected on 18th June 2011 as the Executive Secretary of the Branch had since moved on to a competitor union, and a By-election was held on 25th March 2013 and Moses Owiti Mbora was elected as the Executive Secretary.
36. The By-election was never challenged and Moses Owiti Mbora held that position of the Branch Executive Secretary until his term expired and another election was held on 12th March 2016 after the Claimant was unsuccessful in stopping the elections.
37. RW1 maintained that the Claimant has never served the Union as an Executive Secretary and he is therefore not entitled to the payment of any salary, pension or any allowance whatsoever.
38. He further stated that the Union did not have sufficient money even to pay the former Executive Secretary, Benta Akinyi, who equally went to court under Cause no. 918 of 2012 and judgment was delivered in her favour for payment of her salary.
39. It was RW1's position that the Branch cannot have two Executive Secretaries at a single moment and that the court had already confirmed that Benta Akinyi was the Executive Secretary and served the Branch following her election on 18th June 2011 and Moses Mbora succeeded her after she resigned in 2013.

Submissions

40. The Claimant submitted that in terms of the Recognition Agreement dated 2nd June 2010 between the 1st Respondent and the Teachers Service Commission (TSC) as well as the resolutions of the National Governing Council of the 1st Respondent, the Branch executive Secretaries are employees of the 1st Respondent.
41. It was his further submission that the figures contained in his Claim have not been controverted and hence should stand as true facts.
42. The Claimant stated in further submission that the Judgment in Cause No. 904 of 2011 nullified other elections held after 5th March 2011. He further submits that the said Judgment has never been set aside.
43. The Claimant further submitted categorically that the instant suit does not challenge any elections rather it is filed under Section 18(5) of the *Employment Act*.
44. The Respondents did not file any submissions as the same were missing from the Court's physical record and were not traceable on the online portal.

Analysis and Determination

45. Flowing from the pleadings by both parties, the evidentiary material on record and the Claimant's submissions, the singular issue that stands out for determination is whether the Claimant is entitled to the reliefs sought.
46. As stated herein, the Claimant's claim is for declaratory reliefs as well as an order for payment of salaries, allowances and pension from 1st January 2011 up to 12th March 2016.
47. From the record, the Claimant participated in the 1st Respondent's branch elections which were held on 5th March 2011. Consequently, the then Secretary General submitted Form Q containing the names



- of the elected officials. Some members of the 1st Respondent who were dissatisfied with the elections moved the Court through Industrial Cause No. 355 of 2011. The Court granted orders restraining the Registrar of Trade Unions from registering the notice of change of officials in Form Q dated 7th March 2011. The said Application was later withdrawn.
48. However, the Registrar of Trade Unions did not affect the registration of the union officials elected on 5th March 2011 which included the Claimant, hence they moved the Court through Cause No. 904 of 2011.
 49. The Court in that decision found that the Secretary General of the 1st Respondent was not a competent authority to cause the Registrar of Trade Unions to declare Form Q filed on 7th March 2011 overtaken by events.
 50. In the end, the Court nullified the decision of the Registrar of Trade Unions and ordered him to register Form Q dated 7th March 2011 as it was on 10th March 2011.
 51. In support of his case, the Claimant exhibited an extract of the Register of Trade Union Officers of the 1st Respondent, Nairobi County Branch as at 26th May 2015. The said extract reveals that the Claimant was at the time registered as the Executive Secretary.
 52. On account of the foregoing, the Claimant contends that he was the only one who was duly elected as Executive Secretary pursuant to *the constitution* of the 1st Respondent. In the same vein, the Claimant has submitted that all Executive Secretaries who were elected pursuant to *the constitution* of the 1st Respondent became its bonafide employees. Indeed, this is the basis for the Claimant's claim for salary, allowances and pension.
 53. The Respondents' case is that the Claimant did not serve as an Executive Secretary hence is not entitled to payment of any salary, allowance or pension.
 54. The question thus is whether the entry of the Claimant's name into the Register of Trade Unions Officers following the Judgment of 5th March 2015, entitles him to automatic payment of salaries, allowances and pension during the five-year period between 1st January 2011 up to 12th March 2016? My answer to this question is in the negative.
 55. In my respectful view, beyond entry of the Claimant's name into the Register of Trade Unions Officers, pursuant to the Judgment of 5th March 2015, there were other preconditions to be met in order for him to be entitled to payment of salary, allowances and pension during the period in question.
 56. From the record, there is no evidence that following the entry of the Claimant's name into the Register of Trade Union Officers of the 1st Respondent's Nairobi Branch, he entered into an employment contract with the 1st Respondent and that he rendered his services as the Branch Executive Secretary during the period in question.
 57. Further, under Clause 4.8 of the Recognition Agreement entered between TSC and the 1st Respondent, TSC committed to release teachers elected as Branch Executive Secretaries. In this regard, there is no evidence that the Claimant was released to serve the 1st Respondent as Branch Executive Secretary hence was duly employed.
 58. Indeed, there is no evidence that following the Court's decision on 5th March 2015, the Claimant was engaged by the 1st Respondent and the terms of such an engagement.



59. In addition to the foregoing, the Claimant has admitted that Benta Akinyi Opande and Moses Owiti Mborra were appointed as Executive Secretaries at various dates to serve as Branch Executive Secretaries during the period in question. It thus follows that the said office was at the time, occupied.
60. What's more, it is evident that the Claimant's claim is basically for payment of salary and allowances under the Employment Act. In this regard, Section 17(1) of the Employment Act provides as follows:
1. Subject to this Act, an employer shall pay the entire amount of the wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service directly, in the currency of Kenya—
61. In my view, the aforementioned statutory provision presupposes that an employee has performed his or her work pursuant to a contract of service hence the obligation on the part of the employer to pay the entire amount of wages. In other words, the salary is earned.
62. As stated herein, there is no evidence that the Claimant worked for the 1st Respondent as the Branch Executive Secretary during the five-year period he claims. There is therefore no basis for the claim for payment of salaries and allowances sought by the Claimant under the Employment Act.
63. It is thus the finding of this Court that the reliefs sought by the Claimant do not lie.
64. I further find it worth pointing out that in light of the Judgment of 5th March 2015, it is my view that the appropriate remedy for the Claimant to seek in the circumstances was compensation by way of general damages as opposed to a special claim for salary, allowances and pension.
65. The total sum of my consideration is that the Claim is dismissed in its entirety with an order that each party bears its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2024.

.....
STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Oduor

For the Respondents Ms. Kithinzi instructed by Mr. Kingori

Court Assistant Millicent Kibet

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.



STELLA RUTTO
JUDGE

