



K'Ochumba & 3 others v National Association for Orthopedic Technologists in Kenya & 7 others; Ministry of Health & 3 others (Interested Parties) (Petition E144 of 2021) [2024] KEELRC 269 (KLR) (16 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 269 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E144 OF 2021**

B ONGAYA, J

FEBRUARY 16, 2024

**IN THE MATTER OF ARTICLES 19,20,21,22,23,27,28,35,36
AND 47 OF THE CONSTITUTION OF KENYA,2010**

AND

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER ARTICLES 19,20,21,22,23,27,28,35,36
AND 47 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF ENFORCEMENT OF THE CONSTITUTIONAL RIGHTS AS
ENSHRINED UNDER ARTICLES 27,28,35,36 AND 47 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF SECTION 17,18,19 AND 20 OF
THE SOCIETIES ACT, CAP 108 LAWS OF KENYA**

AND

**IN THE MATTER OF THE SCHEME OF SERVICE FOR THE NATIONAL
ASSOCIATION FOR ORTHOPEADIC TECHNOLOGISTS IN KENYA**

BETWEEN

**DONBOSCO K'OCHUMBA 1ST PETITIONER
JACKSON KENDO 2ND PETITIONER
BEN KATANA 3RD PETITIONER
ELIZABETH KATIAMBO 4TH PETITIONER**

AND



NATIONAL ASSOCIATION FOR ORTHOPEDIC TECHNOLOGISTS IN KENYA	1ST RESPONDENT
KIPYEGON MELLI KENNETH	2ND RESPONDENT
EMMANUEL MAYAKA ONDUSO	3RD RESPONDENT
ELIZABETH MUENI	4TH RESPONDENT
PETER ONDIEKI	5TH RESPONDENT
ALEX JUMA	6TH RESPONDENT
SOPHIA GATUMWA	7TH RESPONDENT
ALEX K KISYANGA	8TH RESPONDENT

AND

MINISTRY OF HEALTH	INTERESTED PARTY
REGISTRAR OF SOCIETIES	INTERESTED PARTY
KENYA MEDICAL TRAINING COLLEGE (BOARD OF DIRECTORS)	INTERESTED PARTY
OTTO BOCK COMPANY (KENYA)	INTERESTED PARTY

JUDGMENT

1. The petitioner filed the petition on September 17, 2021 through M/S Muumbi and Company Advocates. The petitioner prayed for:
 - a. A temporary injunction do issue restraining the respondents, their servants, agents or any person acting under their authority from holding the Annual General meeting slated for 20th – 24th September 2021 pending the hearing of the suit.
 - b. A declaratory order do issue that the petitioners are bona fide and lawful members of the 1st respondent.
 - c. A declaratory order do issue that the process of coming up with the scheme of service and the bill was flawed and unconstitutional, therefore, fatally defective, null and void.
 - d. A declaratory order do issue that the scheme of service is a denial, violation and infringement of the rights of the petitioner enshrines within articles 19,20, 22, 27, 35, 36 and 47 of the Constitution of Kenya.
 - e. An order of restraint does issue to restrain the Registrar of Societies, the 2nd interested party herein from recognizing the officials of the 1st respondents as bona fide officials.
 - f. A permanent injunction do issue restraining the respondents, jointly and severally from passing and or implementing the scheme of service without consulting the members of the 1st respondent.
 - g. A mandatory injunction does issue compelling the respondents to make public and accessible, all the records of the 1st respondent for the last eight (8) years, financial or otherwise.



- h. A mandatory injunction do issue directing the 2nd interested party to both conduct a fresh election of officials and office holders of the 1st respondent within 30 days.
 - i. A permanent injunction to be issued, restricting the access to and withdrawal from, of funds from the 1st respondent's account number 0152021161100 with Standard Chartered Bank, without the approval of members of the 1st respondent or any other accounts used for purported association functions or any other accounts used for purported association functions.
 - j. It is petitioners' prayer that no cadre should use the two words "Orthopaedic and Technology" in title name.
 - k. That the Chief Orthopaedic technologist's office at Afya House be properly established and constituted to avoid mismanagement.
 - l. Any other or further orders that the court may deem just and fit to grant.
 - m. Costs and interest of this suit.
 - n. Order to investigate the criminality and institute proceedings against the 1st to 7th or any other affiliate.
2. The petition was based upon the 1st petitioner's supporting affidavit and exhibits thereto filed together with the petition and supplementary affidavit sworn on December 21, 2023. The petitioners' case is as follows:
- a. The National Association for Orthopaedic Technologists in Kenya was registered in 1977 and has been running the affairs of the Orthopaedic Technologists in the country.
 - b. The National Association for Orthopaedic Technologists elected officials have the mandate of running the affairs of orthopaedic technologists and may liaise with the Chief Orthopaedic Technologist in the Ministry of Health headquarters in some matters pertaining to the profession.
 - c. In the last few years, the respondents have systematically run down the association with reckless abandon which action has led to the rise of this cause of action.
 - d. The 2nd to 7th respondents working in cahoots with the 8th respondent have, without consultation with stakeholders and specifically the 3rd interested party, developed a scheme of service for the profession which scheme of service has deliberately narrowed down on just two aspects of the profession being prosthetists and orthotists, leaving orthopaedic technologists under whom the said prosthetics and orthotists derive their description, have been left out in the cold.
 - e. The respondents have sought to introduce an Act of Parliament to regulate the profession without consulting various stakeholders in the profession. The process has not been inclusive, deliberately cutting out the various stakeholders for the selfish gains of a few.
 - f. The said Scheme of Service and Bill or Act of Parliament for prosthetists and orthotists is a none existing cadre, instead of reviewing Scheme of Service for orthopaedic technologist of 1994.
 - g. The respondents have also delved into the business activities, against the Constitution of the association to the detriment of the greater good of the association.



- h. Funds were withdrawn from the 1st respondent's account for the purchase of kits, which the 2nd to 8th respondents have then sold privately for their personal gain.
- i. The said kits procured from the 4th interested party were never fully paid for and now the 1st respondent is saddled with the responsibility of paying the said debt, while the procured items have been sold by the respondents to private interest for personal gain.
- j. The Constitution by which the 1st respondent was established did not allow for business dealings by or on behalf of the 1st respondent for which reason the 2nd to 7th respondents working in cahoots with the 8th respondents have developed a new constitution allowing them to trade.
- k. The respondents have already collected a lot of money for the last seven years from the account of the 1st respondent, Ministry of Health, individual contribution from members of the profession and well-wishers which they have never accounted for.
- l. The push to implement the proposed Scheme of Service and to have an Act of Parliament passed has been without consultation with various stakeholders.
- m. The Scheme of Service as proposed is for non-existing cadre which cadre ought to be under orthopaedic technologists but the respondents have deliberately ignored, neglected or refused to put into consideration, the members' wishes and views on the same.
- n. The officials of the 1st respondent have continually posted excessive expenditures presumably to host executive committee meetings which accounts have not been subjected to audit nor approved.
- o. The 4th interested party whose mandate is to develop training programmes including orthopaedic technology was not consulted in the new move of changing the name. Usually the curriculum defines the name of cadre being trained, roles and responsibilities.
- p. The establishment of the Chief Orthopaedic Office at Afya House is not complete as there is only one occupant running the show and most of the time it is closed.
- q. The respondents have run and continue to run the Association with a draft constitution, which has not been ratified by the membership of the association, whether in part or as a whole.
- r. The respondents violated the rights of the petitioners by depriving them of the capacity to participate in and give their views before the Association's identity was materially changed contrary to provision of the Constitution.
- s. The respondents in part or as a whole have caused the name of the Association to change from the National Association for Orthopaedic Technology to National Association of Orthopaedic Technologists without the members' knowledge, participation or authority, contrary to the Constitution.
- t. The respondents have caused the name and the logo of the Association to change from the one approved by members to another one, not authorized by nor agreed to by the members of the Association.
- u. The petitioners have been ambushed by the decision of the respondents to pass off the Scheme of Service as representing all views of the Association. They were never consulted as members nor was any notice given for collection of views as at the time the Scheme of Service was being adopted.



- v. The 8th respondent has without authority taken over the running of the Association over and above his mandate as a representative of the Association in the 1st interested party.
 - w. With the help of the 2nd to 7th respondents being former and current officials of the 1st respondent, the 8th respondent has proceeded to oversee the material alteration of the Association in form, name and ideals.
3. The 1st, 2nd, 3rd, 4th and 8th respondent filed the replying affidavit of Emmanuel Mayaka Onduso, the Secretary General of the 1st respondent, sworn on 26.11.2023 and filed through J.M Musangi & Co Advocates. It was stated and urged as follows:
- a. The petitioners are aware that the scheme of service is a human resource instrument developed and approved by the Public Service Commission and the Directorate of the Public Service Management in consultation with the Ministry of Health.
 - b. All members of the 1st respondent were invited to engage in the development of the Scheme of Service but the petitioners voluntarily chose not to participate in the exercise.
 - c. The 1st, 2nd, 3rd, 4th and 8th respondents have not introduced or ratified any Act or Bill of Parliament since they assumed office as alleged by the petitioners as the same does not fall within their mandate.
 - d. The 1st respondent's mandate is to sensitize its members in case any Bill of Parliament or regulation is introduced affecting the health sector.
 - e. The petitioners are aware of the process of introduction and enactment of a Bill to become an Act of Parliament. The process is the mandate of the Parliament of Kenya which is the legislative wing of the state.
 - f. The 1st, 2nd, 3rd, 4th and 8th respondents deny engaging in any business activities or misappropriation of funds as alleged. The 1st, 2nd, 3rd, 4th and 8th respondents engaged an external auditor to undertake an 8-year financial audit.
 - g. The 1st, 2nd, 3rd, 4th and 8th respondents have not passed nor do they intend to pass any new constitution to govern the 1st respondents as alleged.
 - h. The current constitution that is being used was enacted and ratified by the members of the 1st respondent in the year 2013.
 - i. They have not amended or changed the said constitution as alleged and the petitioners have failed to avail the alleged new constitution that the respondents are alleged to have introduced or the alleged said amendments that were implemented.
 - j. The respondents were lawfully and in accordance to the terms of the Constitution of the association elected in the year 2018 during the annual general meeting. There was no objection on the legality of the process since then and it is surprising that the petitioners are raising the issue three years later.
4. Final submissions were filed for the petitioners dated September 20, 2023 and for the 1st, 2nd, 3rd, 4th, and 8th respondents dated January 10, 2024. The Court has considered all the material on record. The Court returns as follows:
- a. As submitted for the 1st, 2nd, 3rd, 4th and 8th respondents. The petitioners have failed to show that the respondents are vested with the authority, constitutional, statutory or otherwise, to



develop or review and issue a Scheme of Service for Orthopaedic Technologists. The petitioners have not shown that the 1st, 2nd, 3rd, 4th, and 8th respondents have issued such scheme of service. By their own evidence particularly exhibit DBK7 on the supporting affidavit shows that the Association had taken steps to invite members' views on revision of the Scheme of Service. The Revised Scheme of Service for Orthopaedic Trauma Personnel of September 2015 exhibited on the supporting affidavit as DKB2 shows it was approved by the Public Service Commission and issued by the Directorate of Public Service Management. The Court returns that the petitioner's case as alleged against the Association and its officials in the making of the Scheme of Service has not been established and must fail.

- b. The Court returns that the petitioners have failed to show that the Association, its officials or the 1st, 2nd, 3rd, 4th and 8th respondents have introduced a Bill of Parliament as alleged. The Court has taken judicial notice that the legislative powers are vested in the Parliament by the Constitution of Kenya 2010 and the petitioners' allegations in that regard are found misconceived. In any event, the petitioners have not rebutted the respondent's case that the alleged Bill or Act was abandoned and does not exist. The petitioners' allegations in that regard will collapse as unfounded or moot as unjustifiable.
- c. The petitioners have alleged misappropriation of funds of the Association by the officials. The Court considers that if such allegations hold at all, they amount to a criminal allegation subject to the criminal justice process. In any event the 1st, 2nd, 3rd, 4th and 8th respondents' case that the 8-year audit was undertaken and a comprehensive report rendered in 2021 is not rebutted. It is also not rebutted that the audit report was presented at the annual general meeting of November 29, 2023 to December 2, 2023, and the petitioners invited to attend. As submitted for 1st, 2nd, 3rd, 4th and 8th respondents, the audit having been undertaken, it would be superfluous to order the same be undertaken as prayed for the petitioners.
- d. The 1st, 2nd, 3rd, 4th and 8th respondents urge that the petitioners are at liberty to access the Constitution, books of accounts and various documents relating to the 1st respondent but in accordance with a request made under Article 24 of the 1st respondent's constitution. It is not shown for the petitioners that they requested such access per the 1st respondent's constitution and access was denied. The prayer in that regard will fail.
- e. The 1st, 2nd, 3rd, 4th and 8th respondents admit that the petitioners are duly recognised members of the 1st respondent and no suspension, expulsion or removal has been imposed against any of the petitioners. The Court returns that the petitioners' grievance in regard to their membership, in absence of evidence of impaired membership, is found misconceived.
- f. In the circumstances, the Court finds that the petitioners have failed to establish violation or threatened violation of the Constitution of Kenya 2010 including provisions of the Bill of Rights as was alleged in the petition. The Court finds the petition unmerited. The Court has considered the conduct of the 1st, 2nd, 3rd, 4th and 8th respondents being belated participation including filing of submissions outside time. Thus, parties will bear own costs of the proceedings.

In conclusion the petition is hereby dismissed with orders parties to bear own costs of the petition.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 16TH FEBRUARY, 2024.

BYRAM ONGAYA



PRINCIPAL JUDGE

