



**Ndungu v Secretary General, Kenya National Union of Teacher & 2 others (Employment and Labour Relations Petition E018 of 2023) [2024] KEELRC 122 (KLR) (1 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 122 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS PETITION E018 OF 2023**

**HS WASILWA, J  
FEBRUARY 1, 2024**

**BETWEEN**

**JOHANA KARU NDUNGU ..... PETITIONER**

**AND**

**SECRETARY GENERAL, KENYA NATIONAL UNION OF  
TEACHER ..... 1<sup>ST</sup> RESPONDENT**

**BRANCH EXECUTIVE COMMITTEE, KNUT NYANDARUA NORTH  
BRANCH ..... 2<sup>ND</sup> RESPONDENT**

**PETER MUTURI NDUNGU ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. This Ruling is in respect of the Petitioner/ Applicant’s Notice of motion dated 15<sup>th</sup> August, 2023, brought pursuant to Articles 23, 162 and 165 of the Constitution, Rule 23 of the Constitution of Kenya (Protection of rights and Fundamental Freedom) Practice and Procedure Rules, 2013 and all enabling provisions of the law, seeking for the following Orders; -
  1. Spent.
  2. That pending the hearing and determination of this application inter partes this Honourable Court be pleased to issue an Order restraining the Respondents from implementing the decision to suspend the Applicant as the KNUT Nyandarua North BEC Executive Secretary made on 9<sup>th</sup> August, 2023.
  3. That pending the hearing and determination of this Petition, this Honourable Court be pleased to issue an Order restraining the Respondents from implementing the decision to suspend the Applicant as the KNUT Nyandarua North BEC Executive secretary made on 9<sup>th</sup> August, 2023.



4. That this Honourable Court be pleased to make any further Orders it may deem fit to grant in the interest of justice.
5. That costs of this Application be provided for.
2. The application is based on the fact that the Applicant herein is a KNUT Nyandarua North Branch Executive Secretary having been duly elected as such in 2021 for a five-year term.
3. That on 4<sup>th</sup> August, 2023, the 3<sup>rd</sup> Respondent, without any authority, called for a branch executive meeting when he was neither the chairperson or member of a branch executive committee having been transferred to Nakuru. Therefore, that the Applicant herein did not attend the said meeting.
4. Since the Applicant did not attend that meeting he was informed on 9<sup>th</sup> August, 2023 that he had been suspended by the members of BEC for misconduct but the particulars were not communicated to him.
5. He stated that to the extent that he was not accorded a chance to be heard before the suspension, the suspension was unfair and in violation of his constitutional rights to be heard, right to human dignity, right to fair administrative actions and fair labour practices.
6. He thus stated that the Respondents are likely to implement their threat by suspending him and urged this Court to move with speed and safeguard his right by stopping the suspension.
7. The Application is further supported by the affidavit of applicant sworn on 15<sup>th</sup> August, 2023, which basically reiterated the grounds of the Application.
8. The application is opposed by the Respondents who filed a joint replying affidavit of Hesbon Otieno, the deputy Secretary General of the 1<sup>st</sup> Respondent, sworn on 19<sup>th</sup> September, 2023.
9. In the affidavit, the affiant stated that the applicant herein was not duly elected as Executive Secretary of KNUT, Nyandarua North Branch. He clarified that KNUT officials are all drawn from registered teachers and by dint of the fact that the Applicant is not a registered teacher, he fails on requirements for elections and on that ground alone, he should not have been elected as an official of KNUT.
10. The affiant stated that indeed the 3<sup>rd</sup> Respondent herein was transferred from Nyandarua County to Nakuru County and being an official of the Union, he challenged his transfer on 12<sup>th</sup> February, 2023 which was successful and cancellation of the transfer communicated to him on 22<sup>nd</sup> May, 2023. However, that he was transferred to Kirima Primary School, a school within Nyandarua County as such he retained his seat as vice chairperson of the branch.
11. It is averred that infact it's the applicant who brought to the attention of the 1<sup>st</sup> Respondent that the 3<sup>rd</sup> Respondent's transfer had been cancelled. Also that upon retirement of the chairperson, the same Applicant informed the 1<sup>st</sup> Respondent that the 3<sup>rd</sup> Respondent was the one holding the office of the chairperson albeit in acting capacity, therefore that its disingenuous for the Applicant to allege that the 3<sup>rd</sup> Respondent ceased to be a member of the 2<sup>nd</sup> Respondent.
12. It is the Respondent's case that it's the applicant that even advised the 1<sup>st</sup> Respondent to substitute the retired chairman with the 3<sup>rd</sup> Respondent as the Chairperson by its letter of 20<sup>th</sup> July, 2023 and based on that letter the 1<sup>st</sup> Respondent wrote to the bank by the letter of 24<sup>th</sup> July, 2023 to change signatories from the retired chairman to the acting chairperson who is the 3<sup>rd</sup> Respondent, as such the 3<sup>rd</sup> Respondent had powers to call for meeting within the branch as the acting chairperson in line with Article X(E)(1) of KNUT Constitution.



13. The affiant stated that as soon as the 3<sup>rd</sup> Respondent assumed the office of the chairperson in acting capacity, he noted that the financial status of the 2<sup>nd</sup> Respondent and the management of teachers was poor and asked the Applicant to call for an urgent executive meeting to discuss these issues, however, that the applicant failed and or refused to call for that meeting, forcing the 3<sup>rd</sup> Respondent to call for the meeting and invite the Applicant who attended the said meeting as captured in the minutes and it is in that meeting that he was made aware of his suspension. That the presence of the Applicant is evidenced by the signed allowance vouchers which members were paid including the Applicant herein.
14. It is averred that on 16<sup>th</sup> August, 2023, the 1<sup>st</sup> Respondent wrote to the applicant, seeking for the applicant to convene an urgent full BEC Meeting for 21<sup>st</sup> August, 2023 to discuss the issues bedeviling the Branch and his Suspension, however the Applicant by the letter dated 17<sup>th</sup> August, 2023 indicated his unavailability as he had a doctor's appointment.
15. Based on this letter, the 1<sup>st</sup> Respondent rescheduled the meeting to 23<sup>rd</sup> August, 2021, but the Applicant did not attend and the members agreed to confirm the suspension of the Applicant of 9<sup>th</sup> August, 2023.
16. He stated that the application herein has been made prematurely, because according to Article X(C) (5)(1) of KNUT Constitution, the Applicant ought to have appealed the decision of BEC to National Executive Council. Nonetheless, that after filling this Suit, the Applicant appealed the decision of BEC on 31<sup>st</sup> August, 2023, but the Union could not deliberate on the matter in light of these proceedings and orders of the Court issued on 17<sup>th</sup> August, 2023.
17. The affiant stated that contrary to the Applicant's disposition, he was informed of the agenda of the meeting five days prior to the meeting.
18. In light of the foregoing, the Respondents urged this Court to dismiss the Application herein to allow the disciplinary proceedings to continue to its logical conclusion.
19. Directions were taken for the Application herein to be disposed of by written submissions with the Respondent filing on the 8<sup>th</sup> December, 2023, however the Applicant did not file any submissions.

### **Respondent's Submissions.**

20. The Respondent submitted that for the Application herein to be granted, the applicant must demonstrate all the conditions pre-requisite for granting of injunctive Orders as listed by the Court in the celebrated case of *Giella v Cassman Brown & Co Limited* [1973] EA 358.
21. On prima facie case, the Respondent relied on the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, which quoted the case of *Mrao Ltd. v. First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 fashioned a definition for "prima facie case" in civil cases in the following words:

"In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."
22. Accordingly, that from the narration of the Applicant's supporting affidavit at paragraphs 4-9, the Applicant has not demonstrated the infringement that requires protection and a result failed to demonstrate any prima facie case.



23. It was submitted that the applicant has not demonstrated the irreparable harm it would suffer that cannot be compensated by payment of damages. In this, he relied on the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, where the Court held that:-

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

24. The Respondent submitted that since this is a constitutional Petition, Article 23(3) of the *Constitution* provides for compensation as one of the remedies due to applicant for infringement of their constitutional right, as such the applicant still has recourse in law. This position was reiterated by the Court in *Jeff Milton O Odongo v Kenya Ports Authority* [2016] eKLR where the Court held that; -

“The burden of proving the existence of real injury that cannot be adequately compensated by damages rests with the applicant. In this case the claimant has not shown that if he is dismissed from employment after the disciplinary process damages will not be adequate remedy in the event his suit succeeds after trial. In the opinion of this court the *Employment Act* (AE) has provided for robust reliefs including damages and reinstatement to remedy for unfair and wrongful termination of employment of every employee in Kenya. Consequently, the court finds that the claimant will not suffer irreparable harm if injunction is denied at this stage.”

25. On balance of convenience, the Respondent submitted that the same tilts towards the dismissal of the application because none of the grounds has been proved to convince the Court to grant the Orders sought. Further that the applicant’s administrative appeal filed after filling this suit is pending hearing as such, it’s imperative for the application herein to be dismissed to allow the disciplinary mechanism to conclude. To Support this Position, the Respondent relied on the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR where the Court held that:-

“The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.”

26. It was submitted further that the case herein and the application has been filed prematurely and in contravention of Article X(C) (5)(I) which provides for appeal to the National Executive Council,



which the applicant did not explore before filling this case till 31<sup>st</sup> August, 2023 when he had already file this case, which the Union cannot act on the Appeal in light of the Orders issued by this Court and the suit herein.

27. The Respondent also submitted that an undertaking as to damages is one of the criteria for granting an injunction and where none has been given an injunction cannot issue as was held in Joseph Hinga Gati v Barclays Bank (K) Ltd [2001] eKLR. A similar view was upheld in the case of Chatur Radio Service v Pronogram Limited [1994] eKLR that:-

“The object in insisting upon an undertaking as to damages is that if by misadventure through the judge not knowing all the facts, such as being misled by the affidavit evidence before him or by the arguments of counsel, an injunction is granted on an interlocutory application which ought not to have been granted, then the defendant is entitled to some remedy in damages; thus, the defendant becomes protected against the damage he may suffer by the wrongful issue of the injunction so that the whole purpose of such injunction, which is to preserve matters in status quo until the issue to be investigated in the suit can finally be disposed of, is not rendered nugatory. Save therefore in exceptional circumstances, an undertaking as to damages is required when an interlocutory injunction is granted in order that the Court granting such injunction may be able to do justice if the injunction was wrongly granted.”

28. In conclusion, the Respondent urged this Court to dismiss the Application with costs.
29. I have examined all the averments and submissions of the parties herein.
30. The applicant had sought stay of execution of a suspension which has already been executed.
31. This decision has already been made and this is due to the respondent’s own internal disciplinary processes.
32. Courts will not normally interfere with an employer’s internal disciplinary process unless it is established that it is flawed and the interference if at all shall be limited to putting the proper process or cause.
33. The applicant has not explained to this court where the process is flawed and where this court may intervene on it.
34. It is therefore my finding that the application to stay the suspension cannot hold but I will allow the respondent to proceed and conclude their own internal disciplinary process fairly and within their parameters set in their disciplinary code.
35. The main claim may however proceed if there is need.
36. Costs in the cause.

**DATED AND DELIVERED IN OPEN COURT THIS 1<sup>ST</sup> DAY OF FEBRUARY, 2024.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

In the presence of:

Ayak Jok holding brief for Mbaluto for respondent – present

Ndichu for applicant – present



Court assistant - Fred

