



**Wambani & 2 others v Odege & another (Cause E007 of 2023)  
[2024] KEELRC 633 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEELRC 633 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
CAUSE E007 OF 2023**

**JW KELI, J  
MARCH 14, 2024**

**BETWEEN**

**ROSELIDAH AWINJA WAMBANI ..... 1<sup>ST</sup> PETITIONER  
MALICK SHANGUYA ..... 2<sup>ND</sup> PETITIONER  
DORINE LIDIGU ..... 3<sup>RD</sup> PETITIONER**

**AND**

**TOM ODEGE ..... 1<sup>ST</sup> RESPONDENT  
UNION OF KENYA CIVIL SERVANTS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

On the Notice of Preliminary Objection dated 9<sup>th</sup> January 2024 and the Notice of Motion Application dated 18<sup>th</sup> December 2023)

1. The Petitioners/ Applicants are members of the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> and 2<sup>nd</sup> petitioners were officials of Kakamega branch of the union. The Respondents suspended them from the 2<sup>nd</sup> respondent. Being aggrieved with the decision together with the 3<sup>rd</sup> petitioner their member, they filed the instant Petition dated 18<sup>th</sup> December, 2023 and received in court on 19<sup>th</sup> December 2023 seeking the following reliefs:-
  - a. A declaration that the suspension of the Petitioners and the entire Kakamega Branch is unconstitutional and as such null and void ab initio.
  - b. A permanent order of injunction against the Respondents restraining them from suspending the 1<sup>st</sup> , 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners, officials and the entire Kakamega Branch (UoKCS) on the unlawful and unconstitutional grounds of filing a case, Kisumu High Court E027 /22 Petition, against the Respondents.



- c. Costs of this suit.
2. In addition to the Petition, the Petitioners filed in court an even-date Notice of Motion application seeking the following orders:-
  - a. Spent
  - b. That pending the hearing and determination of this suit, an interlocutory injunction be and is hereby issued against the Respondents, Agents, and or its Assigns staying the decision to suspend/ dismiss the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Petitioners and or in any other manner whatsoever interfering with or disrupting the membership in the union, of the officials and branch members of Kakamega Branch, UoKCS.
  - c. That pending the hearing and determination of this suit, an interlocutory injunction be and is hereby issued against the Respondents, Agents, and or its Assigns from interfering, harassing, intimidating, threatening, or in any other way whatsoever interfering with the smooth running and operations of the Kakamega Branch of Union of Kenya Civil Servants in the activities of the union, including participation in all party organs and its activities.
  - d. The costs of this application be awarded to the petitioners.
3. The gist of the application was that the respondent arbitrarily without affording the petitioners a hearing suspended them and the entire Kakamega Branch. The Petitioners state that the notice of suspension referred to the Petitioners and the branch suing the union before exhausting the internal dispute resolution mechanism, which they say was not true or justified the draconian action.
4. The application was supported by the affidavit of Roselidah Awinja Wambani, the 1<sup>st</sup> Petitioner. The affidavit annexed their payslips as evidence of subscriptions to the union(RAW-1), a copy of the union constitution and registration status of the branch officials from the Registrar of Trade unions(RAW-2), Suspension letters dated 28<sup>th</sup> November 2023 of the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners (RAW-3), copy of petition in Kisumu HC Pet E027 /2023 where they have sued the Respondents(RAW-4).
5. The Application was opposed by the Respondents vide Replying affidavit of Tom Odege, the 1<sup>st</sup> Respondent, dated 9<sup>th</sup> January 2024. He avers that in strict compliance with the provisions of article 16(3)(iii) of the Union Constitution, the National Executive Board (NEB) sitting on the 8<sup>th</sup> November 2023 and exercising its power under article 15(3)(g) of the Union Constitution resolved that any official who deliberately bypasses the internal dispute resolution mechanisms available to the union officials, member or group members shall stand suspended. ('A' was the minutes). That a circular was sent out to that effect('B').
6. Mr. Odege averred that the suspension of the Petitioners from the union was lawful, fair, and justifiable, and in the event, it was not, the 2<sup>nd</sup> Respondent had an internal dispute resolution committee which handles matters like the instant one ('C' minutes indicating existence of the committee). The court finds that the 1<sup>st</sup> Respondent signed to confirm minutes yet it appeared to the court he was absent from the aforesaid meeting. The chairperson had also not signed the minutes. The Court found that those were not valid minutes as they were not confirmed by persons present in the meeting. The annexure of the sub-committee members appeared to the court imposed as per the pagination of the minutes.
7. The 1<sup>st</sup> Respondent avers that the suspension was not arbitrary as it was by NEB exercising its powers under the union constitution, that it did not infer guiltiness but was necessary for fair and unbiased investigations, the suspension was part of the disciplinary action and the Petitioners would be invited



for disciplinary proceedings and lastly no prejudice to the branch members as the County Executive Council was temporary running the branch pending the disciplinary hearing of the petitioners.

8. Mr. Odege further avers that the Kisumu ELRC petition is distinct from the instant case. That the present petition is regarding the petitioners' deliberate action to bypass the 2<sup>nd</sup> respondent's internal dispute resolution mechanism as provided under Article 16(3)ii and 15(3)(g) of the union constitution and contrary to the NEB resolution. That Kisumu ELRC petition is about the financial probity of the Respondents hence distinct from the instant one.
9. Mr. Odege averred that the Petition offends the doctrine of exhaustion and relied on the provisions of Article 159 (2) (c) and Article 47 of the Constitution of Kenya, Section 9 of the Fair Administrative Act to submit that since the Petitioners have dispute resolution mechanisms within the 2<sup>nd</sup> Respondent, the court is improperly seized of jurisdiction. He relied on the mechanisms established under the union constitution article 16(3) being a dispute resolution committee at both national and county levels.

### **The Notice of Preliminary Objection**

10. The Respondents further filed a notice of preliminary objection dated 9<sup>th</sup> January 2024 the gist of which is that the court lacks jurisdiction to deal with this matter because it is prematurely before the court for failure to exhaust the Union's internal dispute resolution mechanisms relying to article 16(3) (ii) and 15(3)(g) of the union constitution.
11. The Petitioners responded to the response and preliminary objection vide replying affidavit of Malick Shanguya sworn on the 29<sup>th</sup> January 2024, filed in court on the 1<sup>st</sup> February 2024 among others producing a decision of the court dismissing a similar objection on the issue of non-exhaustion of the internal mechanisms of the union. The Petitioners also filed a list of documents dated 29<sup>th</sup> January 2023.
12. The Respondents filed a chamber summons application dated 9<sup>th</sup> February 2023 seeking to strike out the affidavit by Malick Shanguya sworn on 29<sup>th</sup> January 2024 on the basis that the signature did not belong to the deponent and annexed copies of documents with alleged signatures of the deponent. The applicant stated that it did not wish to respond to the chamber summons application. The court Ordered that the Chamber Summons application would be considered in this application.

### **Written submissions**

13. The petitioners informed the court they relied on their application and replying affidavit. They did not file written submissions.
14. The Respondents filed written submissions dated 14<sup>th</sup> February 2024 drawn by Rashid Law Advocates and received in court on the 22<sup>nd</sup> February 2024.

### **Determination**

#### **Issues for determination**

15. The Court having perused the pleadings filed in the matter and the documents filed by the parties, the law, and the written submissions by the Respondents was of the considered opinion the issues placed by the parties before it for consideration were as follows:-
  - i. Whether the Notice of Preliminary Objection dated 9<sup>th</sup> January 2024 is merited.



- ii. Whether the Chamber Summons application by the Respondents dated 9<sup>th</sup> February 2024 is merited
  - iii. Whether the application dated 18<sup>th</sup> December 2023 by the Petitioners is merited.
  - iv. Issue i. Whether the Notice of Preliminary Objection date 9<sup>th</sup> January 2024 is merited.
16. The Respondents filed a notice of preliminary objection dated 9<sup>th</sup> January 2024, the gist of which is that the court lacks jurisdiction to deal with this matter because it is prematurely before the court for the Petitioners' failure to exhaust the Union's internal dispute resolution mechanisms relying on the provisions articles 16(3)(ii) and 15(3)(g) of the union constitution.
  17. The Union Constitution was produced by the Petitioners('RAW 2a').
  18. Article 15(3)g The Union Constitution states:- 'Decisions of the National executive board shall be binding on the union officials, members and employees provided that if such decision directly affects the rights or privileges of any member or group of members such a member or group of members may within (30) days of the date of the meeting of the National Executive Board, appeal to the Advisory Council against such decision and or /resolution.'
  19. Article 16(3)(ii) The Union Constitution reads:-' 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.'
  20. Before the Court was a constitutional petition. Only a court of law can determine whether or not there exists constitutional violations or threats of violations. The Respondent in the letters dated 28<sup>th</sup> November 2023 suspended the entire Kakamega branch and its officials. I find this is not a proper issue for determination under a preliminary objection as the court has to interpret whether or not Article 15(3)(g) of the Union Constitution can apply to the suspension of a registered branch of a union.
  21. The Court holds that the instant Notice of Preliminary Objection does not meet the threshold of a preliminary objection. A Preliminary Objection was well settled in the *Mukisa Biscuits Manufacturing Co. Ltd... Vs... West End Distributors Ltd* (1969) EA 696 to mean: -
 

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Further Sir Charles Nebbold, JA stated that: -

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”
  22. The facts by the parties are not accepted as correct and the clauses cited to have an internal dispute resolution mechanism of the union constitution vis a vis the allegations by the Petitioners call for interpretation of the Constitution application by the court. The court holds that the preliminary objection by the Respondents does not raise a pure point of law and is hence improper. The court



further finds that this being a constitutional petition where violation of constitutional rights is pleaded it is not a matter that can be handled vide the said internal dispute resolution mechanism of the party alleged to have violated the rights.

23. The Notice of Preliminary Objection dated 9<sup>th</sup> January 2024 was without merit and dismissed. Costs in the cause.

**Issue 2. Whether the Chamber summons application dated 9<sup>th</sup> February 2024 is merited.**

24. The court outlined the case of the parties. The applicant relied on their application and the Replying affidavit of Malick Shanguya of 29<sup>th</sup> January 2024. The Respondents sought to strike out the said replying affidavit vide Chamber Summons application dated 9<sup>th</sup> February 2024 on the basis that the signature therein was not of the deponent, Malick Shanguya.
25. The 1<sup>st</sup> Respondent annexed documents with sample signatures of the deponent under his affidavit in support of the Chamber Summons Application. The Petitioners stated they did not wish to respond to this application.
26. The deponent of the Replying affidavit on 29<sup>th</sup> January 2024 is the 2<sup>nd</sup> Petitioner. The court finds that the apparent inconsistency between the affidavit signature and the sample of the signatures produced by Mr. Odege was not fatal to the affidavit as long as the person who swore the affidavit indicated his name as the owner of the affidavit. This was done at the introduction of the said replying affidavit to wit:- ‘I Malick Shanguya, the 2<sup>nd</sup> Petitioner..’ and at the Jurat Malick Shanguya is the Deponent. The Applicant did not call the maker of the affidavit to be cross-examined if they had issues with the same as required under the Civil Procedure Rules, Order 19, rule 2 to wit:-
- ‘2. Power to order attendance of deponent for cross-examination
- (1) Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent.
- (2) Such attendance shall be in court, unless the deponent is exempted from personal appearance in court, or the Court otherwise directs.’
27. Consequently, taking into account the foregoing, the Chamber Summons application dated 9<sup>th</sup> February 2024 by the Respondents is dismissed for lack of merit. Costs in the cause.

**Issue 3. Whether the Notice of Motion Application dated 18<sup>th</sup> December 2023 by the Petitioners is merited.**

28. The Court finds that the issue at this stage is whether there is a prima facie case established for the grant of the interim Orders sought.
29. The Respondent states they acted within the union’s constitutional powers before effecting the impugned suspension.
30. I perused the union constitution filed in Court by the Petitioner. Article 12 (1) provides that a national official may be suspended from office as may be determined by the National Executive Board for various reasons and among them ‘(ii) when he/she is guilty of gross contravention of any of the provisions of this constitution and the Rules and the General standing Orders of the union.’



31. The suspension letter addressed to the 2<sup>nd</sup> petitioner, the union Kakamega Branch Chairman, written by the 1<sup>st</sup> Respondent reads:-

‘ Suspension

This is to convey the decision of the NEB meeting of 8<sup>th</sup> November 2023 that resolved any official who shall sue the Union before exhausting internal dispute resolution mechanism shall stand suspended from any union activities until his petition is heard and determined, this is therefore to notify you that the entire Kakamega Branch stand suspended.” The letter to the 1<sup>st</sup> Petitioner was to the same effect.

32. The Respondents state they acted within their Constitutional powers. Article 12 of the union constitution (3) reads:-‘No official shall be suspended or expelled unless he/she has been given an opportunity to state his /her case personally or in writing at a meeting of the National Executive Board, about which he /she has received a notice of not less than fourteen days in writing. Such notice shall include details of the allegations with which the member is being charged.’”

33. The Respondents submit that the petitioners are not national officials hence article 12 of the Union Constitution does not apply to them. The respondents does not disclose the constitutional procedures that apply to the petitioners.

34. The Branches of the union are established under Article 18 of the union constitution. Clause 3 is the branches. 18(3)(5) provides that the branch may be disbanded by the advisory council on the recommendation of the NEB for failure to comply with the provisions of the union constitution. In the opinion of the Court, It is thus not the NEB that can disband the branch but the advisory council. The Court does not find a provision in the Union Constitution for suspension of the branch.

35. The court finds there is no disciplinary procedure regarding branch officials under the union constitution hence all authorities cited by the Respondents are not relevant as they are related to existing mechanisms. The letters of suspension did not cite the applicable provisions of the Union Constitution applied in making the impugned decision. The court finds there is a prima facie case before it which is one of the conditions for the grant of interlocutory injunctions.

36. The court finds that there are threatened violations of the rights of the petitioners to fair hearing which is a non-derogable right under the Constitution. Article 25 of the Constitution reads:- ‘Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited- (c) the right to a fair trial;

37. The right to a fair trial is elaborated under Article 50 of the Constitution. The suspension of the Petitioners was not supported by the union constitution. The threatened violation of the right to fair hearing forms a basis for grant of conservatory orders including interlocutory injunctions.

38. In the upshot, I dismiss the preliminary objection by the Respondents dated 9<sup>th</sup> January 2024 for lack of merit. I dismiss the Chamber Summons application by the Respondents seeking to strike out the Replying affidavit by 2<sup>nd</sup> Petitioner dated 29<sup>th</sup> January 2024 for lack of merit. The court finds the Instant application by the Petitioners merited and grants the following orders;-

- a. Pending the hearing and determination of this suit, a temporary injunction be and is hereby issued against the Respondents, Agents, and or its Assigns staying the decision to suspend/ dismiss the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Petitioners and or in any other manner whatsoever interfering with or disrupting the membership in the union, of the officials and branch members of Kakamega Branch, UoKCS.



- b. Pending the hearing and determination of this suit, A temporary injunction be and is hereby issued against the Respondents, Agents, and or its Assigns from interfering , harassing, intimidating, threatening , or in any other way whatsoever interfering with the smooth running and operations of the Kakamega Branch of Union of Kenya Civil Servants in the activities of the union, including participation in all party organs and its activities.
- c. Costs in the cause.

39. It is so Ordered.

**DATED, SIGNED AND DELIVERED THIS 14<sup>TH</sup> DAY OF MARCH 2024 IN OPEN COURT AT KAKAMEGA**

**J.W. KELI**

**JUDGE**

**In the presence of:**

C/A: Macheso

For Applicants/Petitioners: - Otieno Advocate

For Respondents: -Wangatia Advocate

