



**Ndungu v Union of Kenya Civil Servants & 2 others (Petition
E233 of 2023) [2024] KEELRC 1306 (KLR) (29 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1306 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E233 OF 2023**

B ONGAYA, J

MAY 29, 2024

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER CHAPTER FOUR, ARTICLES
27(1), 36(1) AND 41(2) OF THE CONSTITUTION OF KENYA;**

AND

**IN THE MATTER OF ARTICLES 1, 2, 3, 4(2), 10, 19, 20, 21, 22, 23, 27, 28, 36, 41, 48,
50(1), 73, 75, 156, 159, 165, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010;**

AND

**IN THE MATTER OF ALLEGED VIOLATION OF SECTION
4 & 5 OF THE FAIR ADMINISTRATIVE ACTION ACT 2015;
SECTION 31(1), 33, 34 AND 35 OF THE LABOUR RELATIONS ACT, 2007;**

BETWEEN

PAUL KARIUKI NDUNGU PETITIONER

AND

UNION OF KENYA CIVIL SERVANTS 1ST RESPONDENT

TOM MBOYA ODEGE 2ND RESPONDENT

REGISTRAR TRADE UNIONS 3RD RESPONDENT

JUDGMENT

1. The petitioner through Ruth Tanui & Company Advocates filed the petition dated 11.12.2023 seeking the following prayers:
 - a. A declaration that the petitioner is entitled to hold office and complete his term of office as the National organizing secretary of the 1st respondent.



- b. A declaration that the petitioner be reinstated as the National Organizing Secretary of the 1st respondent immediately.
 - c. A declaration that the 1st respondent to pay the petitioner all withheld monthly salaries and allowances together with interest at court rates.
 - d. A declaration that the 2nd respondent's attempt to remove the petitioner from office is discriminatory, unlawful, ultra vires and unconstitutional.
 - e. A declaration that the respondent and its organs including the national executive board, the advisory council, the national delegates conference, the national annual delegates conference, the special national delegates conference and the national administrative council are not entitled to consider the removal of the petitioner from the office of the national organizing secretary under the constitution of the respondent.
 - f. Costs of the petition.
 - g. Any such other appropriate relief that the Honourable Court may deem just and fair to grant.
2. The petition was based upon the supporting affidavit of the petitioner and exhibits thereto filed together with the petition and sworn on 11.12.2023. His case is as follows:
- a. That he is the current national organizing secretary of the 1st respondent having assumed office on 5th September, 2019 following being elected as such.
 - b. That despite having retired from civil service on 24th September, 2022 while still in his current position, he is mandated by Article 7(2) and 11(1) of the 1st respondent's constitution to finish his term of five years.
 - c. That on 08.11.2021 while guaranteeing a loan he was taking from the bank, the 2nd respondent wrote a letter to co-operative bank confirming that he was elected on 05.09.2021 and supposed to serve for five years until 2026 and that even after his retirement, he can continue to hold office for another five years as the national organization secretary.
 - d. That on 14.12.2022, the 2nd respondent circulated a letter to all officials of the 1st respondent indicating that all persons who have retired from civil service shall cease to hold office by 01.01.2023.
 - e. That according to the secretary general, a resolution meeting by the national delegates was conference held on 07.12.2022 at Kenya school of curriculum development, it was resolved to have all retirees vacate their office upon retirement.
 - f. That the above is false information and that no such decision was made and a clear depiction of the 2nd respondent overreaching their powers.
 - g. That via ELRC petition no. 224 of 2022 the petitioner herein petitioned to the court to prevent his removal and via the ruling dated 11.05.2023 the court ordered the parties to exhaust internal mechanisms.
 - h. That the respondents herein have failed and refused to follow the court orders despite the petitioner writing several letters and emails that have been ignored.
 - i. That despite a meeting held on 27.09.2023 he is still yet to receive a response.
 - j. The petitioner urged that the orders sought herein be granted.



3. The respondents were directed to file their replying and supplementary affidavit to the petition. They filed their supplementary affidavit out of time, which was struck out.
4. The interested party did not respond to the petition.
5. The respondents also filed a preliminary objection challenging the jurisdiction of this court arguing that the matter was and is to be resolved internally before going to court which is also to be determined alongside this petition.
6. Final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows:
 - a. The parties are bound by the constitution of the 1st respondent.
 - b. The evidence is that per the respondent's constitution, the applicant was validly elected as the 1st respondent's National Organising Secretary. There is no shown valid constitutional ground for terminating his tenure. It appears that at election, the candidate must be a serving civil servant and the cessation of the service in the intervening period does not impair the tenure of an elected union official.
 - c. Article 11 of the union constitution states as follows:
 1. Ever elected official of the union shall hold office for a term of five (5) years, but shall be eligible for re-election.
 2. Notwithstanding the provisions in Article 11(1), the fourteen (14) elected National Officials and the three (3) Trustees of the Union shall hold office for a term of five (5) years, but shall be eligible for re-election twice.
 3. The term of office of all elected National Officials of the Union shall expire at the National Quinquennial Delegates Conference following the assumption of office by that official.
 - d. The Court finds that the petitioner's tenure is protected and he is entitled to continue in office. He is as well entitled by the instant proceedings to enforce Article 11 of the Union constitution.
 - e. The notice of preliminary objection is dated 19.12.2023 and filed through Nyamweya & Mamboleo Advocates. The Court has considered the grounds stated and returns as follows:
 - i. ELRC petition no. 224 of 2022 between the same parties was dismissed and the claims were similar to the instant petition. It was dismissed for parties to invoke internal dispute resolution per Article 16(3) of the Union Constitution. That disputes about interpretation of the constitution of the union are to be settled through negotiation and conciliation and failing amicable resolution, aggrieved party to refer the matter to a tribunal of arbitrators. The procedure has not been exhausted. The petition is said to be premature and trapped by the principle of res judicata.
 - ii. The petition was struck out and not dismissed per the ruling by Ndolo J in petition no. 224 of 2022 delivered on 11.05.2023. Thus it appears to the Court that the matter was not determined on merits. The doctrine of res judicata will not apply. Further, the petition is not premature because the petitioner has shown that the respondents have not been cooperative in invoking the internal dispute resolution. In the meantime, he states that his rights have continued to be violated. There is nothing before the Court



to rebut the petitioner's case that the internal mechanisms have become incapable of being implemented.

iii. The Court returns that the preliminary objection must therefore fail.

f. The interested party filed the replying affidavit of Beatrice Mathenge sworn on 27.02.2024 through the Honourable Attorney General and the learned state counsel Mary Mochoge appeared in that behalf. The issue in dispute has been previously determined by the Court in *Justus Kinyua Mugo v Union of Kenya Civil Servants, Registrar of Trade Unions (Interested Party)* [2020] eKLR. As submitted for the interested party it was held by Onyango J thus

“ Article 12 of the Union's constitution elaborately provides for the process of suspension and subsequent removal of an official. In the absence of such a removal would be in contravention of the said constitution. The constitution of the union does not bar the petitioner from holding office for reason that after his election he has retired from public service. This is only necessary for purposes of election to a national office, and not for a removal. The petitioner is thus entitled to hold office and complete his term of office, as the National Treasurer of the respondent.”

The Court accordingly returns that the petitioner is entitled to hold office as the national organising secretary until tenure as elected ends or is otherwise lawfully removed from office. The submission for the Honourable Attorney General and the petitioner is hereby upheld.

g. The parties are bound by the Court's interpretation and it will apply accordingly.

7. The petitioner has succeeded and the respondents will pay costs of the proceedings and other parties to bear own costs. The petitioner has established that his rights under articles 27, 28, 41, 47 and 50(1) are being violated in the manner his service as the national organising secretary is being interfered with.

In conclusion, judgment is hereby entered for the petitioner against the respondents for:

1. The declaration that the petitioner is entitled to hold office and complete his term of office as the National organizing secretary of the 1st respondent.
2. The declaration that the petitioner be reinstated, if at all purportedly removed, as the National Organizing Secretary of the 1st respondent immediately.
3. The declaration that the 1st respondent to pay the petitioner all withheld monthly salaries and allowances together with interest at court rates.
4. The declaration that the 2nd respondent's attempt to remove the petitioner from office is discriminatory, unlawful, ultra vires and unconstitutional.
5. The declaration that the respondent and its organs including the national executive board, the advisory council, the national delegates conference, the national annual delegates conference, the special national delegates conference and the national administrative council are not entitled to consider the removal of the petitioner from the office of the national organizing secretary under the constitution of the respondent and on account that he has, subsequent to his election, retired from the civil service.
6. The respondents to pay the petitioner's costs and other parties to bear own costs of the petition.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS WEDNESDAY 29TH MAY 2024.



BYRAM ONGAYA
PRINCIPAL JUDGE

