



**Republic v Cabinet Secretary Ministry of East African Community Labour and Social Protection & another; Tom Mboya Odege & 2 others (Exparte) (Judicial Review Application 36 of 2017) [2024] KEELRC 2279 (KLR) (25 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2279 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**JUDICIAL REVIEW APPLICATION 36 OF 2017**  
**MA ONYANGO, J**  
**SEPTEMBER 25, 2024**  
**N THE MATTER OF: SECTION 8 &9 OF THE LAW REFORM**  
**ACT CAP 26 LAWS OF KENYA**  
**AND**  
**IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE**  
**RULES, 2010**  
**AND**  
**IN THE MATTER OF: APPLICATION FOR LEAVE TO PPLY FOR**  
**JUDICIAL REVIEW FOR ORDERS OF CERTIORARI AND**  
**PROHIBITION**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE CABINET SECRETARY MINISTRY OF EAST AFRICAN COMMUNITY  
LABOUR AND SOCIAL PROTECTION ..... 1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**HON TOM MBOYA ODEGE ..... EXPARTE**

**HON OMBOKO MILEMBA ..... EXPARTE**

**HON WILLIAM SOSSION ..... EXPARTE**



## JUDGMENT

1. Pursuant to leave of this court dated 15<sup>th</sup> December 2017, Hon. Tom Mboya Odege, Hon. Omboko Milemba and Hon. William Sossion (hereinafter, the Applicants) filed a Notice of Motion dated 21<sup>st</sup> December 2017 seeking the following orders:
  - i. Certiorari to remove into this Court for the purposes of being quashed the decision of the 1<sup>st</sup> Respondent contained in Gazette Notice Vol. CXIX-No. 184 of 13<sup>th</sup> December 2017 ousting the Applicants from the positions as officials of their respective trade unions.
  - ii. Prohibition preventing the 1<sup>st</sup> Respondent from effecting and/or implementing the decision in Gazette Notice Vol. No184 of 13<sup>th</sup> December 2017
  - iii. Costs of this application be provided for
2. The application is supported by the grounds set out in the statement of facts filed in court on 15<sup>th</sup> December 2017.
3. The gist of the application is that the Applicants, Hon. Tom Mboya Odege, Hon Omboko Milemba and Wilson Sossion are the Secretary General of the Union of Kenya Civil Servants, Chairperson of the Kenya Union of Post Primary Education Teachers and the Secretary General of the Kenya National of Teachers respectively, having been duly and procedurally elected to the said positions in accordance with the law and constitutions of their respective trade unions.
4. It is further averred that the 1<sup>st</sup> Applicant was elected as the Member of Parliament for Nyatike Constituency while the 2<sup>nd</sup> Applicant was elected as the Member of Parliament for Emuhaya constituency in the elections of 8<sup>th</sup> August 2017. That the 3<sup>rd</sup> Applicant was duly nominated as a Senator.
5. Vide the Gazette Notice Vol. CXIX –No. 184 of 13<sup>th</sup> December 2017, the 1<sup>st</sup> Respondent ordered and directed the Applicants to vacate their offices as officials of their various trade unions.
6. The Applicants state that the 1<sup>st</sup> Respondent erroneously contends that the Applicants should vacate the said offices on the basis that the Applicants are state officers by dint of Article 77 and 260 of [the Constitution](#) and are therefore not allowed to continue being officials of trade unions or to hold other offices other than being members of parliament.
7. According to the Applicants, the Gazette notice is based on grave misapprehension of the law for the reasons that:
  - a. The 1<sup>st</sup> Respondent misconstrued the provisions of Article 77 and 260 of [the Constitution](#) and other relevant provisions of the law viz a viz the [Leadership and Integrity Act](#) (Cap 182) to the extent that the Applicants had been categorized as full time State Officers who cannot hold any other office;
  - b. The 1<sup>st</sup> Respondent failed and/or neglected to consider the fact that a State Officer can hold private offices save where it can be shown or demonstrated that such amounts to gainful employment and is inconsistent with the functions of the State Officer as contemplated and defined by [the Constitution](#) and the [Leadership and Integrity Act](#);



- c. The 1<sup>st</sup> Respondent failed to consider the express provision of Article 47 and 75(2) of the Constitution and the relevant provisions of the Fair Administrative Actions Act requiring due process before a decision is made.
8. Further, that the said decision was made in excess of the 1<sup>st</sup> Respondent's jurisdiction and is therefore ultra vires because;
    - a. It is trite that no state or public officer can exercise powers not expressly donated by the Constitution or relevant law;
    - b. Any dispute concerning the election of trade union officials and their being in office is reserved for the Employment and Labour Relations Court as per the provisions of section 34 of the Labour Relations Act and section 12 of the Employment and Labour Relations Act and not the Cabinet Secretary;
    - c. The 1<sup>st</sup> Respondent assumed powers which she did not have at all by directing that the Applicants vacate their offices as officials of their respective trade unions;
    - d. The 1<sup>st</sup> Respondent does not have power to de-gazette or oust duly elected officials of trade unions and to revoke the election of trade union officials.
  9. The Applicants therefore contend that the said decision was contrary to procedure and therefore inundated with procedural impropriety and further, that in reaching the impugned decision the 1<sup>st</sup> Respondent made considerations of irrelevant factors and failed to take into account relevant facts.
  10. The Applicants maintain that the decision by the 1<sup>st</sup> Respondent is void ab initio, an illegality and ought to be brought into this Court for purposes of being quashed.

### **The Response**

11. The 1<sup>st</sup> Respondent opposed the Application through Grounds of Opposition dated 25<sup>th</sup> January 2019 and averred as follows:
  - a. That a State Officer under Article 260 is defined as a person holding a state office. It is further defined to include inter alia an office held by a Member of Parliament and that held by Member of County Assembly.
  - b. That Article 77(1) of the Constitution provides that a full time state officer shall not participate in any other gainful employment. This Article forms part of Chapter Six of the Constitution on Leadership and Integrity which is enforced through the Leadership and Integrity Act 2012. The Act under section 26(1) provides that subject to sub-section (2), a state officer who is serving on a full-time basis shall not participate in any other gainful employment.
  - c. That Sub-section 26(2) of the Leadership and Integrity Act defines the term "gainful employment" to mean work that a person can pursue and perform for money or other form of compensation or remuneration which is inherently incompatible with the responsibilities of the state office or which results in the impairment of the judgment of the state officer in the execution of the functions of the state office or results in the conflict of interest in terms of section 16.
  - d. That section 16(1) provides that a state officer or public officer shall use the best efforts to avoid being in a situation where personal interest conflict or appear to conflict with the state officer's/ public officer's official duties.



- e. The Applicants therefore as provided under Article 260 of *the Constitution*, are state officers working on full time basis as members of parliament.
- f. The 3 applicants are Members of Parliament and at the same time officials of their respective trade unions.
- g. Article 17(4) of the Union Constitution provides that 'the National Executive Board with the approval of the Advisory Council may designate any National Official to be a full time officer of the union at the secretariat'.
- h. The 1<sup>st</sup> Applicant has not denied that he is a full time official of the union and earning a salary and allowance.
- i. The 2<sup>nd</sup> Applicant is the National Chairman of the Kenya Union of Post Primary Education Teachers.
- j. That by the time this Application was filed on 15th December 2017, Article 8(6) of the 3rd Respondent's Constitution provided that "there shall be established the National Executive Board (NEB). This Board shall comprise ten elected officials working full time and shall include ...the Assistant National Treasurer, National Gender Secretary..." Similarly under Article 13(1) of the union's constitution, a teacher elected as executive secretary must resign from his/her employment with Teachers Service Commission to take up this position hence the Branch Executive Secretary earns a salary and is therefore a full time official. The Union-KUPPET has since then amended their constitution to provide that members of the National Executive Board who get engaged as state officers shall serve on part time basis.
- k. That the amendment notwithstanding, the 2nd applicant falls within the category of gainful employment as defined under section 26(2) of the *Leadership and Integrity Act*, as he would still earn a compensation or remuneration as thereby defined.
- l. The 3<sup>rd</sup> Applicant is the Secretary General of KNUT and under Article VI(5) of the union's constitution, the 3<sup>rd</sup> Applicant is the Chief Executive Officer of the union, the chief spokesman of the union and the Secretary of the National Executive Council.
- m. Among the functions of the National Executive Council is that of designating any elected officer on full time basis and determining terms and conditions of service.
- n. That the 3<sup>rd</sup> Applicant has not denied that he is a full time official of the union and earning salary and allowances.
- o. That in view of Article 260 of *the Constitution* and section 26(2) of the *Leadership and Integrity Act*, the Applicants are full time employees in two offices being the state office and trade union office and earning from both contrary to Article 77(1) of *the Constitution*. Even when they serve on part time basis in the union, they earn a remuneration which falls under the definition of "gainful employment".
- p. That in petition *28 of 2016* between Robert Nyabuto v Ronald Kiprotich Tonui and Kenya Union of Post Primary Education Teachers, the court found that the 1<sup>st</sup> Respondent was not qualified to contest in the election for the position of the Assistant National Treasurer as long as he holds the office of Member of Parliament. The Court of Appeal, where the matter at that time pending, had not issued any stay order against the judgment.



- q. In view of the above, the Gazette Notice by the 1st Respondent was lawful and proper for general information, having been issued by the Cabinet Secretary responsible for Labour and Employment matters.
  - r. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents prayed that the Honorable Court do find in their favour and direct that all state officers holding positions in trade unions resign or be deregistered and the affected unions be directed to hold elections for those positions.
  - s. That the orders sought are discretionary and their scope and purpose is limited and, in the circumstances, it will be in the interest of justice that they are denied.
12. The Application was canvassed by way of written submissions. The Applicants' submissions were filed on 18<sup>th</sup> April 2019 while the Respondents submissions were filed on 18<sup>th</sup> April 2019.

### **Applicants' Submissions**

13. The Applicants in their submissions identified the main issue for determination to be whether they were precluded from holding their positions in their respective unions by dint of being Members of Parliament.
14. The Applicants reiterated the contents of their supporting affidavits and maintained that there is no provision in law which precludes the Applicants from holding other positions in addition to their being Members of Parliament. Reliance was placed in the case of *John Okelo Ngafwa vs the Independent Electoral & Boundaries Commission & 2 others (2013)eklr* where the court held as follows;
- “Evidently, the work of a Members of the Senate involves both Parliamentary and non-parliamentary business. The work-hours for Parliamentary business are regulated by the Standing Orders of the House. This court has looked up those Standing Orders and in particular Standing Order 30.1 which provides:-
- i. Unless the Speaker for the convenience of the Senate otherwise directs, the Senate shall meet at 9am on Wednesday and Thursday, but more than one sitting may be directed during the same day.
- It seems that even if a Member of Senate was to be involved in other business of the House (eg. Committees), Parliamentary business may not engage a member fully from Monday to Friday, 8am to 5pm in respect of non-parliamentary business, this court was unable to find any regulation governing the work hours.
15. It is therefore the Applicants submission that they are not full time state officers and even if they were, neither *the Constitution* nor the *Leadership and Integrity Act* preclude their being engaged in other gainful employment.
16. They therefore contended that they were officials of trade unions having been duly and procedurally elected to the said positions in accordance with the law and constitutions of their respective trade unions.
17. The Applicants stated that it is trite and it has not been disputed that the trade unions had been registered and operate in accordance with the provisions of the *Labour Relations Act*. Further, that section 31 of the *Labour Relations Act* provides for the qualification for appointment as trade union officials.



18. They submitted that they met the requirements and were duly and procedurally elected to their respective positions in the trade unions and their being in their respective positions in the trade unions had never been challenged on account of their not being qualified.
19. It was the Applicants' submissions that upon election of trade union officials and their assumption to office, only this court has jurisdiction to make any determination on disputes arising either directly or indirectly from the election of trade union officials.
20. The Applicants submitted that it was only this court that had jurisdiction to remove a duly elected trade union official from office either at the end of the term of the elected trade union official or in compliance with a trade union's constitution. They submitted that in this instance, the relevant trade unions national organs were not involved and did not sanction the removal of the Applicants from office.
21. They submitted that the 1<sup>st</sup> Respondent did not and does not have jurisdiction to remove the Applicants from their offices in their respective trade unions and that there is no such provision in law. That not even the 1<sup>st</sup> Respondent referred to the provision of the law she purported to rely on in publishing the impugned Gazette Notice removing the applicants from office.
22. While relying on the case of Republic vs Kajiado Land Disputes Tribunal SRM'S Court Kajiado & 3 Others HCC 689/2001, the Applicants submitted that the 1<sup>st</sup> Respondent's decision was made in excess of jurisdiction and/or without having requisite jurisdiction and the same was a nullity. They prayed for the decision in the impugned Gazette Notice to be quashed.
23. The Applicants submitted that the issue whether they engaged in other gainful employment contrary to law could only be determined at a hearing after proof of the requirements of section 26 of the [Leadership and Integrity Act](#) and adducing evidence to show that the Applicants' participation in the activities of their respective trade unions was inherently incompatible with their responsibilities as state officers or that it resulted in the impairment of their judgment as state officers or resulted in a conflict of interest.

### **Respondents submissions**

24. In their submissions, the Respondents framed the issues for determination to be:
  - i. Whether the Applicants herein are state officers
  - ii. Whether the Applicants can hold two offices both on full time basis
  - iii. Whether the 1<sup>st</sup> Respondent acted ultra vires her powers by issuing the gazette notice
  - iv. The presumption of legality.
25. On the first issue, the Respondents maintained that the Applicants were state officers as defined under Article 260 of [the Constitution](#). It was submitted that they were state officers working on full time basis as Members of Parliament.
26. With regard to the second issue whether the Applicants can hold two offices both of which are on full time basis as Members of Parliament and at the same time as union officials, the Respondent cited the case relied upon by the Applicants of [Robert Nyabuto Nyabwocha v Ronald Kiprotich Tonui & Another, Nairobi ELRC Petition No. 28 of 2016](#).
27. The Respondents urged the court to make a finding that Members of Parliament are State Officers on full pay and therefore cannot hold other offices which are on full time.



28. The Respondents also cited the case cited by the Applicants John Okelo Ngafwa vs IEBC & 2 others (2013) eklr where the High Court ruled that the senator who appeared as counsel in an election petition had not contravened section 26 of the Leadership and Integrity Act which defined the word gainful employment. The Respondents further cited the appellate decision in Nation Media Group Ltd vs Onesmus Kilonzo, Civil Appeal No. 108 of 2015 (2017) eklr where the Court of Appeal held that there is no compelling reason why judges of the ELRC should continue applying a decision of the High court if they find that it incorrectly interprets the employment law.
29. On the third issue on whether the 1<sup>st</sup> Respondent acted ultra vires her powers by issuing the gazette notice, the Respondents submitted that the remedies of certiorari and prohibition are tools that this court uses to supervise public bodies and inferior tribunals to ensure that they do not make decisions or undertake activities which are ultra vires their statutory mandate or which are irrational or otherwise illegal.
30. The Respondents submit that the Applicants have not demonstrated any irrationality, illegality and impropriety of procedure to warrant the orders sought.
31. While making reference to paragraph 12(d) on the face of the motion on the allegation by the Applicants that they were not accorded a right to elect and choose as to which position they would prefer between being officials of trade unions and being members of parliament, the Respondents maintained that since the Applicants failed to decide and either resign on their own volition on one position and retain the other, the 1<sup>st</sup> Respondent guided by the Constitution directed they vacate offices as union officials. It is the Respondents' position that no evidence has been submitted before this court by the Applicants that they wish to relinquish their seats as Members of Parliament or at all.
32. The Respondents' therefore submit that the de-gazettement of the Applicants by the 1<sup>st</sup> Respondent was legal and is presumed to have been done legally as the Applicants have not adduced any evidence to rebut the legal presumption.
33. The court was urged to strike out the suit

### **Analysis and determination**

34. I have considered the Notice of Motion herein, the supporting and verifying affidavits of the Applicants, the grounds raised in the statutory statement, the respective responses on record and submissions filed.
35. From the material before court, the issue for determination is whether the applicants have established a case for the grant of the judicial review orders sought.
36. I have had due regard to the Gazette Notice Vol. CXIX-No. 184 dated 11<sup>th</sup> December 2017.
37. It is common ground that prior to the 2017 elections the Applicants held offices as trade union officials. In the gazette Notice dated 11<sup>th</sup> December 2017, the Applicants were notified to vacate office in the trade unions by virtue of them being appointed and/or nominated to the elective positions.
38. The Respondents argued that the Applicants were holding two full time jobs being State Officers and still trade union officials which action is unconstitutional under Articles 77 and 260 of the Constitution as well as Section 26(1) of the Leadership and Integrity Act.



39. Article 10 of *the Constitution* requires as follows;

The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them (a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions.

40. Article 260 of *the Constitution* defines “state office” to include the office of a Member of Parliament and “state officer” as a person holding a state office.

41. Article 77 of *the Constitution* of Kenya, 2010 provides:

77. Restriction on activities of State officers.

1. A full-time State officer shall not participate in any other gainful employment.
2. Any appointed State officer shall not hold office in a political party.
3. A retired State officer who is receiving a pension from public funds shall not hold more than two concurrent remunerative positions as chairperson, director or employee of
  - (a) a company owned or controlled by the State; or
  - (b) a State organ.
4. A retired State officer shall not receive remuneration from public funds other than as contemplated in clause (3).

42. Section 26 of the *Leadership and Integrity Act* provides:

- (3) Subject to subsection (2), a State officer who is serving on a full-time basis shall not participate in any other gainful employment.
- (4) In this section, “gainful employment” means work that a person can pursue and perform for money or other form of compensation or remuneration which is inherently incompatible with the responsibilities of the State office or which results in the impairment of the judgement of the State officer in the execution of the functions of the State office or results in a conflict of interest in terms of section 16.

43. This court dealt with a similar issue in *Patrick Njuguna & 7 others v Wilson Sossion & 3 others* [2019] eKLR and observed as follows:

“A reading of Articles 75 and 77 of *the Constitution* and section 26 of the *Leadership and Integrity*, as well as the definition of state officer in Article 260 in my opinion do not bar a holder of the position of a member of Parliament from holding the position of secretary general of a trade union. The said provisions in my understanding make two separate propositions. The first is that a state officer should not place himself in a position of conflict as provided in Article 75(1) as read with Section 26 of the *Leadership and Integrity Act*. The second is that a full time state officer cannot be engaged in any other gainful employment as provided in Article 77(2). My understanding therefore is that the petitioners must prove, either, that the 1<sup>st</sup> Respondent is a full time state officer and therefore cannot be engaged in any other gainful employment, or that holding the two positions of a member of Parliament and the position of secretary general of a trade union would create a conflict as defined in Article 75(2) of *the Constitution* and section 26 of the *Leadership and Integrity Act*.”



44. The Court went ahead to pronounce itself as follows:

“From the foregoing, it is clear that Article 260 of *the Constitution* which defines a state officer, as read with Sections 26(1) and (2) of the *Leadership and Integrity Act* alone would not bar a Member of Parliament from holding other office unless there is a conflict as expressly set out in Section 26(2) of the *Leadership and Integrity Act*.”

45. The above decision having been in respect of the same issue, this court will adopt the same. It is noteworthy that the said suit was in fact in respect of Hon. Wilson Sossion, the 3<sup>rd</sup> Ex Parte Applicant herein.

46. It is thus the finding of this court that the Respondents have not proved that the Ex Parte Applicants were unlawfully holding two full time jobs.

47. I accordingly find that the instant Judicial Review Application is merited and the same is allowed as prayed. The court thus makes orders that:

- i. An order of Certiorari be and is hereby issued to remove into this Court for the purposes of being quashed the decision of the 1<sup>st</sup> Respondent contained in Gazette Notice Vol. CXIX- No. 184 of 13<sup>th</sup> December 2017 ousting the Applicants from the positions as officials of their respective trade unions.
- ii. An order of Prohibition be and is hereby issued preventing the 1<sup>st</sup> Respondent from effecting and/or implementing the decision in Gazette Notice Vol. No184 of 13<sup>th</sup> December 2017.
- ii. The 1st Respondent shall bear the costs of the Applicants.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 25<sup>TH</sup> DAY OF SEPTEMBER, 2024**

**MAUREEN ONYANGO**

**JUDGE**

