



**Kenya Medical Practitioners, Pharmacists and Dentists' Union (KMPDU) & 2 others v Registrar of Trade Unions & 2 others; Benjamin (Applicant); Registrar of Trade Unions & 4 others (Interested Parties) (Appeal E087 of 2022 & Petition E194 of 2022 (Consolidated)) [2023] KEELRC 424 (KLR) (10 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 424 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**APPEAL E087 OF 2022 & PETITION E194 OF 2022 (CONSOLIDATED)**

**MA ONYANGO, J**  
**FEBRUARY 10, 2023**

**BETWEEN**

**KENYA MEDICAL PRACTITIONERS, PHARMACISTS AND DENTISTS' UNION (KMPDU) ..... APPELLANT**

**AND**

**REGISTRAR OF TRADE UNIONS ..... RESPONDENT**

**AND**

**MAGARE GIKENYI J BENJAMIN ..... APPLICANT**

**AS CONSOLIDATED WITH**  
**PETITION E194 OF 2022**

**BETWEEN**

**EDMOND NABUYIA ..... 1<sup>ST</sup> PETITIONER**

**SIMON KIMANI WAWERU ..... 2<sup>ND</sup> PETITIONER**

**AND**

**COMMISSIONER OF LABOUR ..... 1<sup>ST</sup> RESPONDENT**

**KENYA MEDICAL PRACTITIONERS, PHARMACISTS AND DENTISTS UNION (KMPDU) ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**REGISTRAR OF TRADE UNIONS ..... INTERESTED PARTY**



KAUGIRIA ALEXANDER THURANIRA ..... INTERESTED PARTY  
MAGARE GIKENYI J. BENJAMIN ..... INTERESTED PARTY  
STEPHEN OMONDI OLOO ..... INTERESTED PARTY  
WILLIAM WATURU MURIUKI ..... INTERESTED PARTY

## JUDGMENT

### Background

1. The Appellant herein is a trade union registered under the *Labour Relations Act* to represent medical practitioners, pharmacist and dentists.
2. The Registrar of Trade Unions, the Respondent, is the office mandated under Section 31 of the *Labour Institutions Act* to be responsible for the registration and regulation of trade unions, employer's organizations and federations.
3. The Commissioner of Labour, the 1<sup>st</sup> Interested Party is an office established under Section 30 of the *Labour Institutions Act* as an authorized officer under the *Act*.
4. The appeal herein was instituted by a memorandum of appeal dated June 30, 2022. The Appellant was dissatisfied with the decision of the Registrar of Trade Unions communicated by letter dated June 21, 2022 refusing to register duly elected officials of the Appellant. The grounds of appeal are as follow:
  - i. That the learned Registrar of Trade Unions erred in law and fact by declining to register the duly elected officials of the Appellant submitted for registration in form Q dated June 13, 2022 under section 35(2) of the *Labour Relations Act*, without any legal justification.
  - ii. That the learned Registrar of Trade Unions erred in law and fact in declining to register the duly elected officials of the Appellant despite the fact that none of the members of the Appellant nor the losing candidates, had filed any case in court challenging the results and/or conduct of the said elections.
  - iii. That the learned Registrar of Trade Unions erred in law and fact in purporting to entertain a petition addressed to it by an anonymous losing candidate challenging the said electoral process when such jurisdiction is a reserve of the Court under section 34 of the *Labour Relations Act* as was held in *Clay Odari & 2 others v Kenya Petroleum Oil Workers Union & 8 others* [2018] eKLR.
  - iv. That further and without prejudice to the foregoing, the learned Registrar of Trade Unions erred in law and fact in un-procedurally converting itself into a court of law and purporting to determine the validity of the electoral process of the appellant when it does not have such jurisdiction as was held in *Aloise A. Otiende vs. Boniface M. Munyao*
  - v. That the learned Registrar of Trade Unions erred in law and fact in usurping the jurisdiction of the Court by purporting to interpret and/or review the ruling of the court delivered on December 15, 2021 in ELRC Petition No E080 of 2021 which directed the interested party to organize and conduct repeat elections of the appellant.
  - vi. That learned Registrar of Trade Unions erred in law and fact by declining to register the officials of the Appellant elected following elections conducted in strict compliance and concordance



with the Ruling of the court delivered on December 15, 2021 in ELRC Petition No E080 of 2021 and instead relying on its own opinion of what the said ruling must have meant.

- vii. That the learned Registrar of Trade Unions erred in law and fact in giving its own interpretation of what the ruling delivered on December 15, 2021 in ELRC Petition No E080 of 2021 must have meant when, being a party to the said proceedings, it failed to move the said court for an interpretation of its Ruling.
  - viii. That the learned Registrar of Trade Unions ignored the fact that parties in ELRC Petition No E080 of 2021 had filed applications for review and/or interpretation of the ruling delivered on December 15, 2021 but all those applications were dismissed hence the Interested party and the Appellant had no option but to conduct repeat elections in strict compliance with the said ruling.
  - ix. That in any event, the learned Registrar of Trade Unions erred in law and fact in their computation of the 45 days within which the court had directed the said repeat elections to be conducted.
  - x. That the learned Registrar of Trade Unions failed to consider that prior to the said repeat elections, one Tony Cheruiyot, a member of the union, filed a case in court being Eldoret ELRC Pet E017/2022 in which he sought to stop the said elections on the basis that, *inter alia*, the notice calling for the said elections was insufficient, which allegation was dismissed.
  - xi. That in holding that the Appellant did not issue sufficient notice for the holding of the said repeat elections, the learned Registrar of Trade Unions seems to have sat on appeal against the decision of the learned judge in the said Eldoret ELRC Pet E017/2022, thus exercising jurisdiction that it did not have.
  - xii. That the learned Registrar of Trade Unions erred in law and fact in holding that the said repeat elections were not conducted in accordance with the Constitution of the Appellant and the Ruling delivered on December 15, 2021 in ELRC Petition No E080 of 2021 when such a finding goes to the validity of the said elections and which is a preserve of the Court.
  - xiii. That even if it were to be argued, arguendo, that the said repeat elections were not conducted in accordance with the Ruling delivered on December 15, 2021 in ELRC Petition No E080 of 2021 and the ensuing Order, such failure to comply with the Court Order would amount to contempt of court for which any affected party would be at liberty to initiate contempt proceedings in the cause in which the said Order was made.
  - xiv. That the learned Registrar of Trade Unions therefore erred in fact and in law in declining to register the duly elected officials of the Appellant on the allegation that the said elections were not conducted in accordance with the Ruling of the Court delivered on December 15, 2021 in ELRC Petition No E080 of 2021 when no contempt proceedings have been initiated against the Appellant and Interested party for the alleged failure to comply with the court Order.
  - xv. That the learned Registrar of Trade Unions erred in law and fact in failing to take into account the report filed by the interested party herein who organized and conducted the said repeat elections as had been directed by the Court in its ruling delivered on December 15, 2021 in ELRC Petition No E080 of 2021.
5. Simultaneously with the appeal, the Appellant filed a notice of motion application of even date in which it sought the following orders:
- a. Spent.



- b. That pending the inter-partes hearing hereof, this Honourable Court be pleased to issue conservatory Orders allowing the national officials of the Appellants that were registered pursuant to the elections held on May 6, 2021 to continue to execute their respective duties.
  - c. That at the inter-partes hearing hereof and pending the hearing and determination of this appeal, this Honourable Court be pleased to issue conservatory Orders allowing the national officials of the Appellants that were registered pursuant to the elections held on May 6, 2021 to continue to execute their respective duties.
  - d. That this Honourable Court in the exercise of its discretion be pleased to give such other directions and make any other Orders that in its opinion will be necessary for the ends of justice to be met.
  - e. That costs of this application be provided for.
6. The grounds in support of the application which give a background to the appeal are reproduced below:
- i. That this Honourable Court in ELRC Petition No E080 of 2021, nullified the results of the national elections of the Appellant herein held on May 6, 2021 and ordered the said elections to be repeated within 45 days from December 15, 2021.
  - ii. That while nullifying the elections of the Appellant aforesaid, the trial court specifically ordered the interested party herein to organize and conduct repeat elections of the Appellant as directed.
  - iii. That both the appellant and interested party herein were aggrieved with the said ruling and accordingly filed applications for review of the said ruling and order.
  - iv. That pending the hearing and determination of the said review applications, the court granted orders of stay of execution of the said ruling.
  - v. That on April 27, 2022, the trial court in ELRC Petition No E080 of 2021 dismissed all the applications for review filed by aggrieved parties and vacated the orders of stay of execution.
  - vi. That the orders of stay of execution having been vacated, the appellant and interested party herein had 45 days from April 27, 2022 to comply with the said orders by organizing and holding repeat elections as directed.
  - vii. That the interested party organized and conducted repeat national elections of the Appellant on June 11, 2022 as directed by the court.
  - viii. That based on the timelines issued by the court, the said repeat elections were held on the 44<sup>th</sup> day following the lapse of the orders of stay of execution of the said orders, which were vacated on April 27, 2022.
  - ix. That on June 13, 2021, following the said repeat elections, the Secretary General of the Appellant forwarded to the respondent a duly completed form Q asking for registration of change of national officials of the Appellant.
  - x. That on June 21, 2022, the respondent wrote to the Appellant, through the latter's lawyers, informing of its decision to decline to register the said change of officials on allegations that members of the union had not been given sufficient notice of the polls.



- xi. That the respondent declined to register the change of officials of the Appellant (Form Q) aforesaid even though no participant in the said repeat elections (whether as a candidate or voter) has filed any case in court challenging the same.
  - xii. That the respondent declined to register change of officials of the Appellant on allegations of insufficient notice to the members notwithstanding that the court in Eldoret ELRC Petition No E017/2022 dismissed an application filed by a member seeking to stop the said elections on similar allegations.
  - xiii. That the Appellant is therefore facing a leadership crisis unless this court intervenes urgently.
7. The application was supported by the affidavit of Dr Davji Ouma Atela the Secretary General of the Appellant.
  8. Upon hearing the Appellant *ex-parte* on July 5, 2022, I granted prayers 2 and 3 of the application. I further directed the Appellant to serve the application and fixed the same for inter partes hearing on July 20, 2022.
  9. Vide an application dated July 14, 2022, Dr Magare Gikenya J. Benjamin, Dr Kaugiria Alexander Thurania, Dr Stephen Omondi Oloo and Dr William Waturu Muriuki applied to be joined as Interested Parties to the appeal through their Counsel Richard Kamau Lagat of Kamau Lagat and Company Advocates. They further sought the setting aside of the orders of July 5, 2022.
  10. The application which was filed under certificate of urgency was placed before the Duty Judge who fixed it for hearing before me on July 27, 2022.
  11. When the matter came up for inter partes hearing of the Appellant's application on July 20, 2022 Dr Magare and Dr Thurania appeared in person even though the application was filed by their Advocate. Mr Juma appeared for the Appellant while Mr Oure appeared for the Respondent.
  12. After hearing arguments by the parties, I directed that the two pending applications be heard together on July 27, 2022. All parties were directed to file their respective responses.
  13. By another application dated July 25, 2022 filed by Dr William Muriuki Waturu in person, he sought to be enjoined to this suit as an Interested Party, although he was also named as a proposed Interested Party in the application dated July 14, 2022.
  14. Vide a notice of appointment of advocates dated 10<sup>th</sup> November Masika & Koross Advocates came on record for Dr Kaugiria Alexander Thurania.
  15. The Appellant opposed the applications for joinder while the Respondent did not file any response to the said applications. Mr Oure for the Respondent informed the Court that he had not been served with the joinder applications by any of proposed Interested Parties.
  16. After hearing arguments on July 27, 2022 on the joinder applications, I delivered a ruling on October 13, 2022 in which I allowed the applicants to be joined in the appeal as Interested Parties.
  17. On the date of the ruling, the Court gave directions for disposal of the application by the Appellant and the appeal by way of written submissions. Parties were given timelines for filing submissions and a date given for highlighting of submissions on November 7, 2022.
  18. When the parties appeared before me on November 7, 2022, Dr Magare sought five more days to file his submissions on grounds that he was served late.



19. Mr Oure for the Respondent informed the Court that after consultation with his client he was not filing any submissions in respect of both the appellant's application and the appeal and would be bound by the decision of the Court.
20. Mr Juma for the Appellants did not object to Dr Magare being granted more time to file submissions but proposed that parties forego the highlighting of sub/missions, which Dr Magare objected to. The suit was fixed for highlighting of submissions on November 17, 2022.
21. On the said date, the November 17, 2021, the day fixed for highlighting submissions, Dr Magare filed an application for my recusal which application was placed before the Duty Judge on November 21, 2022 and fixed for mention before me on November 30, 2022 for further directions.
22. The matter was not mentioned on November 30, 2022 as the Court was not sitting and was fixed for mention for directions on December 7, 2022.
23. On 17<sup>th</sup> November 2022, which was the date fixed for highlighting submissions, a petition was filed by Dr Edmond Nabuyia and Dr Simon Kimani Waweru, both members of the Appellant herein. The Petition was filed through Masika & Koross Advocates, who were on record for the 3<sup>rd</sup> Interested Party in the Appeal.
24. The petition is dated November 11, 2022 and was filed together with a notice of motion of even date under certificate of urgency.
25. The motion sought orders that the petition be mention on November 17, 2022 before the Principal Judge in Court No 1 and that the petition be consolidated and heard together with the instant appeal.
26. The Petitioners have named the Commissioner of Labour as 1<sup>st</sup> Respondent, the Kenya Medical Practitioners, Pharmacists and Dentists Union, the Appellant herein, as 2<sup>nd</sup> Respondent. The Registrar of Trade Unions, Dr Kaugiria Alexander Thurunira, Dr Magare Gikenyi J. Benjamin, Dr Stephen Omondi Oloo and Dr William Waturu Muriuki are named as 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Interested Parties respectively.
27. The Petitioner seeks the following reliefs:
  - a. A declaration that the Petitioners and other members of 2<sup>nd</sup> Respondent are entitled as against the Respondents and all persons to the protection of their Fundamental Rights and Freedoms enshrined in the Bill of Rights which applies to all and binds all State Organs including but not limited to fair labour practices and the Respondents are under duty to observe the provisions enshrined in Articles 10, 41, 27, 73 and 23 Z of the Constitution with regard to the elections or the officials or the 2nd Respondent;
  - b. A declaration that the 1st Respondent, Commissioner of Labour, did not organize and conduct fresh elections in strict conformity with the law, constitution of the Republic of Kenya, constitution of the 2nd Respondent and the applicable Union bylaws and thus the elections for the officials of the 2nd Respondent's conducted on June 11, 2022 were null and void abinitio.
  - c. A declaration that the irregularities and illegalities in the Union's Elections held on 11th June, 2022 were substantial and significant that they affected the integrity of that election, the declaration of the results and that the officials of the 1st Respondent were not validly elected
  - d. A declaration that Davji Ouma Atela and other National Executive Council/Committee members were not officials of the 2nd Respondent between April 27, 2022 up to the time



they obtained otherwise Orders in ELRC Appeal No E087 of 2022 and all transactions by Davji Ouma Atela and other National Executive Council/Committee members during the stated period including expenditure on the elections held on 11th June, 2022 was unauthorized expenditure.

- e. An order of *mandamus* do issue compelling the 1st Respondent to organize and conduct fresh elections in strict conformity with the constitution of the 1st Respondent and the applicable Union bylaws within 45 days of this Judgment,
  - f. An order of *mandamus* do issue compelling Davji Ouma Atela and other National Executive Council/Committee members who held themselves as officials of the 2<sup>nd</sup> Respondent from April 27, 2022 up to the time they otherwise obtained the Orders in ELRC Appeal No E087 of 2022 to pay back to the 2nd Respondent all the money they expended during that period.
  - g. An order of prohibition do issue prohibiting the Registrar of Trade Unions from Registration of any official of 2nd Respondent on account of elections held on June 11, 2022.
  - h. An order that the costs consequent upon this Petition be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in any event.
28. It is material that the Petitioners was represented by Mr Masika of Masika and Koross Advocates who are advocates for the 3<sup>rd</sup> Interested Party in the appeal.
  29. The petition was placed before the Duty Judge on November 15, 2022 who ordered that the same be mentioned alongside ELRC Appeal No E087 of 2022, the instant appeal, on 17<sup>th</sup> November 2022.
  30. When the parties appeared before me on the petition on November 17, 2022 and after hearing arguments from all the parties on whether or not to consolidate the petition with the appeal, I directed that the two suits be consolidated and be heard together in the appeal. I further gave directions that the parties file supplementary submissions in view of the fact that the petition revolved around the same issues in the appeal. I fixed the consolidated suit for highlighting on December 7, 2022.
  31. When the parties appeared before me on December 7, 2022, Counsel for the 4<sup>th</sup> Respondent informed the Court that he was not filing a formal reply to the recusal application
  32. Mr Masika for the Petitioners and 3<sup>rd</sup> Interested Party informed the court that he had not received any response to the petition, and that for that reason he was not ready to take directions on both the application for recusal and the appeal as consolidated with the petition. He further informed the Court that the 3<sup>rd</sup> Interested Party had filed a preliminary objection.
  33. Mr Juma for the Appellant and Mr Oure for the Respondent insisted that we proceed with the highlighting of submissions as directed by the Court as the Interested Parties and Petitioners seemed intent on ensuring that this suit does not proceed to conclusion.
  34. Mr Leteipa for the 4<sup>th</sup> Interested Party was of the view that the preliminary objection be disposed of together with the recusal application. He opined that the Appellant will not be prejudiced as it was enjoying interim orders.
  35. After hearing arguments of the parties, the Court directed all the parties to file submissions on both the consolidated appeal and the application for recusal and that a ruling will be on notice. That should the application for recusal be successful the Court would send the file for reallocation but should the application be dismissed the Court would go ahead and make a final determination in the appeal as consolidated with the petition.



36. On January 6, 2023 Masika & Koros Advocates for the Petitioners filed yet another application under certificate of urgency and vacation rules seeking orders that:
- i. Spent.
  - ii. That this honourable court be pleased to issue an order directed at the party that conducted the disputed elections on 11th June, 2022 being the 1st Respondent (and/or 2nd Respondent) in the Petition to produce and avail clear copies to Petitioners/parties herein and the court, documents in regard to matters in question in the consolidated Petition and Appeal, and particularly: - the documents particularized in the Petitioners' Notice of Production of documents dated December 7, 2022 and served on the Respondents and other parties on 8th December 2022 within 14th days failure to which the 1st Respondent's (in Petition) Replying Affidavit sworn on August 22, 2022 and/or the 2nd Respondent's (in Petition) Memorandum of Appeal dated June 30, 2022 will stand struck out with costs.
  - iii. That costs of the Application be provided for.
37. I have deliberately set out the history of the matters herein at length because in my view the history is material to explain why decided to make a determination of all pending matters in this consolidated Appeal and petition in one go.
38. The facts that have given rise to the suits herein are straight forward. The origin of the suits is the elections of the Kenya Medical Practitioners, Pharmacists and Dentists Union held on May 6, 2021. The elections were contested by Dr Magere Gikenyi J. Benjamin, (the 2<sup>nd</sup> Interested Party in both the Appeal and the Petition) and 40 others who filed ELRC Petition No E080 of 2021 against the Appellant herein.
39. After hearing the parties my brother Nzioki Wa Makau J. nullified the elections in a ruling delivered on December 15, 2021 where the following final orders were made:
- i. A declaration that the Union's election which was held on May 6, 2021 was not conducted in accordance with the constitution of the Union;
  - ii. A declaration that the irregularities and illegalities in the Union election held on May 6, 2021 were substantial and significant that they affected the integrity of the election;
  - iii. A declaration that the officials of the Union were not validly elected;
  - iv. An order directing the Commissioner of Labour to hold fresh elections of the union within 45 days of the ruling.
40. The Respondents in that petition (the Appellant and Respondent in the Appeal) were dissatisfied with the decision of Nzioki wa Makau J. and filed applications for review which were dismissed. They further filed applications in the Court of Appeal for stay of execution pending appeal and for status quo to be maintained pending hearing and determination of appeal, which was denied by the Court of Appeal in its ruling stated that the application was an abuse of Court process as a similar application had been made in the Employment and Labour Relations Court.
41. Justice Wa Makau in his Ruling delivered on April 27, 2022 dismissed the application for conservatory orders wherein he observed that:
- “The motion before me must fail. Not because there is no prima facie merits on arguability of a proposed appeal but because, to use the words of the Applicant, the motion in this Court is not an optimal utilization of scarce judicial time. The Applicant has filed a similar



motion before the Court of Appeal being COAPPL/E477/2021 and as such it would be a waste of my time to consider this motion. One cannot simultaneously seek reliefs here and in the Court of Appeal as that is abuse of court process. Application is dismissed with costs to the Petitioners.”

42. The Appellant and Labour Commissioner having lost the battle in both this court and in the court of Appeal, were obligated to comply with the orders of this Court (Nzioki Wa Makau) delivered on December 15, 2021 directing the Commissioner of Labour to hold repeat elections of the Union within 14 days of the ruling.
43. In a meeting of the National Executive Council of the Appellant (the Union) held on June 4, 2022 where the only agenda items were;
  1. Updated on Court of appeal Ruling;
  2. Way forward;

the Council was in agreement that the elections had to be held within 45 days from April 27, 2022 when stay orders were lifted by this Court.
44. The repeat elections were subsequently held on June 11, 2022. These elections are the subject of the consolidated Appeal and Petition herein. The Appellant was aggrieved that the Respondent refused to register the officials elected at the repeat elections held on June 11, 2022 as presented for registration in Form Q pursuant Section 34(3) of the *Labour Relations Act* which provides:
  3. Notice of the election of officials under this section shall be given to the Registrar in the prescribed form within 14 days of the completion of the election.
45. Before me for determination are the following:
  - (i) The application for my recusal.
  - (ii) The application dated January 6, 2023
  - (iii) The Notice of Preliminary objection by the 3<sup>rd</sup> Interested Party dated November 10, 2022.
  - (iv) The consolidated Appeal.

I will consider them in the order in which they are set out above.

### **Application for Recusal**

46. By his application dated November 17, 2022, Dr Magare Gikenyi J. Benjamin, the 2<sup>nd</sup> Interested Party seeks the following orders: -
  - (a) Spent
  - (b) Spent
  - (c) The trial judge to recuse herself from hearing the matters (Nairobi ELRCA E087 of 2022 & NRB ELRC Pet 194 of 2022.
  - (d) The matters be handled by a different judge.
47. In the grounds, affidavit and submissions in support thereof, the applicant avers that I am (hell-bent) to ensure that I alone must hear and determine the matters herein at whatever cost before I proceed on transfer. He further avers that on July 5, 2022 I stayed *ex-parte*, the orders of Nzioki wa Makau J. and



- the orders of the Court of Appeal by reinstating Dr Davji Ouma Atela team back to office. He also accuses me of overturning and setting aside the Court of Appeal decision in Petition No186 of 2019.
48. The applicant has made some very wild and disparaging allegations about me in respect of the said Petition No 186 of 2019. From a perusal of the documents he has filed with the application, I gather that I dismissed an application filed in that petition for want of prosecution. I also gather from the documents attached and from the averments, that these averments do not emanate from facts within the personal knowledge of the Applicant as he was not a party to ELRC Petition No186 of 2019 or Civil Appeal (Application) No485 of 2019 which arose from High Court Pet No2 of 2019 which the Applicant has also cited in his application.
  49. According to the Applicant, the petitioner in the said Petition 186 of 2019 is the father-in-law to Dr Davji Ouma Atela, the Secretary General of the Appellant herein. He has however not attached any proof of the same, or stated why, if this is true, I would have any reason to favour any of them. His only reason to assume that I favoured the appellant is that I set aside the decisions of my colleague in ELRC Petition No E080 of 2021 and the Court of Appeal decision in NAI E002 of 2022 which according to him, was irregular. The applicant has repeated these averments in every document he has filed herein and at every court appearance before me.
  50. He further accuses me of allocating to myself this matter on November 17, 2022, an accusation that is not valid as the court record clearly shows that I did not handle this matter on that date. It is the Judge on duty my brother Manani J. who made the orders that the file be placed before me.
  51. It is clear from the conduct and utterances of the Applicant (the 2<sup>nd</sup> Interested Party) and the 3<sup>rd</sup> to 5<sup>th</sup> Interested parties, that they are forum shopping. Firstly, the applicant appears not to understand that the decision of my brother Nzioki wa Makau J and the Court of Appeal decision, were in a different suit, ELRC Petition No E080 and Civil Appeal (Application) NoE.002 of 2022 and for a different cause of action. This is evident from the summary that I have given above. The orders of the two courts were conclusive and the elections that are the subject of the consolidated Appeal and petition now before me arise out of compliance with the orders given by my Brother Nzioki wa Makau in the earlier petition. The issue of overturning the decisions of the two superior courts therefore does not arise.
  52. Secondly, the Applicant has severally referred to my transfer. He originally made reference to my transfer to Mombasa and later, to Eldoret. His position was that after my term as Principal Judge expired, I was supposed to swap places with the incoming Principal Judge so I should stop handling this case.
  53. This is stated severally in the Applicant's affidavit and submissions. It is not clear if this is also the position taken by the 3<sup>rd</sup> to 5<sup>th</sup> Interested Parties, who support the application for my recusal.
  54. It is material to note that at the time the allegations of my transfer were made I had not received my letter of transfer. I recall at one point asking the Applicant whether he had been in touch with the Chief Justice who informed him that I had been transferred even before the transfer letter was issued to me.
  55. Finally, counsel for the petitioners Mr Masika, while addressing the court, on several occasions informed the court that he filed Appeal No E194 because the Respondent did not defend the appeal. That when the petition came up before the Duty Judge they specifically asked the judge to refer the Petition together with the Appeal to Court No1 and not to my court.
  56. When all these theatrics failed, the 2<sup>nd</sup> Interested Party resorted to filing the present application for my recusal. This is clearly a case of forum shopping and therefore abuse of court process.



57. As was stated by Omondi J. (as she then was) in *Prayosha Ventures Limited vs. NIC Bank Ltd. & another; Beatrice Jeruto Kipketer & another (Interested party)* 2020 eKLR,

“If Judicial Officers formed the habit of easily recusing themselves based on unproven allegations which are not reasonably capable of being plausible, then no matter would ever make headway in the courts, as the nature of our decisions is such that there will always be a loser. I am unwilling to be an ally of what appears to be a forum shopping process where a party says “you have not ruled in my favour, recuse and get another Judicial officer who is likely to rule in her favour”.

58. The same sentiments were expressed in *Locabail (UK) Ltd v Bayfield Properties* (2002) OB 451, where the court stated:

“a judge would be wrong to yield to a tenors or frivolous objection as he would to ignore an objection of substance”.

59. In *Kaplan & Stratton V. Z Engineering Construction Ltd & 2 others* (2000) KLR the Court of Appeal stated:

“If disqualification issues were to be raised, say because a Judge and a member of the Bar belong to the same Rotary Club or the same Lions Club or the same Sports Club, there could be no end to such application. When a member of the Bar is elevated to the Bench his Oath of Office tells him enough to do what is right. Judges are human beings. They have their predilections and prejudices. They are complex of instructs, which make the man. For instance, therefore, it is no ground to seek disqualification by saying that the Judge does not like a particular member of the Bar.” The converse is true.”

60. In this case, the applicant has failed to prove the test of bias which is

“whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that a judge was biased (*Magill v Porter* (2002) Z A C 357). It is further clear that the recusal application was motivated by intention to stop me from hearing this application after failing to achieve the same through other means.”

61. It is my finding that the application herein is based on misapprehension of the import of the decision of my Brother in ELRC Apeal No E080 of 2021 and is a calculated scheme by the applicant, supported by the 2<sup>nd</sup> to 5<sup>th</sup> Interested parties, to frustrate hearing and conclusion of this suit by myself. It is also material that both the Appellant and Respondent who are parties to this suit opposed the application for recusal. It is evident that the Applicant who is not a party to the suit having been enjoined only as an Interested Party, has attempted to hijack this suit and tried to ensure it is heard on his terms. This is an abuse of court process and has no place in our judicial system. The application is without merit and is accordingly dismissed with costs.

### **The Application dated January 6, 2023.**

62. The second application for my consideration is the one dated January 6, 2023. The application seeks orders of production of the Report of the disputed election held on June 11, 2022. At paragraph 5 of the grounds in support of the application, the Applicant states: -

The 1<sup>st</sup> Respondent in the Petition (Commissioner of Labour) has at paragraph 19 of the Replying Affidavit to the Appeal sworn on August 14, 2022 of (SIC) averred and/or



pleaded that as Returning Officer, it made an official Election Report which was submitted to the Registrar of Trade Unions and which it annexed to its said Replying Affidavit as annexure CL-5: However, the said annexure CL-5 is an election Results and not Election Report, which is at the heart /central to the Petition. Further, the said annexure CL-5 Result indicates that it is the 2<sup>nd</sup> Respondent (Union) that conducted the election”

63. As has been stated in 1<sup>st</sup> Respondents grounds of opposition dated January 12, 2023, the election report is attached to the Labour Commissioner’s affidavit which at paragraph 19 states:

19. That as a returning officer, on June 14, 2022 an official report of the election was written and submitted to the Registrar of Trade Unions on how election was conducted, wherein as filed in the report there were no evidence of any irregularities and that the election was free, fair, transparent and credible”.

64. The applicant cannot file a notice of production of a report that he already has in his possession merely because the report has been referred to as “Election Results” rather than “Election Report”.

65. The Application is frivolous and seems to be part of the scheme of the 2<sup>nd</sup> Interested Party to delay the conclusion of this suit. The same is summarily dismissed.

### **Notice of Preliminary Objection**

66. The 3<sup>rd</sup> Respondent filed a Notice of Preliminary Objection in which he seeks the striking out of the Appeal on grounds that the persona who instituted the Appeal on behalf of the Appellant was not an official of the Appellant at that instant and further that all documents on record signed/executed on behalf of the Appellant by any former officials of the appellant including Davji Attella at the time of signing/execution be expunged from the record.

67. Although the court gave directions on filing of submissions on all pending matters of December 7, 2022, the 3<sup>rd</sup> Interested Party did not file any submissions on the Preliminary Objection.

68. This notwithstanding a preliminary Objection, as was defined in the locus classicus case of Mukisa Biscuit Manufacturing Co. Ltd. v West End Distributors Ltd (1969) E. A. 696, at page 700 by law J. A. as:

“ 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.”

69. Obviously the issues raised in the preliminary objection herein are not matters of law but facts which are not even agreed upon. Needless to say, the said issues do not qualify to be raised by way of a preliminary objection. The said issues are in any event, what will be determined by the court.

70. The timing of the preliminary objection is also suspect. It has been raised after parties had taken dates for highlighting of submissions severally, which dates had been frustrated by the Interested Parties as I have explained above.

71. As was stated in Mukisa Biscuit Case, a preliminary objection ought to be brought at the earliest opportunity.



72. The preliminary objection herein must fail first, because it is not based on law and secondly because the facts upon which it is based are facts that are not agreed upon by the parties. The same is accordingly dismissed.

### **Consolidated Appeal and Petition**

73. Turning to the main issues in contention in this Consolidated Appeal and Petition, the Appellant contends that repeat elections were held on June 11, 2022 as directed by the Court but the Respondent refused to register the officials elected when presented for registration in Form Q as prescribed under section 34(3) of the *Labour Relations Act*.
74. It is the contention of the Appellant that no members of the Appellant Union, not even the 2<sup>nd</sup> to 5<sup>th</sup> Interested Parties, challenged the elections in court. That instead the 2<sup>nd</sup> to 4<sup>th</sup> Interested Parties filed a letter with the Respondent challenging the electoral process and asking the Respondent to carry out the repeat elections again. That by her letter dated June 21, 2022 the Respondent agreed with the 1<sup>st</sup> to 4<sup>th</sup> Interested Parties and directed that the elections be repeated.
75. It is the contention of the Appellants that through her letter dated June 21, 2022 the Respondent acted in excess of her jurisdiction as section 34(4) of the *Labour Relations Act* prescribes that disputes arising out of elections held under that section should be referred to the Industrial Court (now the Employment and Labour Relations Court).
76. The Appellant relied on the decision of Rika J in *Clay Odari & 2 others v. Kenya Petroleum Oil Workers Union & 8 others* (2018) eKLR where it was held:
- “Election of Trade Union Officials is governed by Section 34 of the *Labour Relations Act*. Section 34(4) stipulates that disputes arising from, or connected directly or indirectly to, elections held under this section may be referred to the Industrial Court”.
77. The Appellant further relied on the decision of Wasilwa J. in *Eliud Wanjobi Gwandaru v Samuel Waita K & 11 others* [2021] eKLR where she held as follows regarding determination of trade union electoral disputes: -
- “Section 34 of the *Labour Relations Act, 2007* on the other hand deals with election of officials of the trade union. Where there are disputes in relation to the said elections the disputes may be referred to this court. My understanding here is that after an election has been held any dispute and which I refer to as an election petition may be filed before this court.
78. The Appellant also cited and relied on the decision in *Halima Adan Ahmed v Seth Panyako, General Secretary Kenya National Union of Nurses & 2 others* [2021] eKLR, where the Hon. Rika J stated thus:-
- “Section 34 [4] requires that disputes arising from or connected directly or indirectly to elections held under the section, may be referred to the Industrial Court. There are clear statutory provisions for challenging election of Trade Union Officials under the *Labour Relations Act*. Although the Petition route was open to the Petitioner, and although the Court finds no fault in her drafting there is no persuasive reason why she avoided coming under the statutory regime which regulates the subject matter.”
79. The Appellant submits that having acted without jurisdiction, the respondent's conclusion that the elections held on June 11, 2022 were not valid cannot stand. That the “order” of the Respondent that the Appellant holds another election, for the third time, is void since her decision nullifying the repeat



elections was made without jurisdiction. The Appellant anchored its submissions on the Court of Appeal's decision in *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR where the learned Judges of Appeal stated: -

If we find that the suit was filed before a court bereft of jurisdiction, the principle encapsulated in the time honoured locus classicus case of *Macfoy v United Africa Co LTD* [1961] 3 All ER, 1169, comes into play and Appeal No 6 of 2018 would therefore fall by the wayside. In that case it was held thus: -

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse..."

80. With respect the letter dated June 13, 2022 by the Interested Parties, the Appellant submits that section 34(4) of the Act provides for the manner in which such elections can be challenged, relying on the decision of Rika J. in *Halima* case (*supra*) where the court held:

"There are clear statutory provisions for challenging election of Trade Union Officials under the *Labour Relations Act*. Although the Petition route was open to the Petitioner, and although the Court finds no fault is her drafting, there is no persuasive reason why she avoided coming under the statutory regime which regulates the subject matter".

81. The Appellant submits that such challenge must be filed before the Employment & Labour Relations Court by way of a Petition pursuant to *Trade Union Elections (Election Petition) Rules, 2014*. That the 2nd to 3rd Interested Parties' letter dated June 13, 2022 addressed to the Respondent was incompetent and does not constitute a petition.

82. The appellant submits that in her impugned letter dated June 21, 2022 one of the Respondent's reasons for declining to register the officials presented in Form Q was that the union members were not given sufficient notice and most members were taken by surprise.

83. The Appellant submits that the issue of the said notice was the subject of Eldoret ELRC Petition No E.017 of 2022 wherein the trial judge dismissed the allegations in a ruling delivered on June 10, 2022. In the ruling the court observed as follows:-

"The petitioner further contends that the notice for election was short, the same having been issued on June 6, 2022 for an election on the June 11, 2022. The Court has had a look at the notice issued on June 6, 2022 and noted that it referred to a meeting of the National Executive Council to be held on June 10, 2022. The notice therefore does not concern the Unions election. The correct notice is the one dated April 30, 2022 setting the elections for June 11, 2022."

84. The Appellant submits that the only way the decision of the court could be set aside was through a review on appeal, neither of which was preferred by the petitioners.

85. The Appellant's further submits that the Respondent did not disclose her source of information to the effect that most members were taken by surprise by the elections.



86. The Appellant submits that the respondent further alleged that the elections were not conducted in accordance with the orders of the court issued on December 15, 2021 in ELRC Petition NoE080 of 2021. That if this were true, it would mean that the 1<sup>st</sup> Interested Party and the Appellant are in contempt of the court orders yet the Respondent did not initiate court action to punish the contemnors. The 81. Appellant relies on the decision of Rika J. in *Clay Odari (supra)* where the Judge observed: -

“The Court’s view is that in issue, is whether the Respondents complied, or did not comply with an order of the Court. This issue is to be resolved through enforcement proceedings in the file in which the order was issued, not through a fresh claim. The Claimant could pursue contempt proceedings against the Respondents under Cause Number 93 of 2916”

87. In its ruling delivered on December 15, 2021, the court directed the Commissioner of Labour to organize and conduct fresh elections of the Appellant within 45 days. The commissioner of labour thereafter filed an application to review the said ruling stating why it could not carry out the exercise but the said application was dismissed hence the commissioner organized and conducted repeat elections on 11th June, 2022 as directed”.

88. The Appellant submits that the 1<sup>st</sup> Interested party’s report was ignored by the Respondent alleging that the 1<sup>st</sup> Interested Party misunderstood the court orders. That the Respondent was using its own interpretation of the decision of the court instead of moving the court for interpretation.

89. The Appellant submits that by June 21, 2022 when the respondent wrote the impugned letter no member of the Union had invoked section 34(4) of the *Act* and there was no basis for the Respondent to nullify to elections.

90. The Appellant submits that with respect to the averments of the 2<sup>nd</sup> to 4<sup>th</sup> Interested Parties, they have no capacity to challenge an appeal filed under section 30 of the Act. That the Court proceedings are limited to the impugned decision of the Registrar and cannot be expanded to accommodate the validity of the elections. That to challenge the validity of elections a party has to approach the court under section 34(4) of the Act as was held in *Clay Odari* case (*supra*) and in *Eliud Wanjohi Gwandaru v Samuel Waita K & 11 others* (2021) eKLR.

91. The Appellant further referred to and relied on *Trade Union Elections (Election Petition) Rules, 2014* which prescribe the procedure for challenging union elections.

92. The Appellant submitted that the 2<sup>nd</sup> to 4<sup>th</sup> Interested Parties, having successfully challenged the elections held on 6<sup>th</sup> May 2021 and having used the same advocates, were aware of the procedure for challenging union elections. That the said rules provide that a petition challenging validity of an election under the Act shall be filed within 7 days after declaration of the results. That having failed to do so they cannot challenge the elections as that would be tantamount to extending the time for filing such petition without leave.

The Appellant urged the court to allow the appeal.

93. Counsel for the Respondent having filed grounds of opposition to the Appeal, informed the court that after consultations with his client he did not intend to file any submissions and would be bound by the decision of the court.



## Response of 1<sup>st</sup> interested party

94. The 1<sup>st</sup> Interested Party filed a replying affidavit of Hellen Apiyo the Ag. Labour Commissioner who deposed that following the Respondent's letter dated September 25, 2020 the office organized the Appellants elections held on May 6, 2021 which were nullified by Petition E080 of 2021 where the court ordered fresh elections to be held in 45 days by the Commissioner for Labour.
95. That the Commissioner of Labour being desirous to conduct elections in accordance with the Union Constitution, made an application to Court being ELRC E080 of 2022, seeking an Interpretation and guidance on the Court Orders issued on December 15, 2021 in relation to the Union Constitution. That the Commissioner of Labour's application was based on the following grounds;
- a. Commissioner of Labour being ordered by the Court to organize and conduct KMPDU elections was tantamount to taking over the functions of the Union organs as enshrined in Article IX of the Union Constitution.
  - b. The Independent Electoral Commission has the mandate to organize and preside over the union elections and to declare the results.
  - c. The Commissioner of Labour had no budgetary allocations to be able to organize and conduct the said election.
96. That on April 27, 2022 the trial Court in its ruling dismissed the Commissioner of Labour's Review Application and upheld its earlier orders that the Interested Party to organize and conduct repeat elections of KMPDU.
97. That, other Union members aggrieved by the Court ruling filed an Appeal application Number ELRC E002 of 2022. In the Appeal application ruling dated June 3, 2022, the Court dismissed the appeal application and ordered the Union elections to be conducted in accordance to the Court orders Issued on December 15, 2021.
98. That, further, few days to the said repeat elections, some union members moved to Court and filed Petition Number ELRC E017 of 2022 at Eldoret with prayers of seeking to stop the said repeat union elections on the grounds that the election notice never gave the Applicants sufficient days. The Court on its ruling dated 10 June, 2022 dismissed the said petition stating that the Notice was sufficient and ordered elections to be conducted in accordance to the Court orders dated December 15, 2021.
99. That, the Interested Party had no alternative but to organize and conduct a repeat union election as ordered by the Court within the 45 days which days began to run from the date of the substantive ruling, that is to say, April 27, 2022 and in accordance with the notice for elections issued by the Union dated April 29, 2022 setting out the date for election as 11<sup>th</sup> June. 2022.
100. That, the Interested Party understood that the moment the Court (Hon. Justice wa Makau) ordered fresh elections within 45 days of his ruling, the elections were now to be conducted as per the court order and not as per the timeliness set out in the Union's Constitution.
- That, on April 7, 2022, as a way for preparing for free, fair and credible elections, the Commissioner for Labour wrote and invited the union members for a meeting that was held in her office to deliberate on how the elections were to be conducted in accordance to the Court order dated 15 December, 2021.
- That, on April 29, 2022, the KMPDU Union Secretary General issued an official election notice two days after the stay orders were vacated Indicating that the repeat elections would be held on 11<sup>th</sup> June, 2022. This letter was served upon the Interested Party on 29<sup>th</sup> April, 2022.



101. That, vide Eldoret ELRC Petition No E017 of 2022, the Court in its ruling held that the 45 days as directed by the Court in ELRC No E080 of 2022 commenced from April 27, 2022, this being the date hereof the Court orders of stay of execution were vacated.

THAT, in Petition ELRC No E017 of 2022, the Court further stated that following the Court Orders issued on 15<sup>th</sup> December, 2021 directing the Commissioner for Labour to organize and conduct repeat union elections, such repeat elections were to be held in accordance with the Court order and not as per the Union Constitution.

102. That, owing to the fact that the election notice was sufficiently given and further given that the Commissioner for Labour was ordered by the Honourable Court to organize and conduct election within 45 days, the same was held virtually on 11<sup>th</sup> June, 2022 as approved by the Union's National Executive Council, in a zoom meeting held between 8.00 am to 5pm, to seamlessly facilitate participation of all registered members eligible to vote.

I further confirm out of 5.043 registered members in the union register 2.198 members voted being 44% of the eligible voters and further that the KPMDU Constitution provides a basic of 15% voters turn out as a threshold of free, fair, transparent and credible election and that the 44% turnout was way above the basic minimum number as provided in the Union Constitution.

103. That as a returning officer, on June 14, 2022, an official report of the election was written and submitted to the Registrar of Trade Unions on how election was conducted, wherein as filed in the report, there were no evidence of any Irregularities and that the election was free. fair. transparent and credible.

That it is confirmed to this Honourable Court that during the said repeat elections, no Irregularities were witnessed nor did any member of the union raise any issue in regard to the repeat elections during the election process.

104. That the role of the Interested Party came to an end upon forwarding notice of election officials in form Q of the Respondent within the prescribed 14 days for proposes of registration of the new officials.

## **2<sup>nd</sup> Interest Parties Submission**

105. The 2<sup>nd</sup> Interested Party submitted that there was no proper notice to members on April 29, 2022. He submitted that on 13<sup>th</sup> June 2022 Dr Davji Ouma Atella presented form Q to the Respondent for purposes of registering new officials. At the same time the Petitioners in ELRC Petition E080 of 2021 petitioned the Respondent not to register the officials elected on June 11, 2022. That on 15<sup>th</sup> June the Respondent requested for documents from the Commissioner for Labour, the Appellant and Nairobi Labour Officer Mr Musandu Boaz as required under section 35(4) of the Act. That before the complainants planned for fresh elections the Appellants rushed to court and filed the instant Appeal on June 30, 2022.

106. According to the 2<sup>nd</sup> Interested Party by the time this court granted interim orders to the Appellants the court was functus officio. That the orders of July 5, 2022 temporarily lifted the invalidation of the elections by Nzioki wa Makau J in ELRC Petition E080 of 2021, these being the same prayers that were rejected by the court in multiple applications. That the said order also overturned the Court of Appeal decision made on 6<sup>th</sup> May 2021 by allowing the invalidated officials elected on 6<sup>th</sup> May 2021 to continue serving in office.

107. The 2<sup>nd</sup> Interested Party submitted that the Appellants have no locus standi to institute the instant suit, relying on the decision of the Court of Appeal in Republic v Danson Mgunya [2016]eKLR where



- the court stated that jurisdictional issue of whether the state had a right of appeal to the Court of Appeal against and acquittal had to be disposed of first before any other issue was considered. The 2<sup>nd</sup> Interested Party further relied on the decision of the Court of Appeal in *Phoenix of E.A. Assurance Company Limited V.S.M. Thiga t/a Newspaper Service* [2019]eKLR where the court held that if a suit is filed without jurisdiction the only remedy is to withdraw it and file a compliant one in the court seized with jurisdiction. That a suit without jurisdiction is dead on arrival and cannot be remedied, citing owners of the *Motor Vessel "Lillians" V Caltex Oil(Kenya) Ltd* [1989] where the court stated that jurisdiction is everything and without it the court must down it tools.
108. The interested party submitted that the deponent of the Affidavit Supporting the Appeal Dr Davji Ouma Atallah had no capacity to instruct counsel as he was not an elected official following the nullification of his election. He relied on the decision of the court in *Dorcas Nyambeki Nyakundi v Yusuf Ali* [2021]eKLR where the court held that only valid officials and general membership could instruct counsel. That the decision nullifying the elections of May 6, 2021 had not been vacated by a competent court of law. That it is not the registration that gave the officials legitimacy but the presumed valid elections. That the Appellant, being a corporate body, can only make decision through validly elected leaders or through the general membership.
109. It further the submission of the 2<sup>nd</sup> Interested Party that the Respondent has authority to approve or reject registration of officials and is not a conveyor belt without discretion to either approve or reject registration of officials. That this is the substance of the appeal, being whether the Respondent exercised her discretion lawfully. Relying on the provisions of section 35 of the Act, the 2<sup>nd</sup> Interested Party submits that the Respondent has discretion to refuse to register elected officials.
110. the 2<sup>nd</sup> Interested Party further submitted that Article 47 requires that for administrative action to be fair written reasons ought to be given for the action. That the letter dated June 21, 2022 was such written reason. The 2<sup>nd</sup> Interested Party relied on the decision in *Cornel Mabatsi & 389 others v Registrar of Trade Unions & another; Kenya County Government Workers Union (Interested Party)*.
111. It is further the submission of the 2<sup>nd</sup> Interested Party that there was no notice of elections as the person who signed the notice was not an authorized officer at the time of signing the notice as this was after the court nullified his election.
112. It is further the submission of the 2<sup>nd</sup> Interested Party that the notice indicated that elections would be held in Tom Mboya Labour College yet the elections were held electronically. He wondered why, if there was notice on April 29, 2022, there necessity for another notice on June 10, 2022. He submitted that the notice was issued 12 hours before elections which was not sufficient time.
113. The 2<sup>nd</sup> Interested party submits that the decision of the court in Eldoret ELRC Petition E017 of 2022 filed by a voter challenging the validity of the elections notice was an interlocutory application and the validity of the election notice was not questioned. That the court only declined to stop the elections.
114. Finally, the 2<sup>nd</sup> Interested Party submits that there were no elections on June 11, 2022 as there were no aspirants, no voter registers and members and aspirants were not aware of the exercise as 12 hours' notice was no notice. The 2<sup>nd</sup> Interested Party prays that the Appeal be dismissed for want of merit.

### **3<sup>rd</sup> Interest Party submissions**

115. The 3<sup>rd</sup> Interested Party, like the 2<sup>nd</sup> Interested Party, submitted that Dr Davji Ouma Atella lacked locus standi to commence the appeal and that the Respondent had administrative jurisdiction to refuse and/or decline to register changes or correction of entries in the Register. That the scope of the Registrar's powers is provided for in section 35(4) of the Act. It is the 3<sup>rd</sup> Interested Party's submission that the



Respondent had power to write the letter dated June 21, 2022. That section 35(4) does not envisage the Registrar of Trade Unions suing for contempt in cases where parties disregard clear court orders as the Registrar has a remedy of simply refusing to register the changes.

### **5<sup>th</sup> Interested Parties' Submissions**

116. Like the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties, the 5<sup>th</sup> Interested Party submitted that section 35 of the Act gives the Respondent powers to refuse to register changes of officials or correcting the Register. That the Respondent exercised the discretion under section 35 of the Act lawfully.
117. That the Appellant's submission that the interested parties are prosecuting an election petition through their submissions is far from the truth. That this appeal was filed by the Appellants and this court is bound only to adjudicate over the dispute brought before it, as an appeal. The court has not effectively been moved to look into whether the election was conducted properly or not except to the extent that the decision of the registrar relates to that subject, and to the extent that such decision is being impeached for its wrongness. The appeal seeks review of the decision of the registrar in refusing to register new officials.
118. The 5<sup>th</sup> Interested Party submitted that the registrar has a duty to ascertain the authenticity of an election before registering new officials. That when a decision of the registrar in refusing to register officials is impeached, then the dispute may bring to fore questions touching on the validity of the election as those are the facts that informed the registrar's decision not to effect the registration of the new officials. That such arguments must not confuse the parties into thinking that the question before the court is that of the validity of the election. The question before the court is that of the validity of the registrar's decision.
119. That the court must remain within the constraints of the principles that guide judicial review of administrative decisions. That is:
  - (i) Is the decision rational
    - a) The administrator considered what ought to be considered
    - b) The administrator did not consider what ought not be considered
    - c) The administrator did not act without reason/did not act arbitrarily
    - d) That given the similar set of facts, at least someone would possibly arrive at a similar decision (outrageous)
  - (ii) Is the decision lawful
    - a) The power to take the decision exists
    - b) The limits of that power have not been exceeded
    - c) The decision was made to achieve the proper purpose for which the power was granted
    - d) The decision was not made to achieve an improper purpose like malice, caprice or other end not intended by parliament
  - iii) Is the decision procedurally proper
    - a) That due notice was given where certain person's rights were adversely to be affected
    - b) That those affected were given adequate opportunity to be heard



- c) That reasons were given for the decision
  - d) That any express procedure designated was followed
120. The 5<sup>th</sup> Interested Party submits that no allegation of procedural impropriety has been averred nor supported by the Appellants and therefore no submission is necessary on that.
121. The 5<sup>th</sup> Interested Party submitted that it had demonstrated that: -
- i. The Registrar of Trade Unions rightly considered representations made to his/her office by a union member questioning the validity of the form Q submitted to him/her for registration.
  - ii. The Registrar rightly considered the provisions of the Union Constitution on elections alongside the court rulings in arriving at his/her decision.
  - iii. The Registrar of Trade Unions actually put into consideration the various decisions in courts in the lead up to the impugned election and even quoted the decisions in his/her final letter detailing reasons for the decision. The Registrar even put into consideration the Court of Appeal ruling, which the court in E017 of 2022 had not been appraised of.
  - iv. That a different understanding or reading of the various court orders by the Registrar is not itself a ground for reviewing the decision of an administrator unless no reasonable person reading that decision would arrive at a similar understanding. For avoidance of doubt, the 5<sup>th</sup> Interested Party agrees with the Registrar's interpretation of the court orders.
  - v. That by the express provisions of Section 35 of the *Labour Relations Act*, the Registrar does have the statutory power to look into the validity of any process leading up to the registration of new officials submitted to his/her office through form Q.
  - vi. That by the express provisions of Section 35 of the *Labour Relations Act*, the Registrar did exercise the statutory discretion lawfully.
  - vii. That all public officers have an implied power, subject to judicial review, to apply and interpret any law that relates to the performance of their functions.

### **Analysis and determination**

122. Before I delve into the determination of the issues arising from the pleadings and submissions, it is worthwhile to consider a preliminary issue raised by the Appellant and 5<sup>th</sup> Interested Party being, to what extent the court can address issues raised by an Interested Party.
123. The Supreme Court has had opportunity to deal with this issue on several occasion. In *Methodist church of Kenya V Mohamed Fugicha & 3 others* [2019]eKLR, the supreme court while quoting its decision in the case of *Francis Kariuki Muruatetu & another vs Republic & 5 others*, Sup. Ct. Petition 15 &16 of 2015 [Consolidated]; [2016] eKLR observed as follows: -

“Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties’ before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.



Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court”.

This must therefore be the guiding principle as the Court sets out the issues for determination in this suit.

124. Having settled the preliminary issue on whose issues are coming up for consideration, I now proceed to set out the issues for determination herein. I however must point out that I did not see any submissions in respect of the petition even though I gave directions for filing of the same on November 17, 2022 and again on December 7, 2022. I am however confident that the Petitioners will not be prejudiced as the petition and appeal are but different sides of the same coin and the augments for or against the one would be the same for the other. The appeal seeks to compel the Respondent, the Registrar of Trade Unions, to register the officials of the Appellant elected on May 6, 2022 while the petition seeks orders compelling the said Respondent not to register the officials.
125. Hearing clarified this issue, I now set out the issues for determination herein, being only the issues in the Appeal and petition, as follows: -
- (i) Whether the registrar of trade unions has powers to refuse to register elected officials;
  - (ii) whether the Appellant is entitled to the orders sought in the Appeal; and
  - (iii) Whether the Petitioners are entitled to the reliefs sought in the petition.
  - (iv) Whether the Registrar of Trade Unions can refuse to register elected officials
126. The parties have argued their cases under sections 30, 34 and 35 of the Act. The parties have also referred to the Trade union Election Rules 2014.

Section 30 provides as follows: -

30. Appeals against decision of Registrar

Any person aggrieved by a decision of the Registrar made under this Act may appeal to the Industrial Court against that decision within thirty days of the decision.

Section 34 provides as follows: -

34. Election of officials

- (1) The election of officials of a trade union, employers’ organisation or federation shall be conducted in accordance with their registered constitutions.
- (2) The constitution of a trade union, employers’ organization or federation shall—
  - (a) not contain a provision that discriminates unfairly between incumbents and other candidates in elections; and
  - (b) provide for the election, by secret ballot, of all officials of a trade union at least once every five years.



- (3) Notice of the election of officials under this section shall be given to the Registrar in the prescribed form within fourteen days of the completion of the election.
- (4) Disputes arising from, or connected directly or indirectly to, elections held under this section may be referred to the Industrial Court.
- (5) The Registrar may issue directions to a trade union, employers' organisation or federation to ensure that elections are conducted in accordance with this section and their respective constitutions.

Section 35 provides: -

35. Notification of officials

- (1) A trade union, employers' organisation or federation shall exhibit prominently—  
SUBPARA (a)  
in its registered office, a notice giving the names of all officials and their titles;  
(b) in every branch office the notice specified in paragraph (a) and in addition, a notice giving the names and titles of the officials of the branch.
- (2) Notice of any changes of officials or of the title of any officials shall be submitted to the Registrar in Form Q set out in the Second Schedule, within fourteen days after the change, together with the prescribed fee, and the Registrar shall register the change, subject to subsection (4) and subsection (5).
- (3) Before registering any change of officials or correcting any register, the Registrar may require the production of any relevant evidence of the change.
- (4) If, after inquiry, the Registrar is not satisfied as to the validity of any appointment or the propriety of any proposed correction, the Registrar may refuse to register the change of officials or to correct the register.
- (5) No change of officials shall have effect until it is registered by the Registrar.
- (6) No person who is not registered by the Registrar in accordance with this section shall act or purport to act as an official of a trade union, employers' organisation, or federation or of any branch.

*Trade Unions Elections (Election Petition) Rules, 2014* provides

3. Filing of petition A petition to question the validity of an election under the Act shall be filed within seven days after the date of the declaration of the results of the election.
4. Presentation of election petition (1) The presentation of an election petition shall be made by delivering it at the office of the Registrar, and the Registrar or the officer of that department to whom the petition is delivered shall issue a receipt in Form 1 set out in the Schedule.
5. Contents and form of election petition
  - (1) An election petition shall—
    - (a) state whether the petitioner is entitled to petition under section 34(4) of the Act; and



- (b) state when the election was held and results of the election, and shall briefly state the facts and grounds relied on in support of the petition.
- (2) The petition shall be divided into paragraphs, each of which shall be confined, as nearly as is practicable, to a distinct portion of the subject, and every paragraph shall be numbered consecutively, and no costs shall be allowed for drawing or copying any petition not substantially in compliance with these Regulations, unless otherwise ordered by the Industrial Court.
  - (3) The petition shall conclude with a prayer that a specified person should be declared duly elected or that the election should be declared void, and shall be signed by all the petitioners.
  - (4) A petition filed under paragraph (1) shall be in Form 2 set out in the Schedule.
  - (5) Evidence need not be stated in the petition, but the Industrial Court may, upon application in writing by a respondent, order such particulars as may be necessary to prevent surprise and unnecessary expenses and to ensure a fair and effectual trial, upon such terms as to costs and otherwise as may be ordered.
  - (6) Where more than one petition is presented relating to the same election, all such petitions shall be dealt with as one petition, so far as the inquiry into the election is concerned.
127. It is evident that section 30 covers all appeals against any decision of the Registrar. The Appellants were therefore in compliance with the law in filing their appeal under the section.
128. With respect to the powers of the Registrar, sections 34 and 35 are very distinct. They cannot be used interchangeably. The marginal note to section 34 indicates that it relates to elections while for section 35 relate the marginal note refers to notification of changes. In order to understand the circumstances when either of the two sections is applicable one must distinguish between registration of officials after elections when all positions are filled and changes made mid-term after the elections. Section 34 (2) (b) states that the constitution of a trade union must provide for elections by secret ballot after every 5 years. This means that the term of office of every official commences immediately after elections and ends upon the lapse of 5 years. Section 34 therefore deals only with elections that happen every 5 years. That section would also cover any elections that happen midterm if the constitution of the union provides for the same.
129. As expressly provided in section 34(4), disputes arising from or connected with elections either directly or indirectly are dealt with by the Court, not the Registrar.
130. On the other hand, changes may occur in the course of the 5 years period when the tenure of office of elected officials has not lapsed. These can arise from removal of an officer from office for any reason as provided in the constitution of the union, or from the resignation or death of an officer or any of many reasons. It is such changes that are dealt with under section 35 of the Act. The section is explicit. It refers to notice of any changes of official or of the title of any official. It is these changes that the registrar is empowered to require production of evidence of the change before effecting the same. Thus section 35 does not make any reference to elections but to changes. This means that once an officer of a union is elected into office in a specific capacity, he is registered and remains in that capacity until the term of office lapses at the end of the term or until a change is registered by the Registrar of Trade Unions. Section 34 does not give powers to the Registrar of Trade Unions to reject registration of elected officials.



131. This distinction is well covered in the constitution of the Appellant in Article IV under the heading – A National Officers of the Union. The same would apply for branch or regional officers who are elected or appointed.
132. From the foregoing it is clear that where there are elections, the Registrar has no mandate to refuse to register such officials unless there are orders of the court to stop such registration after hearing a party who has referred the matter to the court under section 34(4) of the Act.
133. The petitioners averred in the petition that the 2<sup>nd</sup> Respondent did not conduct the elections in accordance with the constitution of Kenya, the *Labour Relations Act* and the union bylaws. The Petitioners further aver that the National Executive/Committee members were not officials of the 2<sup>nd</sup> Respondent between April 27, 2022 upto the time they were given orders by this court.
134. It is unfortunate that the Petitioners did not file submissions as directed by the Court and therefore lost the chance to effectively prosecute their appeal.
135. The foregoing notwithstanding, the *Trade Unions Elections (Election Petition) Rules, 2014* provide that election petitions be filed within 7 days from the date of declaration of the Results of the elections. The Rules further provide that the petitioners shall state whether they are entitled to petition under section 34(4) of the Act.
136. This petition is dated November 11, 2022 5 (five) months after the elections were held. They did not seek leave to file the petition out of time. They also do not state in the petition if they are entitled to petition under section 34(4) of the Act.
137. For the foregoing reasons I find that the letter dated June 21, 2021 by the Respondent herein was in excess of her authority and is null and void. The Respondent is accordingly directed to register the Appellants officials as set out in form Q submitted to the office for registration on June 13, 2022.
- The petition is dismissed for reasons that it was filed out of time without leave, and that the petitioners failed to prove that they are entitled to the orders sought therein.

There shall be orders for costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 10<sup>TH</sup> DAY OF FEBRUARY 2023**

**MAUREEN ONYANGO**

**JUDGE**

