**Esevwe & 11 others v University of Nairobi; Attorney General (Interested Party) (Petition E037 of 2020) [2023] KEELRC 666 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 666 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**PETITION E037 OF 2020**

**AN MWAURE, J**

**MARCH 16, 2023**

**BETWEEN**

**FRANK ESEVWE & 11 OTHERS ..... PETITIONER**

**AND**

**THE UNIVERSITY OF NAIROBI ..... RESPONDENT**

**AND**

**THE HON ATTORNEY GENERAL ..... INTERESTED PARTY**

## JUDGMENT

1. The Petitioners are among unionisable employees, employed and working for the University of Nairobi.

2. The Respondent is a Public University of Higher Learning in Kenya established by an Act of Parliament.

3. The Interested Party is an office established by the *Constitution* and whose core role is to advise the government of Kenya and all state agencies on civil matters of law and the *Constitution*.

4. It is averred in the Petition that in the middle of 2018, the Petitioners and other unionisable employees of the Respondent were dissatisfied by the relationship by the then trade unions known as Kenya University Staff Union (KUSU) and the Kenya Union of Domestic Hotels, Educational Institutions and Hospital Workers (Kudheiha) respectively, and in line with sections 4, 48 of *LRA* 2007 they started the journey of terminating membership therein.

5. It is stated that over 700 non-teaching staff university staff/unionisable employees of the Respondent had left their former unions, Kenya University Staff Union and Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers (KUDHEIHA) respectively, and in line with Article 36 and 41 of the *constitution of Kenya* 2010. The Respondent partly confirmed receipts of Petitioner/

non-teaching university staff unionisable employees, resignations, and further assured implementation thereon. The check off forms duly signed by 498 Respondent's unionisable/non-teaching university staff, were properly forwarded to the Respondent by Kenya Tertiary and Schools Workers Union (KETASWU) for implementation.

6. The Respondent by a letter dated the 28th January 2022, rejected the implementation on vague and unlawful grounds to the extent that Applicant's/Petitioners' union of choice has no recognition agreement signed between the Respondent and the union (KETASWU) and said that the Respondent alluded that those alleged members should therefore make direct deposits to their union of choice (KETASWU).

7. The Petitioners says that the drafters of the Statute law governing the provisions contained at section 48 of the *Labour Relations Act* 2007 do not envisage limitations of any form. The right to leave a trade union is equivalent to the right to join a trade union of one's choice. These rights are constitutionally protected, under Articles 36 and 41 of the *constitution of Kenya* 2010.

8. Article 40 of the *constitution of Kenya* 2010, guarantees and protects Applicants/ Petitioners and all workers in the country right to personal property, and salary when dues become properties of any employee, and the Respondent lacks capacity and mandate to dictate and decide on how to deduct union dues against clear instructions for and against.

9. Deduction of union dues in respect of Form S envisaged and contemplated under section 48 (1) (2) and (3) of *Labour Relations Act* 2007 are also protected rights, the extent that any such lawful instruction for deduction can only be stopped by the instructor's withdrawal of membership from the union.

10. The decision by the Respondent in refusing to comply with the mandatory provisions of section 48 of *Labour Relations Act* 2007 is a violation of fundamental rights and freedoms of the Petitioners, Unionisable employees of the Respondent, the action threatens the sanctity and supremacy of the *Constitution Of Kenya* 2010 and this Court should find and declare so.

11. This Hon Court has an obligation and a constitutional duty to protect and safeguard the Petitioners, unionisable employees of the Respondent and all Kenya Workers Constitutionally protected rights. Section 54 of the *Labour Relations Act* is concerned with recognition of trade unions by the employer, and provides that 'An employer, including an employer in the public sector, shall recognise a trade union for the purposes of collective bargaining, if that trade union represents the simple majority of employees.

12. That the *Employment Act* also recognises the right of association of employees at section 46 (c) (d) (e) and (f) which provides that participation in union activities does not constitute a ground for dismissal or for the imposition of a disciplinary penalty. The Respondent is therefore bound to deduct and remit to the union dues deducted from those member, unionisable employee of the employer who have duly signed Form S in line with section 48 (1) (2) (3) and in favour of the union they subscribe to.

13. The Petitioners prays the following;

    a. The Honourable Court be pleased to make an order of declaration that Petitioners and workers in Kenya have a constitutional and fundamental right and freedom to leave and join a trade union of their own choice as long as it is the right union in terms of its registered constitution.

    b. This Honourable Court be pleased to find and make an order of declaration that the actions and conduct of the Respondent, and in refusing to actualize section 48 of *Labour Relations Act* 2007 in respect of withdrawals and Form S received from the employees, violated Articles 36 and 41 of the *constitution of Kenya* 2010.

c. This Honourable Court do issue an order against the Respondent directing it to compensate and pay from its pocket to the Kenya Tertiary and School Workers Union (KETASWU), monies in the equivalent of union dues which were supposedly to be deducted from members contained in the forwarded FORM-S- check off forms accordingly.

d. Permanent order of injunction be issued to restrain the Respondent by itself or their agents, servants and/ or personal assigns from threatening, intimidating, coercing and victimizing the Petitioners and other Guards/ employees who are subscribing to the Kenya Tertiary and Schools Workers Union (KETASWU) on account of exercising their constitutional rights of associating with the union of their own choice.

e. The Honourable Court be pleased to make an order of declaration that Petitioners and workers in Kenya have a constitutional right and freedom to be deducted union dues from their salaries and the same be remitted to the Union they subscribe to.

f. A permanent order of injunction be issued against the Respondent directing her to stop making deductions from Petitioners or workers union within the establishment after formally resigning from a Union.

g. An order be issued, compelling the Respondent institution itself, or its agent, servants and assigns or representatives to, deduct and remit union dues from her employees who have voluntarily joined the Kenya Private University Workers Union, by signing Form S a sign of subscription to the Union of own choice.

h. An order be issued, directing the Respondent to sign a recognition agreement and commence the negotiation of a collective bargaining agreement with the Kenya Tertiary and School Workers Union if it has fulfilled the aspect of simple majority, pursuant to section 54 of *Labour Relations Act*, 2007.

i. Costs of this Petition be borne by the Respondent.

**Respondent's Case**

14. The Respondent in the replying affidavit dated the 1st day of June 2022 says that it has in place 3 registered and binding recognition agreements for purposes of requirements of Articles 41 (2) (c) of the *Constitution Of Kenya* 2010 and section 54 of the *Labour Relations* with University Academic Staff Union (UASU), Kenya University Staff Union (KUSU) and Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers (KUDHEIHA). The existing Union recognition agreements are broadly structured memorandum/recognition agreements, covering all the unionisable employees. That sometimes in 2018, the Kenya Tertiary and Schools Workers Union (KETASWU) in Petition No. 112 of 2018 filed a similar Petition as the present one and the Court noted that the fact that Articles 36 and 41 of the *Constitution* provide for freedom of association and recognition of trade unions respectively does not elevate such matters to constitutional pedestal. The Respondent's staff are already overrepresented by 3 unions with one employer, and to add another one will be a recipe for industrial confusion and chaos in the workplace.

15. That under section 54 (1) of the *Labour Relations Act*, 2007, a simple majority of unionisable staff refers to the entire workforce and separate interest groups in the said workforce. Accordingly, if Kenya Tertiary and School Workers Union chooses to recruit members from the Respondent, it should target the simple majority of the entire unionisable workforce and not just simple majority of a fraction thereof like the Petitioners/Applicants propose herein. The Respondent's total workforce is 5250 staff against the Kenya Tertiary and School Workers Union force claim of about 492 or

thereon. Consequently, the Kenya Tertiary and Schools Workers Union's agitation for registration of recognition agreement with the Respondent have not met the threshold of a simple majority of the total workforce of 5250.

16. The Petition is res judicata and an abuse of the Court process and the Court has no jurisdiction to entertain the Petition as it would amount to the Court usurping the jurisdiction of the court.

**Petitioner's Submission**

17. The Petitioner submits relying on the case of *Mukisa Biscuits Manufacturing Co Ltd versus West End Distributors Ltd* (1969) EA 696 where it was held that:

> " 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'. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion."

18. The Petitioner says that there is no competent preliminary objection raised herein; as the objections are blurred with facts which will require evidence and which evidence would require this court to interrogate the same, and therefore grounds/reasons raised cannot be sustained by way of preliminary objection as at the time of filing of the submissions, the Respondent had not filed its responses/replies to the suit, Notice of Motion and the Petition.

19. That failure by the Respondent to present/file herein the entire record/proceedings of Nairobi Elrc Petition 112/2018, renders the application of the doctrine of res judicata redundant in these proceedings, and therefore neither this court nor petitioners are conversant with the subject matter of the dispute from which the court delivered a judgment in NBI ELRC Petition no 112/2018.

20. The Petitioner also submits ground V of the Respondent's Preliminary Objection touching on the question of the recognition agreement pursuant to the provisions of section 54 of the *Labour Relations Act*, 2007. This limb of argument is not point of law but rather, a matter which requires factual evidence, as such, the same cannot be determined by preliminary objection. However, this ground is not substantive or core subject matter or dispute in this Petition and therefore fails.

21. The Petitioner further submits that for a matter to be *res judicata*, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merit by a Court of competent jurisdiction. The Petitioner relied on the case of *Henderson versus Henderson* 1843 ALL ER 378 where it was held that where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

22. The Petitioners submits that they are not parties in Nairobi ELRC Petition 112/2018 and therefore in the absence of complete record of NBI ELRC Petition 112/2018 it is practically difficult for Petitioners and this court to have an opportunity of having a look at the pleadings/proceedings and discern the subject matters upon which the court delivered judgment in the suit being ELRC Petition No 112/2018.

23. The Petitioners also relied on the decision of the Singapore Court of Appeal in *Management Corporation Stratta Title Plan No. 301 versus Lee Tat Development Pte Ltd* 2009 S GHC 234. That the courts have never accepted *res judicata* as a principle of law which applies rigidly in all circumstances irrespective of the injustice.

24. The Petitioners also relied on the case of *John Florence Maritime Services Limited & Another versus Cabinet Secretary for Transport and Infrastructure and 3 Others* 2015 eKLR where the Court of Appeal held that 'On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution based litigation cannot be subjected to the doctrine of res judicata. However, we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating and assuming multifaceted dimensions.

**Respondent's Submissions**

25. The Respondent submits that the Petition is res judicata and the only way is for it to be terminated. He cites the decision of the court in *John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport & Infrastructure & 3 others* 2015 eKLR, and *Accredo AG & 3 Others vs Stefano Uccelli & Another* 2019 eKLR and *Musankishay Kalala Paulin vs Director Investigations & 4 Others* 2022 eKLR.

26. The Respondent submits that the dispute cutting across the applicant/Petitioners pleading is about deduction and remission of unions (KUDHEIHA and KUSU) agency fees from the Petitioners salaries/wages as per the duly negotiated and registered collective bargaining agreements. The dispute herein is encouraging union members to withdraw from membership at will while still benefitting from duly and registered collective bargaining agreement without the members paying any fee for the unions efforts and expenses for the collective bargaining agreement.

27. The Respondent submits that section 19 (1) (f) of the *Employment Act* 2007 as read with the Collective Bargaining Agreement are enabling law authorizing the Respondent to deduct union agency fees from applicants/Petitioners wages and pay the amount so deducted to Kudheiha and Kusu. That under sections 17 and 19 (1) (f) of the *Employment Act*, 2007, it is permitted to deduct from wages agency fees against unionisable employees who are not members of the 2nd Respondents and 3rd Respondent.

28. There is no illegality and no constitutional and statutory right has been breached in deduction of agency fees and since the 10 applicants continue to benefit from the Collective Bargaining Agreement between the 2nd and 3rd Respondent, they are obligated to pay agency fee towards the maintenance of the union which are not union dues as per section 49 of the *Labour Relations Act*, 2007 but is charged as a fee to non-members who are benefiting from CBA negotiated by union, whereas union dues on the other hand are provided for in section 48 and paid by union members for purposes of representation.

29. The Interested Party submitted that he does not meet the threshold to be added as party in the proceedings as he does not have any stake or any legal interest in the matter and as such, his removal will not result in any injustice on the part of the Respondent and Petitioners. That this is supported by the provisions of Rule 2 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms)*

*Practice and Procedure Rules* 2013 which defines an interested party as a person or entity that has an identifiable stake or legal interest or duty in the proceedings before court but is not a party to the proceedings or may not be directly involved.

30. The Interested relied on the case of *Kingoro vs Chege and 3 Others* (2002) 2 KLR 243 where the court stated that the guiding principles are that he must be a necessary party, must be a proper party, there must be a relief flowing from the defendant to the plaintiff, the ultimate order or decree cannot be enforced without his presence in the matter and his presence is necessary to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit.

**Determination**

31. The Respondents has raised the issue of the Petition being res judicata. This goes to the jurisdiction of the Court in the Petition and must be addressed by the court in limine before this court moves to frame other issues falling for consideration, if necessary.

32. In *Garden Square Limited vs. Sammy Boit Kogo & Another* Nairobi (Milimani) HCCC No. 1266 of 2003 [2003] KLR 20, the Court held that a preliminary point of law is a pure point of law which if successfully taken, would have the effect of disposing the suit or application entirely.

33. At the onset the court will not deal with the preliminary objection as it was withdrawn by the respondent. This was preliminary objection dated 23rd March 2023.

34. So the court will go straight to the doctrine of *res judicata*. Section 7 of the *Civil Procedure Act* provides that:

> " No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially been in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issues has been subsequently raised, and has been heard and finally decided by such court.

35. On the authority of Wigram VC's decision in *Henderson versus Henderson* 1843 ALL ER 378 relied upon by the Court of Appeal in Civil Appeal No 107of 2010 *Kenya Commercial Bank Ltd vs Benjoh Amalgamated*, *res judicata* applies not only to points upon which the Court was actually called upon by the parties to form an opinion but every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence ought to have brought forward at the time of filing the suit.

36. The Court of Appeal held in The *Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others*, [2017] eKLR), that:

> " For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;
>
> a. The suit or issue was directly and substantially in issue in the former suit.
>
> b. That former suit was between the same parties or parties under whom they or any of them claim.
>
> c. Those parties were litigating under the same title.
>
> d. The issue was heard and finally determined in the former suit.

e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.

37. I have looked at the judgment given by the Court in Petition No 112 of 2021 as consolidated with Cause no 25 of 2019. The issues as considered in the previous Petition are indeed similar to those in the present petition, save for the fact that the Respondent in previous petition was said to be the Council of the University of Nairobi rather than the University of Nairobi. The Petitioners in the present petition are the employees of the Respondent rather than the Union as was in the previous petition. There are also some factual evidentiary differences; the Petitioners in the present petition contra the union in the earlier Petition has brought to court the notices given to the Respondent demonstrating their withdrawal from the Kudheiha and Kusu Unions.

38. What now the court must decide is whether in light of foregoing the Petition brought before court can be considered res judicata, so as to oust the jurisdiction of court in this Petition.

39. Section 7 of the *CPA* refers to the previous suit being between 'parties under whom they or any of them can claim' and as per Wigram VC's decision in Henderson versus Henderson adopted by the Court of Appeal in Civil Appeal No 107 of 2010 *Kenya Commercial Bank Ltd versus Benjoh Amalgamated*, the *res judicata* covers matters which ought to be the subject of the previous petition. This would have only been different if a different union rather than KETASWU was the one said to have recruited members of the Respondent into a new union. Indeed having read the judgment delivered by Justice Maureen Onyango on 5th March 2021 the court finds the issues raised are quite similar to the issues raised in this petition dated 24th February 2023.

40. Their relieves and remedies in this petition are

i. That this application be certified as extremely urgent and be heard ex pate in the first instance. (spent)

ii. That an order be issued directing the respondent to implement 19 forms ( check of forms) duly signed by 498 unionisable employees, forwarded to the respondent as per letter dated 13/1/2022 and in favour of Kenya Tertiary and Schools Workers Union (KETASWU, starting the month of February 2022 pay roll/salary

iii. That an order be issued to compel the respondent herein, to deduct union dues from her employees who are members of Kenya tertiary and schools workers union (KETASWU) and who have signed form S in terms of section 48 and 50 of *labour Relations act*, 2007, and remit the same accordingly and as when the same is forwarded for implementation.

iv. That an order of injunction be issued, and is hereby issued, compelling the respondent by itself or their agent, servants and/or personal assigns to deducting union dues from her union sable employees who have withdrawn their membership form the Kenya University staff union (KUSU) and Kenya Union of Domestic, Hotel, Educational Institutions and Hospital Workers (KUDHEIHA) in terms of section 48(6) of *LRA*, 2007.

v. That an order of injunction be issued to restrain the respondent by itself or their agents, servants and/or personal assigns from threatening, intimidating, correcting and victimizing petitioners and other union sable employees/ not teaching university staff who are subscribing to the Kenya tertiary an schools workers union (KERASWU) on account of exercising their constitutional rights or associating to the union of tier choice.

vi. That an order of injunction be issued to compel the respondent to immediately sign a recognition agreement and commence the negotiation of a collective bargaining agreement with the Kenya Tertiary and schools Workses Union (KETASWU), when the said union complies with section 54 of *LRA*, 2007;

vii. That this honourable court to grant any such other orders, reliefs, which deemed fit, to actualize the great enjoyment of labour rights of the petitioners/ applicants herein and not teaching university staff.

viii. That the costs of this application be provided for.

41. Similarly the issues in the petition 112 of 2018 were:

i. Whether the petitioner had *locus standi* to institute the petition and claim herein.

ii. Whether the claimant had the threshold for recognition by the respondent

iii. Whether the petitioner's right have been violated

iv. Whether the petitioner is entitled to the remedies sought in the petition and claim

42. The petitioner then was Kenya Tertiary and Schools workers Union (KETASWU) the petitioners in 037 of 2022 are 10 employees of the respondent whose main issue is that their dues are to be remitted to KETASWU by the respondent.

43. The petition 112 of 2021 the court pronounced itself and dismissed the petition with costs. The same petition has not been appealed against and so is still valid.

44. The res judicata in Kenya is provided in section 7 of *Civil Procedure Act* which states:

> " No court shall try any suit or issue in which the matter directly and substantially on issue has been directly or substantially in issue in a former suit between the same parties or between parties under whom they or any of them can claim, litigating the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court."

45. Res judicata therefore implies that for a matter to be res judicata the matter in issue must be similar to those which were previously in dispute between the same parties and having been dismissed on merits by a court of competent jurisdiction.

46. In the case of *Henderson vs Henderson* 1843-60 All ER 378 observed:

"...where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction the court requires the parties to that litigation not bring forward their whole case and will not except under special circumstances) permit the same parties to open the same subject litigation in respect of a matter which might have been brought forward as part of the subject in contest but which was not brought forward only because they have negligence, or even accident omitted part of their case. The plea of res judicata applies except in special cases not only not points upon which the court was actually required by the parties to form an opinion and pronounce a judgment but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence right have brought forward at the time".

47. The case before us started with the judgment which was delivered by Justice Maureen Onyango on 5th March 2021 and the prayers were that the court should issue orders compelling the respondents to deduct trade union dues and remit the same to KETASWU and also respondent to have a recognition agreement with the said KETASWU and all these prayers among others were dismissed by the court.

48. That notwithstanding the petitioners went ahead and started registering with KETASWU and giving instructions to the employer to remit the dues to KETASWU and yet there was a judgment that had pronounced itself that the employees could not be members of KETASWU for various reasons including the fact that they could not prove the union covered the sector where they worked and also there is no evidence of registration of the CBA with the employer.

49. The petitioners and employees continued to register with KETASWU which was the petitioner in cause 112 of 2018 and yet there was a judgment in place which had made it clear that all their prayers had been dismissed with costs. It means they were engaging in an exercise in futility.

50. The *Constitution* annexed in the petition on page 6 (u) alludes that members can be from the University inter alia but the court finds the petitioners has not complied with the other issues which caused prayers in Petition 112 of 2018 to be dismissed.

51. Even the issue of the recruited members by the KETASWU was dealt with in the petition 112/2018 and was confirmed there was no evidence of resignation of 703 members from KUDHEIHA & KUSU. Now there is a list of 75 members who say they have resigned from the old union. The respondent alleges there is no evidence that the said union had proved it had recruited simple majority of the employer's staff who allege to have joined the new union. The employer states it has a total work force of 5250 staff against the membership of KETASWU of 498. The petitioner it would appear and the court sees no evidence to prove it has met the simple majority threshold.

52. Finally the court will adopt the pronouncements of the court in the case of *Kenya Union of Commercial Food & Allied Workers vs Hon the Attorney General & COTU (interested party)* Petition no 175 of 2019 where court held: "allowing multiple unions to be recognised by employer is a recipe for chaos. Section 54(1) of *labour relations act* is reasonable and proportionate and not antithetical to constitution norms of freedom of association, the right to organise, the right to collective bargaining and the right to join and participate in the activities of a trade union.

53. The court concedes that the respondent's staff are already over represented by UASU, KUSU & KUDHEIHA which have simple majority of total workforce within the workforce of the establishment in compliance with *Constitution* 2010 and section 54 of *Labour Relations Act* 14 of 2007.

54. If an employee is not comfortable to join any of the above he is not compelled to join a union. The union registering a union where others exist must demonstrate that there is a defined and distinct area

of operation of the new union that is not present in the old union or unions as pronounced in Appeal No 26 of 2020 *Peter Karegua Mwangi & Other vs Registrar of Trade Unions & Others & KUDHEIHA as interested party*.

55. Finally freedom of association envisaged in article 36 of the *constitution* must work in tandem with the government policies in place to strengthen the existing trade unions and not create industrial chaos by registering multi unions for one employer and of cause this is not justifying contravening the provisions of the Kenya *Constitution* 2010.

56. The court would like to point out what my sister Justice Maureen pointed out to the parties in her judgment where she stated out that freedom of association as provided in the *Constitution* does not elevate the same to a constitutional pedestal. The *Labour Relations Act* provide how trade disputes are filled as well as seeking the services of a conciliator. These should be adhered to.

57. The court however does not mean to violate constitutional provisions in article 36 of the *Constitution* on freedom of association but the orders hereto is as relates to the specific facts of this petition.

58. The court finds the 1st interested party Hon. the Attorney General has no role in this matter is an internal matter of the 1st respondent and is struck off from the petition.

59. The court has deliberated on the prayers by the petitioners thoroughly and is satisfied that the prayers 1-VIII are not merited and are dismissed. In closing parties are urged to meet with a conciliator to resolve whatever grievances they have amicably.

60. Each party is ordered to pay their costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 16TH DAY OF MARCH 2023.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the *Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the *Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.