



Barasa & another v Kenya National Union of Nurses & another (Judicial Review Cause 3 of 2022) [2023] KEELRC 3478 (KLR) (27 April 2023) (Judgment)

Neutral citation: [2023] KEELRC 3478 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
JUDICIAL REVIEW CAUSE 3 OF 2022**

**JW KELI, J
APRIL 27, 2023**

BETWEEN

GEORGE BARASA 1ST EXPARTE APPLICANT

FELIX WASIKE 2ND EXPARTE APPLICANT

AND

KENYA NATIONAL UNION OF NURSES 1ST RESPONDENT

**SETH PANYAKO, SECRETARY GENERAL KENYA NATIONAL UNION OF
NURSES 2ND RESPONDENT**

JUDGMENT

1. The Exparte Applicants vide amended notice of motion dated 19th December, 2022 filed pursuant to leave of the High court sought the following reliefs against the Respondents:-
 - a. An Order of Certiorari to remove into this honourable court and quash the decision of the Respondents of 6th October, 2022, suspending Mr. George Barasa, the 1st applicant herein from his position as Branch Secretary of the Bungoma Branch of the Kenya National Union of Nurses.
 - b. An Order of Certiorari to remove into this honourable court and quash the decision of the Respondents of 13th October, 2022, expelling Mr George Barasa, the 1st applicant herein from his position as Branch Secretary of the Bungoma Branch of the Kenya National Union of Nurses.
 - c. An Order of Certiorari to remove into this honourable court and quash the decision of the respondents of 13th October, 2022, expelling Mr. Felix Wasike from his position as Branch Chair person of the Bungoma Branch of the Kenya National Union of Nurses.



- d. An order of Mandamus , compelling the Respondents to reinstate the Applicants to their elected position as Chair person & Branch Secretary of the Bungoma Branch of the Kenya National Union of Nurses.
 - e. An Order of Mandamus, compelling the respondents, to pay all owing rent arrears for the office space occupied by the Bungoma Branch of the Kenya National Union of Nurses.
 - f. An order of Mandamus, compelling the respondents to pay the Applicants all owing allowance arrears from May 2021 Kshs. 80,000 per month for each applicant from May 2021 to date, plus interest thereon.
 - g. An order of Mandamus, compelling the Respondents to pay the Applicants all owing salary arrears from May 2021 i.e Kshs.80,000 per month for each applicant from May 2021 to date, plus interest thereon.
 - h. An order of Mandamus, compelling the respondents to remit back to the Bungoma Branch of the Kenya National Union of Nurses 50% of all monies collected by the branch.
 - i. An order of Mandamus , compelling the respondents.
 - j. That pending the determination of this Application an interim order do issue staying the Respondent's decision of 13th October 2022 expelling the Applicants from their positions as Branch Officials of the Bungoma Branch of the 1st Respondent.
 - k. That pending the determination of this Application, an interim order do issue freezing Kenya National Union of Nurses Cooperative Bank Account Number xxxxxx.
 - l. That pending the determination of this Application, an interim order do issue to Cooperative bank to produce to the Court the bank statements for the Kenya National Union of Nurses Cooperative Bank Account Number xxxxxx for the years 2018-2022.
 - m. An order of prohibition directed towards the respondents prohibiting them from limiting, restricting or otherwise interfering with the Applicants performance of their duties as the legally elected Branch Officials of the Bungoma Branch of the Kenya National Union of Nurses.
 - n. A Declaration that the Respondent's conduct expelling the 1st Applicant from Union Leadership is in contempt of Court Orders of 13th October 2022 and therefore illegal.
 - o. An Order that the Applicants be awarded general damages
 - p. Costs of this Application be met by the Respondents
 - q. Any other orders that the court deems fit.
2. The Application was premised on grounds:-
1. That this Honourable court on 13th October, 2022 gave leave to the 1st Applicant to initiate Judicial Review Proceedings against the Respondents over his suspension from the position of Branch Secretary of the 1st Respondent's Bungoma Branch (Annexure 1)
 2. That the court directed that the leave operates as a stay of the suspension that had been communicated to the Applicant vide a letter dated 6th October, 2022 (Annexure 2).



3. That the 1st Applicant served the respondents with the Court order by Email on 14th October, 2022. (Annexure 3).
4. That in blatant disobedience of the Court Orders, the Respondents proceeded to issue an expulsion letter by email on 15th October, 2022, to the 1st Applicant (Annexure 4 a and 4 b).
5. That the suspension letter of 6th October 2022 quotes the Notices of Disciplinary Action of 1st March 2022 and 18th May 2022 as the basis of the decision to suspend the 1st applicant.
6. That the decision of the respondents' to suspend and subsequently expel the Applicants from their elected position as Branch officials of the 1st Respondent's Bungoma Branch is illegal, un-procedural, unfair and biased.
7. That from the outset, the 2nd Respondent has been unfairly biased against the Applicants because the Applicants were not his preferred contestants for the positions of Branch Chair & Secretary of the 1st Respondent's Bungoma Branch.
8. That indeed, during the 1st Respondent's election of 28th February, 2021, an attempt was made to frustrate the 1st applicant's bid by omitting his names from the ballot papers, resulting in a fresh election in May of 2021 (annexure 6a and 6b).
9. That the Applicants emerged victorious despite opposition from the 2nd Respondent and was duly elected Branch Officials of the Bungoma Branch of the Union (Annexure 6 c)
10. That since the above mentioned elections, the top leadership of the union, specifically the 2nd Respondent has been on a vendetta to frustrate the Bungoma Branch and sabotage its operations.
11. That since the election of May, 2021, the leadership of the Union failed to carry out its duty including organizing for induction of newly elected leaders.
12. That the 2nd Respondent has frustrated the running of the Bungoma Branch of the Union by stalling remittances of funds to the Bungoma Branch for operations, failure to remit salaries and allowance to officers of the Bungoma Branch of the Union, and failure to pay rent for office space for the Bungoma Branch, resulting in substantial arrears(Annexure 7 a and 7 b)
13. That the Bungoma branch had a membership of more than 500 members who diligently make monthly contribution to the Union (Annexure 7 c).
14. That this failure to remit money to the Bungoma Branch, is what necessitated the 1st Applicant's letter of 25th February 2022, to the 2nd Respondent, requesting for payment of all arrears owed to the Branch and additionally, that 55%-65% of money collected from members of the Bungoma Branch be paid directly to the Bungoma Branch Accounts (Annexure 8).
15. That Applicants' positions as elected officials of the union is not a voluntary engagement and it is the norm in the Republic of Kenya that Branch officials of Unions receive salaries and or allowances for the duties they perform.
16. That it is unreasonable to expect the Bungoma Branch of the Union to function and its officials carry out their duties without any financial facilitation from the union headquarters yet all monies collected by the Bungoma branch are under management of National Officials at the Union Headquarters.



17. That the 2nd Respondent did not respond to the issues raised by the 1st Applicant in his letter of 25th February, 2022 but instead issued the notice of disciplinary action dated 1st March 2022 (Annexure 5 a).
18. That the allegations contained in the Notice of 1st March 2022 are a complete fabrication, unsubstantiated and aimed at bullying & intimidating the Applicants into silence.
19. That the 1st applicant responded to the Notice of 1st March, 2022, vide a letter dated 2nd March 2022 (Annexure 9)
20. That deliberations and conclusion of the National Executive Council, resulting from the Notice of 1st March 2022 have never been communicated to members of the union, and no one knows how the matter was concluded and what decision was taken if any at all.
21. That subsequently, via a letter dated 18th May, 2022. The 1st applicant was issued with another notice of disciplinary action by the Respondents to which he responded vide a letter dated 30th May 2022 (Annexure 10).
22. That by a letter dated 5th October, 2022, the Respondent again issued a Notice to the 1st Applicant to Appear before the National Executive Council with regard to the two Notices of disciplinary action. The letter communicated that the venue shall be Down Hill Spring Resort – Webuye and not the Official Union Premises. Additionally, the date of the meeting was stated to be 13th October, 2022, the Respondents issued a Notice of suspension to the Applicant. (Annexure 2).
23. That before the meeting could occur, on 6th October, 2022, the respondents issued a Notice of suspension to the Applicant. (Annexure 2).
24. That on the 13th of October, 2022, the Applicants, accompanied by Mr. Jesse Wamocho, presented themselves at Down Hill Spring Resort – Webuye where they did not find any Officers of the National Executive Council and were informed that the Union had not scheduled any meeting at the venue.
25. That *the Constitution* of the Union is very clear at Chapter XVI Articles 9-13 about the procedure for suspension of a Union Branch Officer such as the Applicants, i.e the decision to suspend a branch officer is made by a 2/3 majority vote of all members of the Branch Governing Council. (Annexure 12).
26. Additionally, the Union Constitution requires that a Branch Officer shall not be suspended without being given an opportunity to state their case to the Branch Governing Council.
27. That the 2nd Applicant has never been issued with a notice of disciplinary hearing and both Applicants were not accorded a chance to be heard before their expulsion.
28. That the Bungoma Branch Governing Council of the 1st Respondent has never at any time sat to deliberate nor resolved to suspend or expel the Applicants.
29. That in fact the National Executive Council has not at any time sat to deliberate on any disciplinary action against the Applicants, nor has it at any time, by a 2/3 majority, voted and resolved to suspend/expel the Applicants as alleged by the 2nd respondents letters of 6th and 13th October, 2022.



30. That the Respondents have illegally changed the signatories of the Union Bank Account which the Bungoma Branch uses. i.e Kenya National Union of Nurses Cooperative Bank Account Number xxxxxx, thus making the Applicants unable to access bank statements.
 31. That the 2nd Respondent unilaterally initiated the disciplinary action against the Applicants, without any consultation to the Bungoma Branch Governing Council, and additionally the National Executive Council has played no part in this disciplinary action.
 32. That the National Executive Council had not been duly consisted at the time of the suspension and expulsion of the Applicants and therefore could not have made any of the decisions in the first place.
 33. That the decision to suspend and subsequently expel the applicants is ultra vires, it is a decision that oversteps the authority vested in the office of Secretary General, it is unprocedural and the result of a dictatorial attitude by the 2nd Respondent.
 34. That the Respondents considered irrelevant factors in arriving at the decision to suspend and expel the Applicant as there was no evidence that any allegations levied against the Applicants were true.
 35. That the respondents have acted in bad faith in purporting to suspend and expel the Applicants from their elected position as Branch Officials of the Bungoma Branch of the 1st Respondents, without any justified reason.
 36. That the 2nd Respondent is abusing his powers by purporting to single handedly institute the disciplinary motion and then sit as the judge and decision maker of a process that requires consultation with the Branch leadership as well as National Leadership of the Union.
 37. That the respondents' conduct has caused the Applicants great mental anguish, embarrassment and loss of dignity before peers and colleagues, financial challenges.
 38. The application was further supported by affidavit of George Barasa dated 20th December, 2022.
3. The Application was opposed vide Replying Affidavit by Seth Panyako the General Secretary, the 2nd Respondent, sworn on the 15th February, 2023. In support of the response the 1st respondent filed list of documents dated 15th February 2023 which documents were annexed as SP-1 to SP-18 under the affidavit of the 2nd respondent.

Written Submissions.

4. The court directed the suit be canvassed by way of written submissions. The parties complied. The Exparte applicants written submissions drawn by George Barasa were dated 7th February, 2023 and received in court on the 13th February, 2023. The respondents written submissions drawn by Chesengo & Company Advocates were dated 7th March, 2023 and received in court on the 8th March, 2023.

Determination

Issues for determination.

5. The Exparte Applicant identified the following issues for determination:-
 - a. Jurisdiction and procedural impropriety.



- b. Right to be heard.
 - c. Taking irrelevant factors into consideration.
6. The Respondent in their submissions addressed the merit of their decision on the Exparte Applicants.
7. The Court having considered the application and statement as well as the written submissions by the parties was of the considered opinion the issue for determination in the suit was whether the suit was merited.

Exparte Applicants' Case.

8. The exparte applicants submit that entire process by which the Exparte Applicants were suspended and expelled from their position as elected union leaders was a complete sham for non-compliance with procedure under Union Constitution XV1 Articles 9-13. That the procedure of removal of branch union officials started by vote of 2/3 majority of all members of Branch Governing Council which should be forwarded to the National Governing Council for adoption and effect. That Branch Union Official cannot be removed by National Executive Council acting on own volition.
9. That the union branches are semi-autonomous units that recruit members and conduct business in that capacity. That the Bungoma Branch Governing Council has no issue with Exparte Applicants and had not initiated any disciplinary proceedings. That the Secretary General has no power to suspend or expel the exparte Applicants. That their right to be heard was violated. That the National Executive Council never held disciplinary meeting against the exparte applicants or raised resolution to expel the Applicant. That they asked for minutes with resolutions to suspend and or expel them and same was not availed. That they were not issued with suspension notice before being expelled. That they appeared at Downtown Hotel Webuye on 15th October, 2022 as requested and were there all day and none of the officials of National Executive Council arrived hence they submit there was no such meeting held .
10. That the Union constitution chapter XX1 (2) reads:-
- “No member official of the union shall be suspended or expelled unless he has been given an opportunity to state his or her case personally and in writing at a meeting of the national Executive Council.” That the clause implies opportunity both in writing and physically. That the union constitution provides for witness at disciplinary hearings.
11. The Exparte Applicants submit that the suspension and expulsion were based on irrelevant Factors without corroboration like there was no complaint by other officials. No evidence of any document with forged signatory Secretary General, no report to the police on the alleged forgery, that the issue of funding the branch was the genesis of their woes with the 1st Respondent and that there were no funds to divert as the branch had not received funds for last 3 years from the headquarters.

Response Case

12. The respondents responded to the suit vide the replying affidavit of the 2nd Respondent Seth Panyako, the General Secretary of 2nd Respondent sworn on the 15th February, 2023. They denied the allegations by the exparte applicants and produced evidence to support the expulsion of the exparte applicants and stated the expulsion was recommended in accordance with the union constitution by the National Executive Council at its meeting held on 13th October, 2022 at Down town Hill Spring Resort Webuye. That the notice of 5th October 2022 gave notice of the meeting. The Communication of expelling



George Barasa was done by 1st Respondent to Registrar of Union on 15th November 2022. (SP14 and SP15) were the minutes and attendance list of the said meeting). The respondents relied on other documents annexed by the 2nd respondent under affidavit in support of the accusations against the ex parte applicants.

Decision

13. The union/1st Respondent is governed by its registered Constitution. The ex parte applicants alleged non-compliance with chapter XVI Articles 9-13 of the union constitution.
14. The union constitution was filed in court by the Respondent. The part on disciplinary is captured under chapter XX1 Articles (1) which grants power to National Executive/governing Council to suspend or expel member for infringing terms and condition of *the Constitution* or acting in a manner detrimental to the interests of the union. Article 2 of the union constitution reads:- ‘No member official of the union shall be suspended or expelled unless he has been given opportunity to state his/her case personally and writing in a repeating of the National Executive Council of which he has received not less than 7 day’s notice in writing.’ The 1st Respondent in replying affidavit dated 15th February 2023 asserts that indeed the National Executive Council held the meeting of 13th October, 2022 and annexed minutes (SP 14 and 15 being the minutes and attendances list open meeting). The court noted the meeting was held on 13th October 2022 at Town hill resort – Webuye at 10.20 am to 13-45 pm . There were 11 members present and the agenda was discipline of George Barasa, the branch Secretary and Felix Wasike , the Branch Chairman (ex parte applicants). The minutes refer to Notice of motion of 1st March 2022 and 18th March 2022 issued to the 1st ex parte applicant on various allegations of running branch activities without consent of other branch officials and assuming role of General Secretary by direct correspondence with County officers contrary to the union constitution and illegally directing union dues as indicated in his letter dated 25th February 2022 contrary to union constitution chapter X1 (3) and Section 48 and 50 of the *Labour Relations Act*. Sending threat text messages to colleague whose content was disclosed and writing letters on forged union headquarters letter head without consent of the General Secretary against the union constitution and the law.
15. The meeting members observation were finding the ex parte applicants guilty of being disrespectful to the council for not appearing, finding he forged the general signature and the union letter head where he wrote letter of 13th March, 2022 to the County Government to illegally divert union dues for months of March and April, 2022 and utilize same for personal use and forged members signatures to withdraw members from the union inter alia.
16. The meeting resolved under chapter III(7) and X1 (3) of the union constitution to expel the ex parte applicants George Barasa and Felix Wasike from the union Branch Secretary and Branch Chairman respectively. The minutes were signed by 1st Respondent and Joseph Ngwai National Chairman(SP14) . The respondents annexed signatures of attendance list of the National Executive Council meeting held on 13th October, 2022 at Down town Hill Spring Resort Webuye(SP-15). The Communication of expelling George Barasa was done by 1st Respondent to Registrar of Union on 15th November 2022(SP-16).
17. The court finds that Ex parte Applicant George Barasa vide letter of 30th May 2022 received the notice of motion of May 2022 and responded in writing to the alleged of diversion of funds, running branch activities without consent of other officials, the alleged abusive text message and forged union headquarters letter heads. The response was dated 30th May 2022 and addressed to the 1st Respondent (SP4) . Felix Wasike the 2nd ex parte applicant responded vide letter dated 31.5.2022 (SP – 9). SP 10 was



letter by George Barasa addressed to Bungoma County under letter head of 2nd Respondent submitting resignation of 135 members from he 2nd Respondent and annexing the names .

18. The court having evaluated the evidence by the parties found that the ex parte applicants were given opportunity to respond in writing to allegations against them which they did on 30th and 31st May 2022 respectively.
19. The court found there was a meeting of the National Executive counsel of the 2nd Respondent on the 13th October, 2022 at Webuye where the Ex parte applicants alleged they did not find the officials but the minutes and signed attendance list was produced as SP-14 and SP-15.
20. The court finds there was substantive compliance with Chapter XX1 of the union constitution which deals with discipline before the expulsion of the ex parte applicants by the respondents.
21. The 1st Respondent issued letter of 6th October 2022 before the hearing of 13th October 2022 which was a violation of the union constitution. The ex parte applicants having been since expelled on the same grounds the court finds the irregular suspension is overtaken by events.
22. The court found evidence of proof of the alleged offences and violation of the union constitution by the Ex parte Applicants qualifying to support the expulsion which evidence included letter of 12th July 2021 stating the National office had recommended change of signatures of bank account, letter to Bungoma County withdrawing members of the 1st Respondent under the National office letter head. On balance of probabilities those acts by ex parte applicants were detrimental to the interests of the union under its constitution Chapter XX1. Subsequently the court found that the expulsion having been in compliance with the union constitution the suspension letter was overtaken by events of the 13th October 2022 council meeting which found the ex parte applicants guilty of the allegations under the said suspension letter and the notice of motion. The court finds that there is appeal mechanism under the 1st Respondent Constitution and that is the right redress mechanism when not satisfied with the expulsion or suspension.
23. On the reliefs concerning the unpaid rent the union branch officials should pursue the same with the union governing council under the procedures under the union constitution.
24. On the reliefs of unpaid allowances to the ex parte applicants. The ex parte applicants if they were entitled to the allowances as elected officials the same was accrued right and they should pursue the same as normal claim as evidence will be required of the outstanding claims for service.
25. The court then having found the Ex parte Applicants was granted right to be heard and failed to appear or take up the opportunity and the allegations having been found to have been supported by evidence the court finds no merit to grant orders sought as concerns the expulsion. The court finds that the Judicial review proceedings for order of mandamus are not appropriate for claims for unpaid allowances which have not been established by the court and the same ought to be pursued as normal claims.
26. The Notice of motion dated 19th December 2022 is dismissed.
27. The 2nd Respondent is a member union. The Ex parte Applicants were its members. The court exercised its discretion and declines to award costs in the proceedings.
28. It is so ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 27TH APRIL 2023.

JEMIMAH KELI,



JUDGE.

In the presence of:-

Court Assistant: Lucy

Respondent : Wanjala holding brief for Chitsengo

Exparte Applicants: in person present

