



**Alwala v Kenya University Staff Union (Petition E001 of 2023)
[2023] KEELRC 899 (KLR) (14 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 899 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
PETITION E001 OF 2023**

**JW KELI, J
APRIL 14, 2023**

BETWEEN

JOSECK ALWALA PETITIONER

AND

KENYA UNIVERSITY STAFF UNION RESPONDENT

RULING

1. The Petitioner vide Petition dated January 12, 2023 sought various orders and together filed Notice of Motion dated January 13, 2023 all received on the January 12, 2023.
2. The Applicant/Petitioner seeks the following substantive orders under the Notice of Motion.
 - a. Spent
 - b. That pending hearing of the Application *interpartes* there be and is hereby issued conservatory orders staying the decision of the Respondent of December 20, 2022 and communicated to the Petitioner through its communication dated January 4, 2023 suspending the Petitioner as Secretary of KUSU - Kibabii University Branch.
 - c. That the order granted in 2 above be extended and or be confirmed pending the hearing and determination of the petition filed herein.
 - d. That the cost of this application be borne by the Respondent.
3. The Application was premised on the grounds that:-
 - a. The Applicant has been unlawfully and unprocedurally suspended from office for a period of 90 days pending the hearing .
 - b. The Respondent did not have any authority under its constitution to mete such a punishment on the petitioner.



- c. The activities of the petitioner's branch may come to a halt as he is the core of the branch's operations.
 - d. The Respondent intends to call a meeting of certain branches in a bid to satisfy decisions that it may have far reaching ramifications in the absence of the applicant
 - e. The suspension of the applicant was ill motived and without any justifiable backing.
 - f. Interests of justice and fair play
 - g. Other grounds or reason to be advanced at the hearing hereof.
4. The Application was further supported by the Affidavit of the Applicant sworn on the January 12, 2023 annexing the impugned letter of suspension and the Respondent's two constitutions.
 5. The Application was opposed by the Respondent vide grounds of opposition dated January 30, 2023 to effect that the Application was fatally defective, the application did not meet the threshold for grant of conservatory orders sought and that the court did not have jurisdiction to interfere with the internal disciplinary mechanisms of the Respondents. The Respondent further filed replying affidavit of Charles Mukhwaya in opposition to the Application sworn on the February 4, 2023.
 6. The Application further filed Supplementary Affidavit in response to the replying Affidavit which was sworn on the February 15, 2023.

Written submissions

7. The Application was canvassed by way of written submissions. The Applicant's written submissions drawn by DC Chitwah & Company Advocates were dated February 3, 2023 and received in court on the February 28, 2023 . The Respondent's written submissions drawn by Bruce Odenyo & Company Advocates were dated February 27, 2023 and received in Court on the February 28, 2023.

Decision

8. The court finds the issue to be determined in the instant applications was whether the Application was merited.

Applicant's Case

9. The Applicant in his Supporting Affidavit states he was the Branch Secretary of the Respondent's Kibabii University elected to serve five years. That he was aware the court in Nairobi ELRC in Petition No E026 of 2021 delivered Judgements on March 18, 2022 where it declared the Respondent's constitution registered on July 15, 2022 by Registrar of trade unions to be a nullity and unconstitutional and reinstated the constitution registered on the April 3, 2013.
10. That he raised the issue at the Annual delegates conference held on December 9, 2022 and how the judgment affected the operation of branches. That this did not augur well with current National Officials who want to maintain status quo under the repealed Constitution.
11. That after the ADC he received letter dated January 4, 2023 suspending him from office for 90 days pending the hearing (JA -1) .
12. That under both Constitutions the applicant can only be suspended after a hearing (JA 2 both Constitutions).



13. That the National Executive Council (NGC) had no primary mandate to primary to suspend him before recommendation by Members of Branch, Branch Executive Committee or Branch Annual General Meeting.
14. That the suspension was thus illegal and unprocedural and infringement of his rights.

Respondent's Case

15. The Applicant was suspended on January 4, 2023 following uncalled for misconduct during the Respondent's 16th Annual Delegates Conference meeting of December 9, 2022 where the Petitioner caused breach of peace by becoming unruly , disorderly and disrupted meeting .
16. That the misconduct had nothing to do with Petition No e026/2021 but on breach of peace and conduct unbecoming of official.
17. That the Respondent's NGC sitting on December 20, 2022 took great exception on his conduct and decided to suspend him pending appropriate disciplinary proceedings in line with its constitution. That the Applicant was yet to respond to complaints against him. That under Section 19 (g) of the Constitution the Respondent NGC has powers to undertake disciplinary action against any official of the Respondent including suspension. That the Applicant has not exhausted internal disciplinary mechanism if not happy with the suspension.

Written Submissions.

Applicant's submissions

18. The Applicant submits that any steps taken by the NGC must be duly reported to the ADC of the union for ratification at which conference appeals lie citing both constitutions . The letter of suspension did not refer to the ADC of the Respondent to ratify the decision of the ADC.
19. That under Article 3 of the constitution delegate means member nominated to represent union at the National delegates conference and that he attended the conference in that capacity and not as an individual.
20. That Article 19 (g) of the Respondent Constitution reads:- “ where a member as envisaged in (a) is an officer of the Union all disciplinary action shall be carried out on recommendation of NEC”.
Article 19 (5) reads: “ No member shall be suspended or expelled unless he/she has been given an opportunity to be heard or express himself in writing to such organ where matter is under consideration”.
21. That Article 47 of the Constitution provides for fair administrative action that is expeditious, efficient, lawful reasonable and procedurally fair.

Respondents submission

22. The Respondent submits that a litigant who seeks conservatory orders under rule 23 of the Constitution of Kenya Practice and procedure Rules (2013) must demonstrate 3 limbs as set out in the case of George Odera -us Lake Victoria Environment Programme & 3 Others (2015) eKLR being:-
 - a. He has a prima facie case .
 - b. Unless the conservatory order is granted he is likely to suffer prejudice or injury as a result of violation or threatened violation of his constitutional right or constitution .



- c. It would be in the Public Interest to grant the order.
23. That the Applicant has not demonstrated a *prima facie* case as defined in *Mrao Ltd -vs- Frist American Bank of Kenya Ltd & 2 Others* (2003) eKLR to wit:- “it is a case which, on the material presented to the court, a tribunal directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.” That the petitioner does not meet threshold in Anarita Karimi Njeru Case.
24. That Article 19 (g) of the Respondent’s Constitution the NGC has powers to undertake disciplinary action against any official of the Respondent including suspension and the NGC was executing its mandate under letter of suspension of Applicant of January 4, 2023.
25. That the Applicant has not exhausted the internal dispute resolution mechanisms available to him.
26. The Respondent further relied on decision in *Center for Rights Education & Awareness (CREAW) and another -vs- Speaker of the National Assembly & 2 Others* (2017) eKLR to effect that the Petitioner seeking conservatory Orders must satisfy the court of his right being under threat of violation or being violated unless the conservatory order is granted as the same is meant to preserve the subject matter pending hearing and determination of the petition.

Decision

27. The letter of suspension dated January 4, 2023 gave reason of the suspension to be unruly behavior at proceedings of the ADC and stated that the NGC had suspended the Applicant from office of branch Secretary for a period of 90 days from date of the letter to allow time for him to be heard.
28. The Applicant stated reasons he was suspended to be having raised issue of how the judgement in Nairobi Petition No E026/2021 affected the branches. There was no evidence under the replying affidavit to rebut his explanation.
29. The Applicant stated the suspension was in violation of the Respondent’s Constitution Articles 19. The Respondent submits the Applicant was suspended under Article 19 (g) of their constitution. The said clause reads:- ‘where a member as envisaged in (a) is an officer of the Union all disciplinary action shall be carried out by the NGC on recommendation by NEC’.
30. Clause 19 (a) of the Respondent’s constitution reads:- “an ordinary member may face administrative action including suspension and or expulsion from the union or as may be determined by BAGEM/ BSGM on the recommendation of the BEC”. It thus follows that the NGC can only act on recommendation of NEC.
31. Clause 19 (f) of the Respondent’s constitution provides for hearing or expression in writing before suspension of a member. There was no compliance with the clause before the suspension of the applicant.
32. On *prima facie* basis the court finds that the suspension letter was issued before the hearing or opportunity being granted to the Applicant to express himself on the allegation and further the NGC acted without NEC recommendation as provided for under Article 19 of its constitution. The court finds that the suspension for 90 days was extreme and given without fair administrative action. The Respondent failed to comply with its own constitution.
33. The court finds that the Applicant has met the 3 limbs for grant of conservatory orders as stated in *George Odero* case(supra) has he demonstrated a *prima facie* case as found above and was elected for term of 5 years thus will be prejudiced by the continued illegal suspension.



34. In conclusion the Application dated January 12, 2023 is allowed staying the decision of Respondent of December 20, 2022 under letter dated January 4, 2023 and the suspension of Application as Secretary KUSU – KIBABII University is lifted pending hearing and determination of the Petition.
35. Costs of the Application to the Applicant.
36. Parties to take direction for hearing of the Petition .
37. It is so ordered.

DATED , SIGNED AND DELIVERED AT BUNGOMA THIS 14TH APRIL, 2023.

JEMIMAH KELLI,

JUDGE.

In the presence of:-

Respondent: Khisa Advocate

Applicant: In person

Court Order:

Pre- trial direction for Petition on 24th April, 2023

It is so ordered.

JEMIMAH KELLI,

JUDGE

