



**Mwaniki v Kenya Union of Food & Allied Workers Union & another (Employment and Labour Relations Petition 1 of 2021) [2023] KEELRC 852 (KLR) (13 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 852 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
EMPLOYMENT AND LABOUR RELATIONS PETITION 1 OF 2021**

**ON MAKAU, J  
APRIL 13, 2023**

**BETWEEN**

**CHARLES NJOGU MWANIKI ..... PETITIONER**

**AND**

**KENYA UNION OF FOOD & ALLIED WORKERS UNION ... 1<sup>ST</sup> RESPONDENT**

**BONFACE KAVUVI ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The suit herein is contained in the Amended Petition dated June 15, 2021. The facts are that by a letter dated September 25, 2020 the Registrar of trade unions directed all the trade unions in Kenya to hold branch and national elections of officials between January 4, 2021 and August 30, 2021. Accordingly, through a letter dated November 30, 2020, the 2<sup>nd</sup> Respondent (General Secretary of the 1<sup>st</sup> Respondent) directed the branch secretary Nyeri branch of the union to convene a branch general meeting to elect branch officials among other businesses.
2. On December 9, 2020, the branch general meeting slated for January 10, 2021. In accordance with Rule 26(f) of the union's constitution, the petitioner wrote to the General Secretary, applying to be allowed to contest at the said elections as the branch secretary Nyeri. He further paid the required nomination fees of Kshs 100,000.00 to the union in accordance with Rule 26(f) (i) of the union constitution. The fees was paid into the union's bank account number 0941822290.
3. The respondents failed to issue the petitioner with the nominations forms to enable him to secure the required 275 signatures from supporters. Further the respondents failed to acknowledge receipt of the nomination fees and also failed to notify him whether or not he had been cleared to contest in the January 10, 2021 elections. His efforts to get clearance were thwarted when the General Secretary told him that he would not be cleared to contest in the elections because during the previous elections, he filed Cause No 252 of 2016 to challenge irregularities in the union elections.



4. In view of the foregoing matters, the petitioner brought this petition on January 6, 2021 alleging that the failure by the respondents to clear him to contest in the elections was punishment to him for filing the 2016 case and therefore they had violated his constitutional rights. He prays for the following reliefs:-

- i. A declaration that failure by the respondents to issue the petitioner with official nomination fee payment receipt as well as prescribed nomination forms is an affront to his right to participate in the branch elections as espoused under article 41 of the Constitution of Kenya as well as Rule 26(f) of the 1<sup>st</sup> Respondent's Constitution.
- ii. An order of mandatory injunction compelling the respondents to acknowledge the sum of Kshs 100,000.00 paid by the petitioner in accordance with rule 26(f) (i) by issuing him an official receipt.
- iii. A declaration that the purported elections of the Nyeri branch officials of the 1<sup>st</sup> respondent conducted on January 10, 2021 did not only contravene the clear orders of this Honourable Court made on January 7, 2021 but also infringed the petitioner's rights enshrined under the Constitution and is therefore null and void.
- iv. An order directed at the Registrar of Trade Unions directing her to deregister the returns of the purported elections of the 1<sup>st</sup> respondent's Nyeri branch Officials as regards the office of branch secretary.
- v. An order directing the respondents to convene a special General meeting of the members of Nyeri branch for the purposes of electing a Branch Secretary.
- vi. An order of mandatory injunction compelling the 2<sup>nd</sup> Respondent to issue the petitioner with prescribed nomination forms to enable him collect signatures of his supporters as required under rule 26(f)(iii) so as to participate in the said election.

In The Alternative To The Above

- vii. General damages to the petitioner for the infringement of his right to participate in the above elections as a candidate.
- viii. Refund of the sum of Kshs 100,000.00 paid by the petitioner.
- ix. Costs of these proceedings.

5. Pending the determination of the petition the petitioners applied for, and obtained conservatory orders halting the Nyeri branch elections. The respondents went ahead to hold the elections but the Registrar of trade union refused to register the elected officials on the basis of the said court order.

6. The Respondents opposed the petition vide Replying Affidavit sworn on October 27, 2022 by the second respondent. In brief the facts pleaded in the petition are not contested save that the respondents denies any wrong doing against the petitioner. It is the respondents' case that the union official were closed for Christmas holiday from December 23, 2020 to January 4, 2021, that instead of the petitioner going for the nomination forms, he wrote an email on January 5, 2021 claiming that the union had failed to provide him with the nomination forms; that the union responded vide a letter the same date calling him to go for the nomination forms; that instead, on January 8, 2021, the petitioner



served a court order asking to be issued with nomination forms; that on the same date, the union emailed the nomination forms to the petitioner; that he never presented the same back as required by the Constitution and he never attended the general meeting for the election; and that the elections proceeded and new officials were elected.

7. The respondents' case is that the court order directed them to issue nomination forms to the petitioner and they complied and it is their further case that after the election the Registrar of trade unions registered the new officials as per Section 35 (4) of the Labour Relations Act. Therefore, they prayed for the suit to be dismissed since the petitioner has failed to demonstrate which of his constitutional rights have been infringed.

### Submissions

8. The petitioner submits that he met the criteria set under Rule 26 (f) of the Unions Constitution for any elective position. He reiterated that he paid Kshs 100,000.00 to the Union's Account and wrote a letter to the respondent on December 23, 2020 indicating his intention to contest for the position of branch secretary. However, the respondents refused to comply with Rule 26(f) (i) and (ii) of the Constitution.
9. As a result, the petitioner submits that he was prevented from collecting the 275 signatories from his supporters as required by Rule 26 (f) (iii) of the Constitution. He further submitted that when the nomination forms were sent to his advocate in Nairobi on January 8, 2021 at 2.45pm, it was not possible for him, being based in Nyeri, to get the forms and collect the required signatures in time before the elections on Sunday January 10, 2021.
10. It is therefore submitted that the petitioner was denied the necessary facilitation and thereby he was locked out of the elections. Further, the failure to facilitate the petitioner in his attempt to contest the said position as required under the union constitution violated his right under Article 36, 41 and 47 of the Constitution of Kenya and the elections were not free and fair.
11. For emphasis, reliance was placed on Albert Chivini Muirotsi & 7 others v Registrar of Trade Unions & others, Cause No 34 of 2016 where the court held that elections for union leadership must be regulated by the law and be based on the existing union constitution.
12. In conclusion it is submitted that the manner in which the respondents handled the petitioner's attempt to contest for elections was irrational, unfair and illegal as it was contrary to the statute and therefore the orders sought are warranted, including issuance of receipt for the nomination fees of Kshs 100,000.00, nullification of the elections held on January 10, 2021, deregistration of returns at the Registrar of Trade Union, order for special General meeting, Nyeri to elect branch secretary, and issuance of nomination forms for collection of signatures. Alternatively the petitioner be awarded general damages for infringement of his right to participate in the elections, refund of Kshs 100,000.00 nomination fees and costs.
13. In response, the respondents maintained that they facilitated the petitioner to participate in the elections but he failed to participate in the same. Therefore, they denied the alleged violation of the petitioner's constitutional rights and maintained that the petitioner has not demonstrated how the violation of his rights was done.
14. Further, the respondents submitted that under the union constitution, nomination fees is non-refundable and therefore the claim for refund of the same cannot be allowed.
15. Finally, the respondents submitted that the court cannot issue any orders in this suit because the Registrar is not a party to the suit. In their view, the petitioner should have filed appeal before the



Registrar of Trade Unions within 30 days from the date of the election under Section 30 of the [Labour Relations Act](#). They urged the court to dismiss the petition with costs as the elections were free and fair.

### **Determination**

16. The issues for determination are: -
- a) Whether the petitioner complied with the requirements for contesting in the election on January 10, 2021.
  - b) Whether the respondents discharged their obligation of facilitating the petitioner to contest for the position of branch secretary, Nyeri.
  - c) Whether the elections were free and fair.
  - d) Whether the reliefs sought are merited.

### **Compliance by petitioner**

17. Rule 26(f) of Union Constitution provides that: -
- “26(f) any person not actually engaged or employed in an industry or occupation with which the union is directly concerned may contest the office of the branch secretary provide that: -
- i. Such a person shall have paid a sum of Kenya shillings one hundred thousand (Kshs 100,000.00) by a Bankers cheque paid to the main Account and official receipt issued and letter of acknowledgment issued by the secretary general.
  - ii. Such a person shall have made an application in writing to the secretary general at least two weeks before the date of the Branch general meeting or Branch special general meeting.
  - iii. Such a person shall have completed the prescribed union Nomination form supported by at least Two Hundred and Seventy five (275) fully paid up members from various industries in order to be eligible for the election.
  - iv. The candidate who meets the above requirements shall be notified by the Secretary General to participate in the election of at least one week before the date of the Branch General meeting of the members.
18. The petitioner has adduced evidence to show that he paid the nomination fees of Kshs 100,000.00 by a direct deposit to the respondents Account at ABSA Bank No 0941822290 on December 23, 2020. On the same date he also applied to contest for the position of branch secretary, Nyeri *vide* a letter dated December 23, 2020 to the General Secretary and the same was delivered on the same date and stamped by the office. To that extent the petitioner complied with Rule 26(f) (i) and (ii) by paying the nomination fees and submitting his application to contest 2 weeks prior to the election date.
19. The rest of the requirements were all dependent on facilitation by the General Secretary of the Union, namely issuance of official receipt for the nomination fees and letter of acknowledgment of the payment. The other requirement is completing the prescribed union nomination forum duly supported by at least 275 members from various industries as per Rule 26(f) (iii) of the [Constitution](#). Again that requirement could only be met upon the General Secretary issuing the petitioner with the prescribed nomination forms, and in good time before the election.
20. The last requirement is a notification by the General Secretary that a candidate has met all the requirements to participate in the election which must be done at least one week before the date of



the branch elections. In this case the claimant met all the requirement except where he was prevented by the Respondent.

### **Respondents' obligation**

21. From the aforesaid Rule 26(f) of the union Constitution, the union, through its General Secretary was obliged to issue official receipts for the nomination fee paid by the petitioner and with a letter of acknowledgment. He was also obliged to issue the petitioner with the prescribed nomination forms. Finally, he was obliged to notify the petitioner that all the requirements of Rule 26(f) had been met at least one week before the date of the election.
22. The respondents failed to comply with all the above requirements. The General Secretary failed to issue an official receipt for the nomination fees and to write an acknowledgment letter as required under Rule 26(f) (i). He also failed to issue the petitioner with the prescribed nomination form within the required form to enable him to seek support from the required 275 members of the union as required under Rule 26 (f) (iii). Instead the respondents closed office for Christmas holiday until when it was 5 days to the branch elections.
23. It would appear that the respondents acted negligently or deliberately, to technically, lock out the petitioner from the election. Even with court intervention, the respondents did not comply with Rule 26 (f) (i). They also issued the nomination forms too late giving the petitioner less than 2 days to complete the form and secure the support of 275 members. In the circumstances the General Secretary could not issue a notification of compliance because the nomination form was not completed 7 days before the elections.

### **Free and fair election**

24. Free and fair elections presuppose that both the process, and the action of election is done fairly and within the four corners of the law and the union's constitution. There is no denial that elections took place on January 10, 2021. The dispute is that the process was marred with unfairness and breach of Rule 26 (f) of the Union's Constitution.
25. The said breaches have been highlighted above, which in this courts view, rendered the election of 1<sup>st</sup> respondent's Nyeri Branch secretary elections voidable for being not free and fair. The question that arises is whether any substantively fair elections results can result from an unfair process which violates the law? The answer is a resounding No Consequently, I agree with the petitioner that the election of the Union's Nyeri branch secretary was not free and fair because the union deliberately or negligently failed to facilitate the petitioner to contest for the position after paying the requisite nomination fees of Kshs 100,000.00.

### **\*Reliefs**

26. The respondents submitted that the court cannot issue the orders sought because the procedure for challenging the election is provided under Section 30 of the *Labour Relations Act* being an appeal to the Registrar of Trade Union. The petitioner is however of the view that the election had been suspended pending determination of this petition and therefore the election was a null and void for being done in contempt of court.



27. I have considered the above submission and wish to state that Section 34(4) of the Act give jurisdiction to his court to determine election disputes arising from election of Trade Union officials. It stated:
- “That disputes arising from or connected directly or indirectly to elections held under the section, may be referred to the Industrial Court.”
28. I have also considered the court order issued on January 7, 2021 which read as follows in part:
- “3. The Respondents may issue the claimant with the nomination forms to enable the claimant to vie for the position of Branch Secretary, Nyeri.
4. In default of Order 3 the Respondents Nyeri Branch General meeting and/or election of Nyeri branch officials, January 10, 2021 stands suspended, pending hearing of the application inter partes.”
29. The respondents have demonstrated that they complied with the said court order the same day it was served on them by issuing the petitioner with the requisite nomination forms. The compliance with the order meant that the alternative order of suspension of the General meeting and/or election of branch officials was overtaken by events. It also meant that, except for issuance of an official receipt for the Kshs 100,000.00 nomination fees, the whole petition had been spent.
30. However, the petitioner gave new life to the petition when he amended it to impugn the election, which orders were not pleaded in the initial petition filed. Having made a finding of fact that the respondents failed to facilitate the petitioner to vie for the position of Branch secretary after paying the requisite fees and making the application under Rule 26(f) of Union’s Constitution, I make declaration that the election of the branch secretary of 1<sup>st</sup> Respondent’s Nyeri Branch on January 10, 2021 was in breach of the Constitution of Rule 26(f) of the Union’s constitution and is therefore null and void.
31. For the same reason an order is issued to directing the Registrar of Trade Union to forthwith deregister the returns of the purported elections of 1<sup>st</sup> Respondent’s Nyeri Branch officials with regard to the office of the Branch secretary.
32. In view of the foregoing, the respondents are directed to convene a special General meeting within 90 days of this judgment. In that regard the respondents are directed to issue the petitioner with official receipt for the nomination fees of Kshs 100,000.00 paid on December 23, 2021 and the letter of acknowledgment as per Rule 26 (f) (i) of the Union Constitution. The respondents are further directed to conduct free and fair election, within the stated period, by complying with Rule 26(f) of the Union’s Constitution.
33. In conclusion, I enter judgement for the petitioner in the following terms: -
- a) The election of 1<sup>st</sup> respondents, Nyeri branch secretary held on January 10, 2021 is hereby nullified for failure to comply with Rule 26(f) of the Union’s Constitution.
- b) The Registrar of trade union is directed to forthwith deregister the returns of the 1<sup>st</sup> respondent’s Nyeri branch election of branch officials held on January 10, 2021 with respect to the office of the Branch Secretary only.
- c) The respondents are directed to convene a special General meeting of the 1<sup>st</sup> Respondent’s Nyeri Branch, within 90 days of this judgment, for purposes of electing its branch secretary in accordance with Rule 26(f) of the Union’s Constitution.



d) The respondents are directed to issue the petitioner with an official Receipt for the nomination fees of Kshs 100,000.00 paid on December 23, 2021 and a letter of acknowledgment as required under Rule 26(f) (i) of the Constitution.

e) The petitioner is awarded costs of the suit plus interest.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 13TH DAY OF APRIL, 2023.**

**ONESMUS N MAKAU**

**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 April 15, 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N MAKAU**

**JUDGE**

