



Ndungu v Union of Kenya Civil Servants & another; Registrar of Trade Unions (Interested Party) (Petition E224 of 2022) [2023] KEELRC 1132 (KLR) (11 May 2023) (Ruling)

Neutral citation: [2023] KEELRC 1132 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E224 OF 2022**

L NDOLO, J

MAY 11, 2023

BETWEEN

PAUL KARIUKI NDUNGU PETITIONER

AND

UNION OF KENYA CIVIL SERVANTS 1ST RESPONDENT

TOM MBOYA ODEGE 2ND RESPONDENT

AND

REGISTRAR OF TRADE UNIONS INTERESTED PARTY

RULING

1. By his Petition dated 28th December 2022, the Petitioner pursues a declaration that he is entitled to hold office and complete his term as the National Organizing Secretary of the 1st Respondent.
2. Alongside the Petition, the Petitioner filed an interlocutory application seeking interim orders staying implementation of General Circular No 226 of 2022 dated 14th December 2022, whose effect was to remove him from office.
3. Subsequent to this, the Respondents filed a Notice of Preliminary Objection dated 17th January 2023, challenging the jurisdiction of this Court to deal with the matter. It is this Objection that is the subject of this ruling.
4. The Objection is based on the following grounds:
 - a. The Employment and Labour Relations Court lacks jurisdiction to deal with this matter as the Union Constitution has an internal dispute resolution mechanism to deal with matters of such nature as the ones raised in the Petition;



- b. The suit offends Article 16(3)(ii) of the Union Constitution which provides for internal dispute resolution mechanism available to union officials, members or group of members.
5. The parties urged their respective positions by way of written submissions.
- The Respondents submit that both the Petition and the Notice of Motion are prematurely before the Court because the Petitioner has not exhausted the internal dispute resolution mechanism provided in the Union Constitution.
6. The Respondents submit that the doctrine of exhaustion is grounded on Article 159(2)(c) of the Constitution of Kenya which provides that:
- (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles-
- (a) ...;
- (b) ...;
- (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
7. The Respondents further rely on Section 9(2) and (3) of the Fair Administrative Action Act which requires courts to postpone judicial action until exhaustion of internal dispute resolution mechanisms. Under Section 9(4) of the Act, a party may make an application to be exempted from this requirement. Such a party must however demonstrate exceptional circumstances that merit exemption from the exhaustion rule (see United Millers Limited v Kenya Bureau of Standards, Director, Directorate of Criminal Investigations & 5 others [2021] eKLR).
8. The Petitioner submits that the exhaustion requirement is not applicable in his case in light of the constitutional issues raised under Articles 20(1), 22(1), 27(3), 41, 47 and 50. He states that the forum proposed by the Respondent for resolution of the dispute is unable to determine constitutional questions.
9. In advancing his case, the Petitioner relies on the decision in William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR where exceptions in the application of the exhaustion doctrine were outlined as follows:
- “...The first principle is that the...Court may, in exceptional circumstances consider and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it...
- The second principle is that the jurisdiction of courts to consider valid grievances from parties who lack adequate audience before a forum created by statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted.”
10. In his pleadings filed in court, the Petitioner lists a number of constitutional provisions. He however fails to plead with precision, how these provisions have been violated.



11. The Respondents referred the Court to the decision in *Dhow House Limited v Kenya Power and Lighting Company* (Constitutional Petition No E058 of 2021) [2022] KEHC 11840 (KLR) where Mativo J (as he then was) stated thus:

“...Mere recitation of Articles of *the Constitution* is not enough. The Petition must demonstrate how the Articles or fundamental rights have been violated or threatened...”

12. The dispute now before me has to do with the Petitioner’s eligibility to continue serving as the National Organizing Secretary of the 1st Respondent. To my mind, this is an upfront dispute between the Union and its official, which ought not to be elevated to a constitutional issue.

13. The Union Constitution, at Article 16(3)(ii), provides for an internal dispute resolution mechanism, which the Petitioner ought to have exhausted before coming to court.

14. In the result, I agree with the Respondents that this matter is prematurely before the Court and proceed to strike out both the Petition and Notice of Motion dated 28th December 2022.

15. Each party will bear their own costs.

16. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 11TH DAY OF MAY 2023

LINNET NDOLO

JUDGE

Appearance:

Mr. Andande for the Petitioner

Mr. Odunga for the 1st Respondent

Mr. Mamboleo for the 2nd Respondent

