



**Kenya Medical Practitioners’ Pharmacists and Dentists Union & 2 others v Registrar of Trade Unions & 2 others; Commissioner for Labour & 5 others (Interested Parties) (Appeal E087 of 2022 & Petition E194 of 2022 (Consolidated)) [2023] KEELRC 2025 (KLR) (4 August 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2025 (KLR)

**REPUBLIC OF KENYA**

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

**APPEAL E087 OF 2022 & PETITION E194 OF 2022 (CONSOLIDATED)**

**B ONGAYA, J**

**AUGUST 4, 2023**

**BETWEEN**

**KENYA MEDICAL PRACTITIONERS’ PHARMACISTS AND DENTISTS UNION ..... PETITIONER**

**AND**

**REGISTRAR OF TRADE UNIONS ..... RESPONDENT**

**AND**

**COMMISSIONER FOR LABOUR ..... INTERESTED PARTY**

**KAUGIRIA ALEXANDER THURANIRA ..... INTERESTED PARTY**

**STEPHEN OMONDI OLOO ..... INTERESTED PARTY**

**MAGARE GIKENYI BENJAMIN ..... INTERESTED PARTY**

**WILLIAM WATURU MURIUKI ..... INTERESTED PARTY**

**AS CONSOLIDATED WITH**

**PETITION E194 OF 2022**

**BETWEEN**

**DR EDMOND NABUYIA ..... 1<sup>ST</sup> PETITIONER**

**DR SIMON KIMANI WAWERU ..... 2<sup>ND</sup> PETITIONER**

**AND**

**COMMISSIONER FOR LABOUR ..... 1<sup>ST</sup> RESPONDENT**



**KENYA MEDICAL PRACTITIONERS PHARMACISTS AND DENTISTS  
UNION ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**REGISTRAR OF TRADE UNIONS ..... INTERESTED PARTY**

**KAUGIRIA ALEXANDER THURANIRA ..... INTERESTED PARTY**

**MAGARE GIKENYI BENJAMIN ..... INTERESTED PARTY**

**STEPHEN OMONDI OLOO ..... INTERESTED PARTY**

**WILLIAM WATURU MURIUKI ..... INTERESTED PARTY**

### **RULING**

1. The appellant filed a notice of motion dated March 6, 2023 through Julius Juma & Co Advocates. The application is made pursuant to the provisions of section 5 of the *Judicature Act*, sections 12 and 20 of the *Employment and Labour Relations Act* and all enabling provisions of the law. The applicant prayed for orders as follows:
  - a. (spent)
  - b. That this honourable court does hereby find Ms Beatrice Mathenge, the Registrar of Trade Unions, in contempt of its judgment delivered on February 10, 2023.
  - c. That this honourable court does hereby issue summons to Ms Beatrice Mathenge, the Registrar of Trade Unions, to attend court in person and show cause why she should not be punished for acting in contempt of the judgment delivered in this matter on February 10, 2023.
  - d. That this honourable court does hereby issue an order committing Ms Beatrice Mathenge, the Registrar of Trade Unions, to civil jail for six months for acting in contempt of the judgment delivered in this matter on February 10, 2023.
  - e. That costs of this application be borne by the contemnor in person.
2. The application is based upon the annexed affidavit sworn on March 7, 2023 by Dr Davji Atella, the appellant's Secretary General, and upon the following grounds:
  - a. That this honourable court delivered its judgement in this matter on February 10, 2023.
  - b. That in the said judgment, this honourable court directed the Registrar of Trade Unions to register the officials of the appellant elected on June 11, 2022 and communicated to the Registrar vide form Q dated June 13, 2022.
  - c. That following the said judgment, the appellant wrote to the Registrar vide letters dated February 14, 2023 requesting for registration of its officials in compliance with the judgment of the court.
  - d. That further, on March 1, 2023, the appellant, through their advocates, wrote to the Registrar asking for compliance with the judgment of court. In their letter dated 1<sup>st</sup> March, aforesaid, the appellant forwarded to the Registrar a certified copy of the judgment, decree and a copy of form Q dated June 13, 2023.



- e. That despite the above efforts to have the respondent comply with the judgment and decree of this court, the Registrar has blatantly refused to comply with the same.
  - f. That both the appellant and their advocates have made several trips to the offices of the respondent to persuade her to comply with the judgment of this court but those efforts have gone to naught.
  - g. That it is in the interest of justice that this court stamps its authority by punishing the contemnor so as to ensure that its judgments and orders are respected.
3. There is no response on record from the contemnor in opposition to the contempt application dated March 6, 2023.
  4. The petitioners also filed the notice of motion dated March 8, 2023 brought under the provisions of article 159 (1) (2) of the *Constitution of Kenya, 2010*, Sections 1A, 3A, 63 (e) and 80 (a) of the *Civil Procedure Act*, rules 33 and 34 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* and all enabling provisions of the law. The petitioners prayed for orders:
    - a. (... Spent).
    - b. That the judgment/decree/orders of the honourable court delivered on the February 10, 2023 be reviewed and or set aside so as to meet the ends of justice.
    - c. That the court be pleased to issue any other appropriate order including and not limited to an alternative order of review of the judgment/decree/orders of the honourable court delivered on February 10, 2023 by way of allowing parties to file responses and submissions to the application dated January 6, 2023 and the petition.
    - d. That costs of the application be provided for.
  5. The petitioners' application was based on the grounds on the face of the motion and as further supported by the affidavit of Dr Edmond Nabuyia sworn on March 8, 2023. The grounds to support the application were as follows:
    - a. Orders delivered on December 7, 2022 are completely different in form and substance from the alleged directions appearing in the judgment and written proceedings.
    - b. The court had issued very clear directions for petitioners to file and serve submissions together with further affidavit if need be with regard to the petition within 7 days and thereafter other parties serve and file their corresponding submissions within further seven days and that the documents, including written submissions, with regard to the application for recusal be exchanged and filed between parties within 30 days and that thereafter, the court would deliver the ruling on application for recusal of the Judge on notice. And thus, the extraneous directions appearing in the judgment and written proceedings to the effect that were the court to dismiss the application for its recusal, it would contemporaneously proceed to deliver judgment and other rulings on any other application in the matter is completely untrue.
    - c. The written proceedings and the extraneous directions in the were due to the conflict of interest by the trial court which was on transfer effective March 1, 2023 and preceded by annual leaver and Christmas vacation. The said ingenious fabrication lead to the trial court taking away the parties fundamental rights to fair hearing and administrative action by denying them an opportunity to file pleadings, responses, submissions and highlighting and its place delivered judgment by ambush.



- d. The notice for delivery of the ruling from the court through emails to parties and cause list of the material date on February 10, 2023 on delivery of the impugned judgment clearly indicated that what was to be delivered was the ruling and nothing pointed out to possibility of delivery of the judgment.
  - e. The applicants have requested the online electronic proceedings of the court for December 7, 2022 in the matter so as to play at the hearing of the instant application to show the purported directions on delivery of the judgment and other rulings are an afterthought fabrication that apart from being a ground for review of the judgment, amounts to important new information that was not available and necessary during the proceedings of December 7, 2022.
  - f. There is a fundamental error or mistake on record that the Commissioner of Labour's replying affidavit sworn on August 22, 2022 annexure CL-5 is an election report on conduct of the elections held on June 11, 2022 and not election results of the same. The applicant's case is that the said exhibit is an election result and not an election report on the said elections. The court had made the finding in circumstances that the duty judge had on January 6, 2023 made orders that were disregarded.
  - g. The court in the judgment directed the Registrar of Trade Unions to register the union officials pursuant to directions of June 11, 2022 when the elections had on their face been conducted by the union officials themselves and who were the candidates and not by the Commissioner of Labour despite the orders directing the Commissioner of Labour to conduct the elections thus, "An order is hereby issued directing the 2<sup>nd</sup> respondent (Commissioner of Labour) to organize and conduct fresh elections in strict conformity with the constitution of the 1<sup>st</sup> respondent and the applicable union bylaws within 45 days of the ruling." Instead of the Commissioner of Labour conducting the elections as ordered the Commissioner allowed union officials to conduct the elections in which they were themselves candidates per the letter dated June 13, 2022 received by the Registrar of Trade Unions that the union KMPDU had conducted their elections as per the court order dated December 15, 2021 on June 11, 2021 between 8.00am to 5.00pm and that the list of newly elected officials was attached.
  - h. The other error or mistake on record is that the court relied on illegal and irrelevant Trade Unions Elections (Election Petition) Rules, 2014 to summarily dismiss the petition that it was not filed within 7 days after elections held on June 11, 2022. The Rules were illegal because they were promulgated by the Cabinet Secretary without parliamentary approval per the [Statutory Instruments Act 2013](#) and they are null and void. They were a law that did not exist. The Parliament and the Attorney General have confirmed that the Rules were never tabled before the Parliament. In event the current petition was not an election petition but was a constitutional petition under the rule 17 of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013](#) and Rule 17 of the [ELRC Rules](#). The [Trade Unions Elections \(Election\) Rules, 2014](#) could not oust those Rules.
  - i. The refusal to recuse by the trial Judge did not affect the fact of the alleged conflict of interest.
  - j. The certified typed judgment was availed on March 8, 2023 and the application filed without delay on March 8, 2023 being two weeks from the date of delivery of the judgment on February 10, 2023.
6. In its response to the application the appellant filed a replying affidavit sworn by Dr Davji Atella, its Secretary General, on June 20, 2023 in which he avers that this Honourable Court lacks jurisdiction to entertain the application for review dated March 8, 2023 because an appeal having been lodged in



the Court of Appeal together with an application for stay of execution under Rule 5 (2) (b) of the [Court of Appeal Rules](#).

7. It is further argued that the applicant in the application dated March 8, 2023 has failed to meet the threshold for grant of the orders for review as sought in their application.
8. That the applicant is estopped from claiming that they were condemned unheard having failed to file their respective submissions on the consolidated petition as directed by this Honourable Court on December 7, 2022.
9. In conclusion the deponent urged this Honourable Court to find the application dated March 8, 2023 devoid of merit and to dismiss it with costs.
10. In a brief rejoinder, the petitioners (applicants) filed a supplementary further affidavit sworn by Dr Edmond Nabuyia, the 1<sup>st</sup> petitioner herein, on June 28, 2023 in which he stated that the Notice of Appeal dated February 20, 2023 filed by the 2<sup>nd</sup> Interested Party has since been withdrawn under Rules 81 and 52 of the [Court of Appeal Rules](#). It is on this basis that the petitioners argue that there is no pending appeal filed as contended and thus urging this Court to consider its application for review and allow it as prayed.
11. Parties thereafter filed their respective submissions to the two applications which are being determined together. The Court has considered all the material in that regard and returns as follows.
12. To answer the 1<sup>st</sup> issue, it is clear that on December 7, 2022 the Court directed parties to file submissions in 30 days on both the petition and the application. The Court then directed that ruling would be on notice. The Court further directed that should the application not succeed the Court would go ahead and do the judgment on the consolidated appeal and petition. If the application succeeded, the Court would do only the ruling. Now the judgment was delivered on February 10, 2023. The time allowed to file the submissions had lapsed on or around January 7, 2023. The applicant has not given any reason or good ground why they failed to comply with the Court's direction to file submissions as had been directed. That self-inflicted failure to comply with the Court's directions was in clear failure to cooperate and comply with the directions for the expeditious, just and proportionate determination of the disputes brought to the Court as envisaged in section 3 of the [Employment and Labour Relations Court Act](#). Looking at the clear directions by the Court given on December 7, 2022, it would appear that instead of reflecting at the failure to comply with the Court's directions, the applicants set out to attack the trial Judge. That conduct appears distasteful and outside the obligations imposed upon the litigants under the said section 3 of the Act. While making that finding, the Court ordered (and allowing the applicants' application in that regard) that the verbatim transcribed proceedings of December 7, 2022 be availed to the parties as duly typed and certified. The certified proceedings are on record. The final orders and directions by the Court are as follows: "Parties to file submissions on both petition and application for recusal within 30 days. The Court will deliver a ruling on the application on notice. Should the application not succeed the Court will go ahead and do the judgment on the consolidated appeal and petition. Should the application succeed, the Court will do only a ruling."
13. To answer the 2<sup>nd</sup> issue, there is no doubt that an appeal had been preferred against the Judgment in the instant matter. The Court returns that once the appeal was preferred, the power to elect to prefer review or appeal was thereby exhausted. It is immaterial that the appeal was subsequently withdrawn. Upon that ground alone, the Court returns that with respect to the instant application for review, an appeal was preferred and legal processes cannot be a ping pong in clear breach of the settled rules of procedure. The application for review must fail upon that ground as the application for review was an abuse of court process. That conduct must as well be frowned against as undermining section 3 of the [Employment and Labour Relations Court Act](#) which imposes upon parties the obligation to



comply with the Court's directions as well as the Court's rules of procedure – without which it will be impossible to move wheels of justice proportionately, expeditiously and justly. The notice of appeal had been filed by Dr Magare Gikenyi J Benjamin and there is no order before this Court on withdrawal of the appeal. The notice of appeal had been filed on February 20, 2023 and it was before filing of the review application on March 8, 2023. Thus, the application for review was filed at a time the notice of appeal had already issued. By that election by one of the parties to the proceedings, the dispute effectively moved to the Court of Appeal and the application for review was an abuse of court process.

14. To answer the 3<sup>rd</sup> issue, the Court returns that the matters the applicant calls errors or mistakes in the judgment are actually an argument that the Court was wrong in its opinion and reasoning. Such are not established as to constitute a ground for review but they are matters that should properly go on appeal. The applicants have failed to show any known ground for review. The application must fail. The submissions made by learned Deputy Litigation Counsel Mr Daniel Oure for the Honourable Attorney General on behalf of the Registrar of Trade Unions and the Commissioner for Labour are upheld. It should also be clear that the refusal of the trial Judge to recuse cannot be a valid ground for review but may be a matter that the applicants may have been at liberty to appeal if at all dissatisfied.
15. Turning to the application for contempt, the same is not opposed. The order was that the Registrar of Trade Unions was directed to register the appellant's officials as set out in form Q submitted to the office for registration on June 13, 2022. While there is no reason to doubt that the Registrar of Trade Unions was served and repeatedly required to comply per the affidavits filed for the applicant, there was no compliance in that regard. Accordingly, the Court finds that the Registrar is in contempt of Court for failing, repeatedly so, to comply with order directed at her in the judgment delivered herein.

In conclusion the two applications one for review and the other one for contempt are hereby determined with orders:

1. The application for review dated March 8, 2023 is hereby dismissed with costs in favour of the respondents in that application.
2. The application for contempt dated March 6, 2023 is hereby allowed with orders:
  - a. The Registrar of Trade Unions one Ms. Beatrice Mathenge is hereby found in contempt of the Court's Order in the Judgment delivered herein on February 10, 2023 by the Honourable Justice Maureen Onyango requiring her to register the appellant's officials as set out in form Q submitted to her office for registration on June 13, 2022.
  - b. The Honourable Deputy Registrar to issue and cause service of summons forthwith today for the said Registrar of Trade Unions one Ms Beatrice Mathenge to physically attend before the Recess Duty Judge on Wednesday August 9, 2023 at 9.00am or soon thereafter, at Milimani Commercial Court Building, as the matter will be called out before the recess Duty Judge to show cause why she should not be punished for acting in contempt of the Judgment delivered in this matter on February 10, 2023.
  - c. That costs of the application be paid personally by the contemnor. the holder of the office of the Registrar of Trade unions, one Ms Beatrice Mathenge.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 04TH AUGUST, 2023.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

