



Munderu & 5 others v Panyako the General Secretary, Kenya National Union of Nurses & another (Petition 6 of 2020) [2023] KEELRC 2610 (KLR) (19 October 2023) (Ruling)

Neutral citation: [2023] KEELRC 2610 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
PETITION 6 OF 2020
MA ONYANGO, J
OCTOBER 19, 2023**

BETWEEN

**AGNES WANGECI MUNDERU 1ST PETITIONER
GEORGE SHIVEKA 2ND PETITIONER
DAMON KWARAA 3RD PETITIONER
BENSON KIPKOROR BIWOTT'T 4TH PETITIONER
MUTUNGA L. KIOKO 5TH PETITIONER
RUTH MWIHAKI 6TH PETITIONER**

AND

**SETH PANYAKO THE GENERAL SECRETARY, KENYA NATIONAL UNION
OF NURSES 1ST RESPONDENT
KENYA NATIONAL UNION OF NURSES 2ND RESPONDENT**

RULING

1. There are two Applications for the court's determination. The first application is the one dated 13th August 2020. It filed by the Petitioners/Applicants and supported by the affidavit of Agnes Wangeci Munderu. The second application is dated 17th June 2021 and has been filed by the Respondents and is supported by the affidavit of the 1st Respondent.
2. In the application dated 13th August 2020, the Petitioners seek for orders that;
 - i. Spent



- ii. This Honourable Court be pleased to order and direct the Respondents to release pay outstanding NEC rebates and standing allowances of Kshs 1,260,000, Kshs 660,000 and Kshs 1,567,500 to the 1st, 2nd and 3rd Petitioners respectively within 14 days of order
 - iii. Costs of the Application be granted to the Applicants
3. The Application is based on the grounds that; -
- i. The 1st, 2nd and 3rd Petitioners are National Treasurer, National Deputy Treasurer and National Deputy organizing Secretary of the 2nd Respondent.
 - ii. That as officials of the 2nd Respondent, the 1st, 2nd and 3rd Petitioners are entitled to a standing allowance.
 - iii. That the Respondents have deliberately and maliciously failed and /or neglected to pay the 1st, 2nd and 3rd Petitioners their allowances as follows;
 - 1st Petitioner
 - a. Monthly NEC rebates /standing allowance
Last paid in November 2019, rate per month is Kshs 150,000 making it Kshs 1,200,000. (150,000 x 8 months, that is upto July 2020)
 - b. Monthly NEC airtime
Kshs 60,000 at the rate of Ksh 7,500 multiply by 8 months which is to July 2020
Total: Kshs 1,260,000
 - 2nd Petitioner
 - a. Monthly NEC rebates /standing allowance
Last paid in December 2019, rate per month is Kshs 75,000 making it Kshs 600,000(75,000X 8 months, that is upto July 2020)
 - b. Monthly NEC airtime
Kshs 60,000 at the rate of Ksh 7,500 multiply by 8 months which is to July 2020
Total: Kshs 660,000
 - 3rd Petitioner
 - a. Monthly NEC rebates /standing allowance
Last paid in December 2018, at the rate of Kshs 75,000 per month making it Kshs 1,425,000(75,000 x 19 months upto end of July 2020)
 - b. Monthly NEC airtime
Kshs 142,500 at the rate of Ksh 7,500 multiply by 19 months upto July 2020
Total: Kshs 1,567,500
 - iv. That the Respondent(s) have no justification to withhold the allowances due to the 1st, 2nd and 3rd Petitioners



- v. That the 1st Respondent on separate dates unilaterally instituted purported disciplinary charges against the 1st, 2nd and 3rd Petitioners and many other officials and has finally purported to unlawfully remove the above stated officials from office and is using the said removal as an excuse to withhold the allowance.
 - vi. That the said excuse is not tenable as the withheld allowances date back to 2018 and that the three petitioners are validly in office and can only be removed by the National Government Council – a supreme organ of the 2nd Respondent as per their constitution and until the Registrar of Trade Unions registers the changes and not the 1st Respondent as is being attempted in this case
 - vii. That the most current and valid list of officials from the Registrar of trade unions in respect of the 2nd Respondent have the three officials as bona fide officials in their stated capacities
 - viii. That this court should countenance the blatant abuse of office and violation of the 2nd Respondent's constitution
 - ix. That it is only just and fair that this court intervenes and ensures that the Petitioners' rights are not violated further.
4. That application is opposed. The Respondents filed a replying affidavit sworn on 14th September 2020 by Seth Panyako or the General Secretary of the 1st Respondent. In his affidavit, Mr Panyako avers that the application is unmerited for reasons that a rebate or an allowance is an amount of money that is only returnable after a specified official spends the same in doing official functions as properly sanctioned or assigned by the union organs or the general secretary as the union's authorized representative as per section 2 of the *Labour Relations Act*. He contends that the applicants have not demonstrated by way of tangible evidence what they did under whose authorization and how much they spent from their pockets to warrant them be eligible for refund of the monies so spent.
 5. The deponent further states that all the applicants have abdicated their responsibilities, remained defiant and disrespectful to the union leadership for no justifiable reason and have refused to invoke the internal mechanisms of the union to present their issues and that further, their intention is illegal and fraudulent as they don't want to work but to be refunded money in form of rebates. According to Mr Panyako, the applicants were later on expelled after their refusal to attend a properly convened NEC meeting in sheer arrogance and ignorance of the law and the provisions of *the constitution*. It was thus contended that no amount of rebates or allowances are payable at all since the applicants abdicated their duties and have since been expelled from the union as per the NEC resolution of 19th June 2020.
 6. In the Application filed by Respondents dated 17th June 2021 they seek the following orders:
 - i. That the court be pleased to strike out this Amended Petition for being otherwise an abuse of the court
 - ii. That the costs of this application be provided for
 7. The grounds for the application are that,
 - i. The substratum of this matter has been overtaken by events since elections of the 2nd Respondent were held on 26th February 2021 and changes of officials effected in which none of the petitioners were (re) elected back into office therefore the Petitioners have no legal legitimately to purport to proceed with the matter when they are no longer in the office and/



or have no business whatsoever and/or connection and/or dealing of whatever nature with the 2nd Respondent.

- ii. The prayers sought in the amended petition are spent since the court issued orders on 5th June 2021 and 27th October 2020 and ordered for a financial inquiry to be undertaken and filed by the Registrar of Trade Unions on the issue of alleged misappropriation of funds of the union. The Petitioners prayers for another audit to be undertaken outside the inquiry already undertaken is thus superfluous and an abuse of court process.
 - iii. The Petitioners are neither officials nor members of the 2nd Respondent hence have no locus standi to institute these proceedings and even purport to amend the Petition, to that extend the Amended Petition is misconceived, defective and bad in law and cannot be ventilated for orders sought
 - iv. That the Petitioners are playing judicial lottery and would want to clandestinely continue operating as officials of the Union even against the will of the masses of members of the union that elected them out on 26th June 2021.
 - v. This Amended Petition offends the principles of drafting Constitutional petitions as espoused in the case of Mumo Matemu vs Trust Society of Human Right Alliance(2013)eklr and Anarita Karimi Njeru(1979)KLR 154
 - vi. This petition is frivolous, vexatious and an abuse of the court process as it seeks to elevate pure civil disputes and presenting them as constitutional issues
 - vii. The Petition is creating anarchy in the judicial process
 - viii. The petition is incompetent, lacks merit, is fatally defective and cannot be ventilated for orders sought.
8. From the record, it appears that the Petitioners did not file any response to this application.
 9. On 7th June 2023, parties intimated that they would wish to dispose of the applications by way of written submissions.
 10. The Petitioners' submissions was filed on 22nd June 2023 while the Respondents submissions were filed on 3rd July 2023.

The Petitioners' submissions

11. In their submissions dated 20th June 2023, the Petitioners submitted that under section 35 of the [Labour Relations Act](#), officials of a trade union are entitled to be paid allowances and as such, the Respondents should effect the rebates as sought by the petitioners until the Registrar effects changes on the official records, that payments of those allowances including any other fringe benefits are awarded legislatively.
12. It is further submitted that the Respondents are bound to abide by the mandatory provisions of Section 39(a) of the [Labour Relations Act](#) which provides that;

Subject to its rules and the provisions of this Act, the funds of a trade union, employers' organization or federation may be used only for the following purposes-

- a. The payment of salaries, allowances and expenses to its officials;



13. It is the petitioners' contention that the alleged disciplinary proceedings against the 1st, 2nd and 3rd Respondents were instituted after they filed the instant case and that as such, it is apparent that the Respondents acted in bad faith.
14. The petitioners aver that regardless of the pending disciplinary proceedings against them, the Respondents are not justified to withhold their allowances and that the said action is unlawful. To buttress this position, the Petitioners relied on the case of [*Naftali Mogaka Nyabonga v Kisii County Government & Another\(2022\)*](#) eKLR
15. The court was urged to find merit in the application dated 13th August 2020.

The Respondents' submissions

16. The Respondents in their submissions framed the issues for determination to be;
 - i. Whether this Court should first consider and deliver a ruling on the application dated 17th June 2021 for striking out the amended petition
 - ii. Whether the application for the alleged outstanding rebates/ allowances is incompetent
 - iii. Whether the application for alleged outstanding rebates/ allowances has been proved to the required standard in law?
17. On the first issue, the Respondents submitted that the application dated 17th June 2021 should first be disposed of since its outcome will determine the direction of the matter. It is the Respondents' case that the said application raises jurisdictional issues, attacks the competency of the amended petition and informs the court that this matter has been overtaken by events after the elections of 26th February 2021.
18. On the second issue, counsel for the Respondent's submitted that the orders sought in the application dated 13th August 2020 are not supported in the amended petition. It is submitted that whereas the primary petition was for alleged financial misappropriation and removal of union's bank signatories, the application is for a civil claim for alleged outstanding rebates. The Respondents submit that the two issues are different causes of action and have no relevance whatsoever as the claim for rebate is neither pleaded nor sought in the petition. The cases of [*IEBC & Another Vs Stephen Mutinda Mule & 3 others \(2014\)*](#)eKLR and [*Raila Amolo Odinga & Another Vs IEBC & 2 OTHERS \(2017\)*](#)eKLR were cited in support of this position.
19. The Respondents further submitted that the instant application is a civil Claim whereas the primary matter is a petition and that there is no procedure whereby a claim of any sort can be commenced by way of a Notice of Motion. According to the Respondents, any claim has to be commenced by a statement of claim pursuant to rule 4 of the Employment and Labour Relations Court (Procedure) Rules, 2016 or where the rules provide that it be commenced by way of a Petition. Reliance was placed on the case of [*Shop & Delivery Limited t/a Betika V Njagi \(Miscellaneous Case E 145 of 2022\) \(2023\)*](#) KEELRC 228 (KLR).
20. It was also submitted that the instant application and even the primary petition was filed without the authority of the 2nd, 3rd, 4th, 5th and 6th Petitioners and therefore cannot be ventilated upon.
21. Lastly, as to whether the application for the alleged outstanding rebates/allowances has been proved to the required standard in law, the Respondents submitted that the Petitioners have not demonstrated at all what they did to be entitled for a refund on what they expended on.



22. It is the Respondents' submission that resulting from the Applicants' refusal to work they were subjected to a disciplinary process wherein they were ultimately lawfully removed from office. It was stated that their removal from office was properly processed by the union organs.
23. The Respondents submitted that upon issuing notices against the 1st, 2nd and 3rd Petitioners, a meeting of the National Executive Council was convened on 19th June 2020 but the Petitioners refused to attend. That upon deliberations on the disciplinary cases, NEC unanimously resolved to expel the three officials from the Union with effect from 19th June, 2020 and therefore, the claim for rebate allegedly upto March 2021 is untenable.
24. It is submitted that the union conducted its elections on 26th February 2021 and the Petitioners were not voted back to office.
25. It was thus submitted that the applicants had not discharged the burden or indeed proved that they are entitled to NEC rebates/outstanding allowances of whatever amount.

Determination

26. From the applications before me, the only issues that fall my determination are:
 - i. Whether the application dated 13th August 2023 is meritorious
 - ii. Whether the Amended petition has been overtaken by events
27. On the first issue, the Petitioners have sought to be refunded allowances that they claim they are entitled to. They have averred that they were officials of the 2nd Respondent who served in the capacity of National Treasurer, National Deputy Treasurer and National Deputy organizing Secretary respectively.
28. From a perusal of the application dated 13th August 2020, no evidence has been tendered before court to confirm that indeed the petitioners are owed the said allowances. This court cannot grant the orders sought in the absence of such proof. It is my view that such prayers can only be made after parties have tendered all the evidence at the hearing.
29. The application therefore stands dismissed.
30. With respect to the second issue, it has been submitted by the Respondents that the Union conducted elections on 26th February 2021 and the Petitioners were not voted back to office. The Respondents submitted that, there are new office bearers and the instant petition has been overtaken by events.
31. It is my view that the second application must also be subjected to a hearing as the Petitioners must be given an opportunity to adduce evidence when their claims arose, whether before or after elections. It is also material that the petitioners allege that there are disciplinary proceedings pending against them and therefore according to them they have not been removed from office.
32. For the foregoing reasons it is my view that granting the orders sought by the Respondents would be draconian at this stage.
33. The second application filed by the 1st Respondent is therefore also declined. Parties are directed to arrange to have the suit heard and determined on the merits.
34. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 19TH DAY OF OCTOBER, 2023



M. ONYANGO
JUDGE

