



REPUBLIC OF KENYA



KENYA LAW
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Mshihiri v Dock Workers Union (Petition 11 of 2022)
[2023] KEELRC 2484 (KLR) (12 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2484 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
PETITION 11 OF 2022
M MBARŪ, J
OCTOBER 12, 2023

BETWEEN

QUEEN ELIZABETH MSHIHIRI PETITIONER

AND

DOCK WORKERS UNION RESPONDENT

JUDGMENT

1. The petitioner is seeking the following orders;
 - a. A declaratory order that the respondent infringed on the rights and fundamental freedoms of the petitioner in contravention of article 27(1), (2) and (5), Article 41(2) (c) and 47(1) and (2) of *the constitution*.
 - b. A declaration order that the respondent pays the petitioner general damages for infringement of her constitutional rights.
 - c. An order that the respondent's elections board be and is hereby disbanded and a fresh board is constituted within 30 days of this judgment.
 - d. An order that the respondent holds and conducts a fresh by-election for the position of trustee within 30 days after the new elections board is constitutional as per order (c) above.
 - e. Any other declaration or order this court may deem fit to grant.
 - f. Costs of the suit.

Petition

2. The petitioner is an adult and the respondent is a registered trade union under the provisions of the *Labour Relations Act*, 2007 (LRA).



3. The petitioner is a paid up member of the respondent and by such membership is eligible to vie and contest for any position of the officials of the union are provided under its constitution.
4. Pursuant to Section 36(2) of the LRA, the petitioner presented her candidature to the respondent's elections board for the vacant position of Trustee during the by-election held on 30 June 2022. Under Article 5 of the union constitution, the elections board is the only organ mandated to organise and conduct elections and to also process all elections complaints and make recommendations to the conference as the supreme organ of the union.
5. The by-election held on 30 June 2022 was marred by irregularities and malpractices calculated to influence the outcome of the elections in favour of a preferred candidate who was being fronted by the respondent to the detriment of the petitioner and the end result was an unfair election that was unverifiable.
6. The petition is that at the Toyo polling station situated at the New Container Terminal, the petitioner's election agents were threatened and intimidated by her opponent and her agents to the extent that they could not freely perform their role of overseeing the elections at the polling station and protect the petitioner's interests. There were malpractices witnessed at the station.
7. Due to harassment and intimidation, the petitioner's agents could not participate in the process of counting the votes to ascertain the veracity of the results announced by the returning officer. The respondent's preferred candidate, Dreda Mwanjala organised people to heckle and shout at the petitioner's agents at the polling station when the counting of the votes was in progress to the extent that they influenced the returning officer to announce the petitioner's valid votes as spoilt votes without ascertaining the same. The rules issued by the elections board to govern the conduct of the by-election were unfair and denied the candidates access to the tallying centres where the votes were being counted and tallied thereby blocking the petitioner from directly raising her concerns for immediate redress.
8. Despite the petitioner protesting the malpractices through her letter dated 1st July 2022, the respondent declined to address or take the necessary action leading to this petitioner seeking for votes recount. The returning officer had announced that the petitioner had garnered 480 votes against 482 votes of her opponents but later claimed that the ballot boxes had been reshuffled with fake ballot papers hence disrobing the provisional results.
9. On 3 July 2022 the petitioner was informed that the vote tallying had since changed after the count with more votes from two (2) other polling stations and which gave Dreda Mwanjala the preferred candidate a total of 483 votes while the petitioner's total tally remained at 480 votes. The 2 additional polling stations, Eldoret and Kisumu were not recognised since they were not among the 12 polling stations which the elections board had earlier registered, published and circulated to the members ahead of the by-elections.
10. The petition is that the respondent deliberately created unfavourable circumstances calculated at denying the petitioner the right to participate in the by-election. At the nominations stage, the respondent provided the petitioner with the wrong application from which was meant for a shop steward position printed with misleading information contrary to Section 36(2) of the LRA and this was a ploy to deny the petitioner a chance to be nominated to vie for the Trustee's position.
11. The petition is also that there was discrimination against the petitioner on the basis of her age in an attempt to block her from vying for the position chiding her that she was too young to contest for the trustee position and that she was too junior because a member of the respondent for only 4 years which is not part of the eligibility criteria as per the respondent's constitution. This was contrary to Article 27 of [the constitution](#).



12. After the petitioner notified that the respondent was deliberately attempting to block her candidature she wrote a letter dated 25 April 2022 to the respondent and registered her concerns about the malpractices and calling for elections board to be impartial and conduct the elections in accordance with the law. The petitioner also wrote to the County Labour Officer but there was no response. The respondent proceeded and processed her nomination to vie for the intended position.
13. After the elections, the petitioner wrote a letter dated 6 July 2022 to the Registrar of Trade Unions requesting that the elections not be registered by dint of Section 35(4) of the LRA on account of the irregularities and malpractices. The respondent has been pushing for the registration of the trustee notwithstanding the petitioner's protestations and dispute of the results of the by-election.
14. The petitioner testified in support of her petition that she is an employee of the respondent since the year 2018 and that she is a member of the respondent union which held its elections on 30 June 2022 and she vied for the position of National Trustee. The petitioner testified that when she sought to be elected, her interest was for the position of Trustee but the respondent gave her application forms for the position of a shop steward. This was meant to block her from participating in the national elections.
15. For the trustee's position, there were 18 applications for 3 positions.
16. Following the national elections for the respondent, the petitioner emerged No. 4.
17. The petitioner testified that her rights were violated by the respondent because, at several polling stations particular Teyo, MCC and KPA Mombasa polling stations her votes were not properly counted. There were a total of 12 polling stations, Teyo station was opened for 2 hours which denied her crucial votes for employees attending different work shifts. She lodged a complaint with the elctions board without any action. Possible voters in her favour were forced to go home after their shifts. The voting process was not free and fair.
18. The petitioner testified that her polling agents were intimidated and ended up not acting in support of her interests. Her opponent Dredar Mwanjala who was vying for the same position had his votes counted properly but when her votes arose, they were stated to be spoilt votes. She asked the overseer for a votes recount but the presiding officer declined. The recount was not possible since there was tampering. She lodged a complaint with the Registrar of Trade Unions but is not sure if this reached the office.
19. The petitioner testified that the positions of trustees should be conducted afresh, the respondent's elections rules be amended and in the alternative she should replace Dredar Mwanjala as the trustee.
20. The petitioner also called Bwahi Joseph Manyanyiko as a witness who testified that during the elections he was an overseer for the petitioner based at NCC but there were irregularities in votes counting where the preferred candidate Dredar Mwanjala's votes were counted as against those of the petitioner. Voting started at 8AM instead of 6AM and potential voters for the petitioner who left their shift could not return to vote. The respondent created two more polling stations in Kisumu and Eldoret creating avenues for voter manipulations.
21. The third witness in support of the petitioner was Bernard Kisalu who testified that he was an overseer for the petitioner at Toyo polling station and he witnessed irregularities. Counting was not done properly and votes meant for the petitioner were allocated to her opponent, Dredar Mwanjala.
22. In response to the petition, the respondent filed the Replying Affidavit of Simon Kiprono Sang the general secretary who aver that the petitioner challenged the election of Dredar Mwanjala as the 3rd trustee of the respondent. Under Article 14(1)(b) of the respondent's constitution, the election of



trustees should be conducted one year after the election of officials and in this case, officials were elected on 24 June 2021 and hence election of trustees was to be held on 2 July 2022. On 30 June 2022 elections were held and Dredar Mwanjala was elected as the 3rd trustee but because of the subsisting interim orders restraining the respondent from effecting changes, the respondent has been operating without trustees and the previously elected trustees from 4 April 2016 elections remain in office in terms of Section 35(6) of the LRA.

23. Before the challenged elections of 30 June 2022, one trustee Katana Kenga previously elected, retired from the service of the employer, Kenya Ports Authority and hence ceased being a trustee and this reduced the number of trustees from 3 to 2.
24. In the elections held on 4 April 2016, the other trustees who were elected together with Katana Kenga were Dredar Mwanjala and Matreda Matilda Mwakireti. Pending the hearing of this petition, the two trustees were promoted to management positions and thereby causing cessation of their membership with the respondent union and effectively, the petition is overtaken by events. The challenge to the election of Dredar Mwanjala as a trustee and who has ceased to be a member and trustee of the respondent renders the petitioner academic. The change of events means the Form Q filed with the RTU is no longer relevant.
25. The petitioner is aware of these facts but opted to proceed with her petition.
26. Due to changes in trusteeship positions, the respondent is left without any trustees and this is currently vacant.
27. Mr Sang aver that under Article 12(2)(a) and (b) of the union constitution, the National Executive Committee (NEC) is the organ mandated with the administration of the union on behalf of members. No NEC can be held without at least one trustee. No withdrawal of money from the accounts of the union can be done without the signature of one trustee and the respondent is faced with paralysis of its operations. In terms of Section 4 of the LRA, the union constitution is suspended without the trustees and NEC remains suspended without the election of trustees.
28. The respondent undertakes to ensure that the petitioner will participate in the by-election to fill the vacant positions where Dredar Mwanjala was elected and to ensure that her rights under Section 4 of the LRA and Article 4(2) (e) of *the Constitution* are protected.

No witness was called.

At the close of the hearing, both parties filed written submissions.

29. The petitioner reiterated the contents of her petition and evidence that the election of trustees held on 30 June 2022 was marred by irregularities and in two polling stations at Toyo and MCC her agents were harassed and during vote counting, her votes were marked as spoilt and efforts to have a recount was not possible due to votes being manipulated. Her agents were chased away denying her a fair chance at being elected and the election of Dredar Mwanjala should be nullified to be replaced with her name.
30. The petitioner submitted that of the 10 polling stations, the respondent added two more stations at Eldoret and Kisumu to defeat her candidature. Such irregularities are sufficient to justify the nullification of the elections and the petitioner be allowed as prayed.
31. The respondent submitted that the petition is filed contrary to the provisions of Rule 7 of the Employment and Labour Relations Court (Procedure) Rules, 2016 which provides that a petition should only be commenced pursuant to *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.



32. The respondent submitted that the allegations that the petitioner's agents at Toyo and MCC were harassed is without evidence. the petition that there was violation of rights under *the constitution* is without any particulars or evidence.
33. On 30 June 2022 the respondent held the elections for trustees in accordance with Section 34(3) of the LRA and had until 13 July 2022 to notify the RTU of the outcome and at the time the petitioner filed this petition, returns had been filed. The elections board relied on the rules developed for the elections and allowed the petitioner and her agents to participate. The witnesses called to support the petitioner admitted to having been allowed to undertake their roles at the allocated polling stations. This is not a proper petition and the orders sought should be dismissed with costs.

Determination

34. The substantive orders sought in the petition is that;
 - a. A declaratory order that the respondent infringed on the rights and fundamental freedoms of the petitioner in contravention of article 27(1), (2) and (5), Article 41(2) (c) and 47(1) and (2) of *the constitution*.
 - b. An order that the respondent's elections board be and is hereby disbanded and a fresh board is constituted within 30 days of this judgment.
 - c. An order that the respondent holds and conducts a fresh by-election for the position of trustee within 30 days after the new elections board is constitutional as per order (c) above.
35. The petitioner opted to file a petition. This subject has gathered notoriety and this court and the Court of Appeal have reiterated the provision of Rule 7(3) of the Court Rules with regard to when and why one should file a petition or a Memorandum of Claim.
36. As outlined above, the substantive orders sought by the petitioner, in their nature, these are matters governed under the LRA and however much the constitutional route is stretched, the LRA read together with the Court Rules have provided a clear procedure for redress of any particular grievance prescribed therein.
37. The Article 41 rights under *the Constitution* are enacted in the LRA and the rules made thereunder provide adequate remedy and orderly enforcement mechanisms. Filing a petition directly relying on the provisions of *the Constitution* for enforcement of labour relations rights governed by the LRA without seeking a declaration of invalidity of the provisions of the Act or alleging that the remedies provided therein are inadequate, such is not a proper petition. The instant petition does not raise any question of the interpretation or application of *the Constitution* that is not addressed under Rule 7 of the Court Rules read together with the LRA.
38. This is not a proper petition. Such matter ought to have been addressed instantly and before the court could proceed with the hearing. At this point, due to the needless invocation of the petition, no costs shall be awarded.
39. The petition is premised on the alleged violation of the petitioner's rights under Article 27(1), (2) and (5), Article 41(2) (c) and 47(1) and (2).
40. Article 27(1), (2) and (5) of *the Constitution* gives everyone the right to equal protection of the law and the right not to be discriminated against by another person on any of the specified grounds. In employment and labour relations, Section 5 of the Act forbid discriminatory treatment at work.



41. Where one is alleging discriminatory treatment, the particulars thereof must be addressed to allow the respondent discharge its burden in disproving such matter. It is not sufficient to cite that there is discrimination in the holding of trustees' elections. The particulars with regard to such allegations and particularly the threshold addressed in the case of Mohammed Abduba Dida v Debate Media Limited & another [2018] eKLR must be gone into. In this case, the court held that;
- ... that provisions or rules that create differences amongst affected persons do not of necessity give rise to the unequal or discriminatory treatment prohibited by Article 27, unless it can be demonstrated that such selection or differentiation is unreasonable or arbitrary and created for an illegitimate or surreptitious purpose. And the second is that, whether or not there has been a violation of *the Constitution* should be determined by applying a three stage enquiry to the circumstances of each case. The three stage enquiries are; firstly, whether the differentiation created by the provision or rules has a rational or logical connection to a legitimate purpose; if so, a violation of Article 27 will not have been established. If not, a second enquiry would be undertaken to determine whether the differentiation gives rise to unfair discrimination. If it does not, there is no violation of *the constitution*. But if the selection or differentiation gives rise to unfair discrimination, then the third enquiry would be necessary to determine whether it can be justified within the limitation provisions of *the constitution*.
42. Save to state that the election of trustees was marred by irregularities, her agents were not allowed to oversee the counting of votes and that a recount was not possible due to the alleged malpractices, the case of discriminatory treatment is not addressed at all. Even in a case where the petitioner went to seek to submit her application for the position of trustees and was given the form for shop stewards, she noted such matter and was given the correct application form. The mix-up in the issuance of forms cannot be the sole basis to invoke constitutional rights in terms of Article 27.
43. Article 41 (2) (c) of *the Constitution* give everyone the right to form, join or participate in the activities and programmes of a trade union. The petitioner is a member of the respondent union. She was allowed to participate in the elections and position of trustees. She merged 4th position whereas the respondent constitution only allows for 3 positions. She was among 18 applicants. Only 3 were required. Her case was to have the position of Dredah Mwanjala replaced with her name.
44. In the entirety of the petition, the petitioner does not demonstrate any matter that she was prevented, stopped or in any manner denied her right to form, join or participate in the activities of the union of her choice. Her participation in the election for trustee's position was not guaranteed and that was the sole purpose of holding an election for the respondent members, through a democratic process to decide the persons they wanted to have as trustees.
43. Invoking the rights under Article 41 of *the constitution* was unnecessary.
45. Article 47(1) and (2) of *the Constitution* gives the right to fair administrative action. An adverse decision that is being challenged is core to the invocation of Article 47. From the impugned decision, the petitioner is asserting that her rights to fair administrative action was violated. her case is that following an election held on 30 June 2022, her opponent Gredah Mwajala got 482 votes and she got 481 ranked at number 4. Of interest, the petitioner is least concerned with the two other trustees. Their names, votes allocated and total results, these were not gone into.

An election cannot be nullified to suit one candidate.

46. The entirety of the elections once challenged becomes relevant and important to interrogate.
47. Where the election of Gredah Mwanjala is alleged to have been irregular, inherently, the petitioner ought to have also addressed the elections for the other two trustees. The court cannot remove one



trustee and fail to question the election of the others. Where there was any irregularity as alleged, the possible beneficiary of such matter cannot be the petitioner only and not all the 18 applicants interested in the same positions of trustee.

48. failure to annex the decision of the elections board sought to be nullified is fatal to the entire petition. The court is denied the chance to interrogate the impugned decision. There was nothing to be nullified and the procedural lapses cannot be cured by invoking Article 47(1) and (2) of *the Constitution*.
49. Should the court issue an order disbanding the respondent's election board and order for fresh elections?
50. Should the court order the respondent to conduct fresh by-election for the position of trustees?
51. The substantive orders sought in the petition found without good foundation, to order the respondent to disband its elections board would be overarching and without justification.
52. Section 4 of the LRA gives every trade union the mandate to conduct its elections for national, branches or as the case may be in accordance with its constitution. Unless a matter is presented that the union constitution has provisions that are unlawful or unconstitutional weighed against the subject at hand, every trade union has the power to adhere to its constitution and proceed to conduct its elections for officials or trustees.
53. In reply to the petitioner, Simon Kiprono Sang in his Replying Affidavit dated 24 July 2023 aver that as the general secretary of the respondent, he is aware that Dredah Mwanjala has since been promoted to management and has since left the membership of the respondent and this position is vacant. Also, the other trustee Matreda Matilda Mwakireti has since been promoted into management and has left the membership of the respondent. The third trustee, Katana Kenga has since retired and exited his membership with the respondent and his position as trustee. All positions of trustee are vacant. This leaves the respondent without a trustee and calls for a by-election where the petitioner will be invited to participate.
54. The court finds no merit in the petition. As outlined above, the option to file a petition instead of a Memorandum of Claim pursuant to Rule 7(3) of the Employment and Labour Relations Court (Procedure) rules, 2016 the petition is hereby dismissed with costs to the respondent.

DELIVERED IN OPEN COURT AT MOMBASA THIS 12 DAY OF OCTOBER, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... **and**

