



Odiwuor v Universities Academic Staff Union & 4 others; Otiemo & another (Interested Parties) (Cause E015 of 2023) [2023] KEELRC 2975 (KLR) (22 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2975 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E015 OF 2023
S RADIDO, J
NOVEMBER 22, 2023**

BETWEEN

WYCLIFFE HUMPHREY ODIWUOR CLAIMANT

AND

UNIVERSITIES ACADEMIC STAFF UNION 1ST RESPONDENT

**UNIVERSITIES ACADEMIC STAFF UNION, MASENO UNIVERSITY
CHAPTER 2ND RESPONDENT**

DR STEPHEN ONYANGO OKEYO 3RD RESPONDENT

**DR BENARD OKAL (SUED AS THE COMMISSIONER TO THE BY-
ELECTION) 4TH RESPONDENT**

**DR SARAH OBINGA (SUED AS THE COMMISSIONER TO THE BY-
ELECTION) 5TH RESPONDENT**

AND

GEORGE OJUONDO OTIENO INTERESTED PARTY

ALEXANDER OKOTH OCHIENG INTERESTED PARTY

JUDGMENT

1. Through an Amended Memorandum of Claim filed on 15 March 2023, Wycliffe Humphrey Oduor (the Claimant) sued the Respondents seeking orders:
 - a. A declaration that the actions of the Respondents to allow the 3rd Respondent to contest for the position of chapter secretary of the 2nd Respondent is in violation of sections 31 and 34 of the *Labour Relations Act* and Articles 1, 3(b)(c)(d)(e)(g)(l)(m)(t), 4(i)(a), 8(b), 14(c)(d) and (i) and 20(c) of the Universities Academic Staff Union (UASU) Constitution.



- ab. An order that the election of the 3rd Respondent as the chapter secretary of the 2nd respondent held on the 10/3/2023 is invalid and the results nullified.
 - bb. An order that a fresh by—election for the chapter secretary of the 2nd Respondent be conducted by the 2nd Respondent in strict observance of the Union’s constitution.
 - (c) An order of permanent injunction be issued restraining the Respondents whether by themselves, their agents, servants or persons claiming through them howsoever from including the name of the 3rd Respondent to the list of contestants for the by-election for the position of secretary or any other position in the 2nd Respondent.
 - (d) Costs of the suit.
 - (e) Such other orders as this Honourable Court shall deem just.
2. The 3rd Respondent filed a Response on 23 March 2023 and the 1st, 2nd, 4th and 5th Respondents filed a joint Response on 29 March 2023.
 3. The parties filed Agreed Issues on 30 May 2023, and the Cause was heard on 12 June 2023 and 26 September 2023.
 4. The Claimant, Deputy Secretary of UASU Maseno Chapter and Dr Stephen Onyango Okeyo (the 3rd Respondent) testified.
 5. The Claimant filed his submissions on 22 October 2023, the 1st, 2nd, 4th and 5th Respondents on 18 October 2023 and the 3rd Respondent on 27 October 2023.
 6. The Court has considered the pleadings, evidence and submissions.

Exhaustion of alternative dispute resolution avenues

7. The question of exhaustion of alternative dispute resolution avenues was not one of the Issues the parties agreed should be left to the determination of the Court when they filed Agreed Issues.
8. The Respondents nevertheless made this Issue part of their submissions and Article 5(d) of the Union’s Constitution was called in aid of the arguments.
9. The Court will refrain from addressing an issue the parties did not consider determinative of the dispute when they were narrowing down the questions in dispute.

Whether 3rd Respondent is a member of UASU?

10. Issues 1 and 2 as framed by the parties were:
 - i. Whether the 3rd Respondent is a member of the 2nd Respondent – UASU Maseno chapter and a member of the 1st Respondent – Universities Academic Staff Union (UASU)?
 - ii. Whether by the dismissal of the 3rd Respondent he ceased or became disqualified as a member of the 2nd Respondent – UASU Maseno chapter and ceased or became disqualified as a member of the 1st Respondent – Universities Academic Staff Union (UASU)?
11. An answer to the twin and closely related questions will dispose of the Cause.
12. The Claimant asserted that the 3rd Respondent was not a member of the UASU Maseno chapter because he had ceased working at Maseno University after being dismissed before the by-elections.



13. In his submissions, the Claimant cited Articles 19 and 20 of the Union's constitution to support the contention that the 3rd Respondent was not a member of the Union.
14. The Respondents denied that the 3rd Respondent had ceased to be a member of UASU. They asserted the Claimant had failed to prove the contention.
15. According to these Respondents, the Secretary General of the Union was the custodian of union records and without the Claimant placing before the Court a copy of the membership register, he had failed to discharge the burden of proving that the 3rd Respondent had ceased being a member.
16. The Court has relooked at the cited Articles. Article 19 relates to organisation of UASU chapters and the only provisions which appear relevant to the dispute is Article 19(g) and (h)
17. The same provide:
 - (g) All chapter officers shall be elected every five years' subject to article 14 by secret ballot at the chapter general meeting and shall remain in office for five years, provided that any chapter officer may be removed from office by two thirds of chapter members voting by secret ballot at a special chapter general meeting. The vacancy so created shall be filled by elections as stipulated in article 22 at such Special General Meeting or Annual General Meeting, the voting thereon being carried out by secret ballot. Such elected officials shall hold office for the remaining term.
 - (h) Any chapter officer may be suspended from office by a two-thirds majority decision of all members of the chapter committee. The chapter Executive Committee shall have powers to appoint one of its members to act in post pending decisions of the special general meeting of members whether or not such an officer should be removed from office altogether.
18. The Article does not aid the case or assertions by the Claimant that the 3rd Respondent ceased being a member of the UASU Maseno chapter.

Whether the 3rd Respondent was eligible to contest and hold office at chapter level

19. The Claimant challenged the eligibility of the 3rd Respondent to contest or hold an office within the UASU Maseno chapter on the ground that having been dismissed from service by Maseno University on 27 February 2023, he was ineligible to contest or hold office by virtue of Article 4(i)(a) of the Union's Constitution.
20. The Article states:

Membership of the union shall be open to all academic and research staff of the universities appointed on academic terms of service.
21. According to the Claimant, the 3rd Respondent having been dismissed by the University and therefore not being part of the academic or research staff of the University could not continue to be a member or eligible to contest for leadership position at the chapter level.
22. The Claimant further contended that the 3rd Respondent having lost his lectureship at the University, he (3rd Respondent) could not propagate or advance the interests of the members of the chapter as envisaged by the Union's Constitution preamble and Article 3. Article 3 sets out the Aims and Objectives of the Union.



23. Article 4(i)(a) of the Union's Constitution already cited above provides for membership of UASU but does not explicitly outline how one loses membership. Reading it together with the preamble and Article 3 does not therefore resolve the question posed by the parties herein.
24. The question, therefore, begs, how does one lose membership of UASU?
25. Under Article 4(i)(i) of the Union's Constitution, a member can give three months' written notice of resignation.
26. For its part, Article 4(i)(j) of *the Constitution* clothes the National Executive Committee with the power to expel a member who is found guilty of prescribed offences.
27. Article 19(g) allows the removal of a chapter official by the membership of the chapter.
28. The 3rd Respondent did not resign, was not expelled by the National Executive or removed by the chapter membership.
29. The Claimant contended that upon dismissal from the service of Maseno University, the 3rd Respondent became ineligible to hold or contest for any position within the chapter.
30. However, in his submissions, the Claimant seemed to admit that the 3rd Respondent remained a member at the national level. He stated:

The membership of the Union (at National level) is regulated principally by Article 4 of the union constitution. Article 4 (i) (a) provides; Membership of the union shall be open to all academic and research staff of the universities appointed on academic terms of service My Lord, the above provision is in mandatory terms that a member of the union (at National level) must be an academic or research staff of the universities. The first condition to being a member of the union (at National level) is that a person must satisfy the condition of being an academic or research staff of the universities. That after joining the Union at National level under Article 4 (i) (a), the said member must further belong to a chapter, the other level to which the UASU Union is organized. We submit that a member is disqualified as a member of the chapter when his employment as an academic or research staff of the university terminates (Article 4 (i) (a) A person who is not an academic or research staff of the university to which the chapter relates is ineligible to be a member of the chapter, however, he may still be a member of the UASU union (at National level).

31. The submission and acceptance by the Claimant that the 3rd Respondent remained a member at the national level should be understood within the context of Article 4(i)(h) which provides that:

A member of the Union, subject to the provisions of this Constitution, shall enjoy all rights and privileges of membership so long as they remain members in good standing.
32. Under Articles 9(b) and 22(h) of the Union's Constitution, to be eligible to contest for an office in the Union, a member needs to be up to date with subscriptions. There was no evidence that the 3rd Respondent was in arrears.
33. The Claimant did not demonstrate that the 3rd Respondent was ineligible to contest or hold a chapter office.



Whether election of 3rd Respondent violated section 31 of the *Labour Relations Act*?

34. The Claimant also took the position that the election of the 3rd Respondent was contrary to section 31 of the *Labour Relations Act* because by the time of the by-election, he had ceased to be an employee of Maseno University.
35. The section sets out as follows:
- The officials of a trade union or employers' organisation shall be persons who are, or have been, engaged or employed in the sector for which the trade union or employers' organisation is registered.
36. The 3rd Respondent was at the material time a person who had served, had been engaged in and employed within the sector UASU was competent to represent.
37. The Court finds that he was competent and eligible under the statutory provision to contest and hold office within UASU despite the exception in Section 31(4) of the *Labour Relations Act*.

Conclusion and Orders

38. Flowing from the above, the Court finds no merit in the Cause and it is dismissed with costs.

DELIVERED VIRTUALLY, DATED AND SIGNED IN MIGORI ON THIS 22ND DAY OF NOVEMBER 2023.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For applicant O.J. Okoth & Co. Advocates

For 1st, 2nd, 4th and 5th Respondents Onsongo & Co. Advocates

For 3rd Respondent Amos O. Oyuko & Co. Advocates

