



Ambasa & 4 others v National Executive Council of the Kenya National Union of Teachers & 3 others (Petition E037 of 2023) [2023] KEELRC 2826 (KLR) (10 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2826 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E037 OF 2023
B ONGAYA, J
NOVEMBER 10, 2023**

BETWEEN

**BARRACK ODHIAMBO AMBASA 1ST PETITIONER
STANLEY KORIR 2ND PETITIONER
OPIYO JOHN JUMA 3RD PETITIONER
KENYAMANN ERIONG’OA 4TH PETITIONER
MENYA MARTHA AMOTO 5TH PETITIONER**

AND

**THE NATIONAL EXECUTIVE COUNCIL OF THE KENYA NATIONAL
UNION OF TEACHERS 1ST RESPONDENT
REGISTRAR OF TRADE UNIONS 2ND RESPONDENT
TEACHERS SERVICE COMMISSION 3RD RESPONDENT
THE HON ATTORNEY GENERAL 4TH RESPONDENT**

JUDGMENT

1. The petitioners filed the petition dated January 23, 2023 and filed in Court on February 28, 2023 through the firm of Aboki Begi & Company Associates Advocates. The petitioners prayed for:
 - a. A declaration be and is hereby made that the Kenya National Union of Teachers is a Union regulated by a registered Constitution (Rules and Regulations) which are self – regulating with clear rules on its amendment and alteration which must be followed before any amendment or alteration is made to the Union Constitution.



- b. A declaration be and is hereby made that any amendment to the Kenya National Union of Teachers Constitution (Rules and Regulation) must be made in strict compliance with its Constitution on procedure of amendments as outlined in the Union's registered Constitution before the proposed amendments.
 - c. The amendments or alterations of the Kenya Union of Teachers Constitution [2015] Constitution (Rules and Regulations) to give effect to the Union's Revised Constitution [2022] (Rules & Regulations) did not follow the procedure of amendments outlined in the existing Union Constitution 2015.
 - d. The revised Kenya National Union of Teachers Constitution of February 2022 is null and void for failure to conform with the procedure of amendments as stipulated in the existing 2015 Union Constitution.
 - e. Costs of this petition and incidentals be to the petitioners.
2. The petition was supported by the annexed affidavit sworn by Barrack Odhiambo Ambasa, the 1st Petitioner. The petitioners' case is as follows:
- a. The petitioners are all members of the Kenya National Union of Teachers (KNUT) having subscribed to the Union's constitution and that they legitimately expected that the Union affairs would be run in accordance with the law and in particular in line with the Union's Constitution.
 - b. The petitioners urge that there are deliberate steps by the 1st respondent in complete violation of the provisions of the Union's constitution to amend the Kenya National Union of Teachers (KNUT) Constitution 2015.
 - c. That the published version of the Kenya National Union of Teachers Constitution (Rules and Regulations) as revised in February 2022 purports to amend various Articles of the Kenya Union of Teachers Constitution (Rules and Regulations) 2015 without strict compliance to the procedure for amendments or alterations as provided for under the Kenya Union of Teachers Constitution (Rules and Regulations) 2015 and as such, the amendments or alterations be declared null and void *ab initio*.
 - d. It is further urged that the impugned amendments are made in an attempt to alter the basic structure of the Union's Constitution without public participation from the membership of the union as required under Article 10 of the Constitution of Kenya as read with Article II (2) of the Kenya National Union of Teachers Constitution.
 - e. The petitioners' further state that the amendment to the Union's Constitution to extend the vacation of office for national office holders and branch secretaries is discriminatory to other carders of officials of the Union in total violation to the provisions of Article 27 of the Constitution of Kenya, 2010.
 - f. The petitioners urged the Court to find their petition with merit and to allow it in terms of the reliefs sought therein.
3. The petition is opposed by the 1st respondent who filed a Notice of Preliminary Objection dated 08.05.2023 raising the following grounds:



- a. The respondent is not known in law and therefore not a proper party before the Honourable Court as envisaged by Section 8 (b) of the *Labour Relations Act*, 2007 of the Laws of Kenya and therefore not capable of suing and being sued.
 - b. The suit herein is time barred having been filed outside the statutory limitation period of 30 days in view of section 30 of the *Labour Relations Act*, 2007, Laws of Kenya.
 - c. The petitioners failed to exercise their statutory rights to raise objection as envisioned in section 27 (4) of the *Labour Relations Act*, 2007, Laws of Kenya, when the Registrar of Trade Unions published the notice of change of the KNUT Constitution on 25.03.2022 as required by law.
 - d. The 1st petitioner lacks authority to lodge the suit herein on behalf of his co-petitioners in view of the strict requirements of Order 4 Rule 1 (3) of the *Civil Procedure Code*, 2015.
 - e. The petitioners' application and petition are incompetent, bad in law, barred in law, an abuse to the Court process and should be dismissed with costs to the respondents.
4. In further response, the 1st respondent filed a replying affidavit sworn by Collins Oyuu, the Secretary General of the Kenya National Union of Teachers, on May 25, 2023, in which he avers that the contents of the petition have not been verified as the 1st petitioner has failed and/or ignored and/or neglected to annex a Verifying Affidavit to the petition.
 5. He further stated that the Kenya National Union of Teachers (KNUT) sought to amend its 2015 Constitution to align with the developments in the labour industry in the country and internationally.
 6. That the areas of focus for amendment to the 2015 Union Constitution were drafted and presented and approved by the National Steering Committee of the union on 2nd December, 2021 at Turtle Bay, Watamu, Malindi.
 7. Further that the proposals were also presented for approval to the National Executive Council of the Union on 4th December, 2021 and that the Advisory Council of the Union gave its approval of the proposed amendments on 18th December, 2021.
 8. That following the approval of the proposals by the necessary organs, the Union called for a special conference for purposes of tabling the amendments for adoption by membership on 19th February, 2022 where over 2,000 delegates were in attendance. No objection to the proposed amendments were raised and the union membership adopted a resolution to amend its 2015 Constitution.
 9. It is contended that upon ratification the Union's Secretary General notified the 2nd Respondent of the changes in line with the mandatory requirements of Section 27 of the *Labour Relations Act*. The 2nd Respondent then published the Notice of Amendment of the 2015 KNUT Constitution as required by law.
 10. In addition, the Notice was also published in three (3) local dailies as required by law. No objections to the proposed amendments were recorded and upon expiry of the twenty – one days' notice period the 2nd Respondent notified the union of the registration of the changes.
 11. The 1st respondent maintains that due process was followed in the manner in which the 2015 KNUT Constitution was amended and that the KNUT (Rules and Regulations) Revised February 2022 is in operation and all structures of the union have conformed to the provisions as contained therein.



12. Mr. Oyuu confirmed that the operations of the Union are currently running and governed by the provisions of the 2022 Constitution. He urged that the process of amendment was undertaken in a legal and procedural manner.
13. The 1st respondent urged the Honourable Court to find the petition without merit and to dismiss it with costs to the 1st respondent.
14. The 3rd respondent opposed the petition by filing a replying affidavit sworn by Dr. Julius Olayo, the 3rd respondent's Director in charge of Human Resources Management and Development (HRM &D) Directorate, sworn on 5th June, 2023. He stated that the petition lacks merit, is vexatious and an abuse of the Court process. He urged the Court to dismiss the petition with costs to the 3rd respondent. It was urged that the 3rd respondent is improperly enjoined as a party to the petition and that the petition does not disclose any reasonable cause of action against the 3rd respondent. Dr. Olayo stated that the substratum of the petition relates to the Kenya National Union of Teachers' Constitution, and that the 3rd respondent herein is neither a member of the Union nor has control over the functions and internal affairs of the Union. Thus, the 3rd respondent's case was that there was no cause of action against it to warrant its inclusion as a party to the petition and that none of the prayers in the petition are sought against it.
15. The 3rd respondent averred that the Kenya National Union of Teachers duly complied with all requirements for amendment of its 2015 Constitution and as such termed the Union's actions as legal, procedural and justified.
16. The 1st and main issue is whether the amendment of the Kenya National Union of Teachers Constitution, Rules and Regulations, Revised December 2015 was in accordance with its provisions leading to the Kenya National Union of Teachers Constitution, Rules and Regulations, Revised February 2022. Article XVII on Amendments and Alteration of Articles of the Kenya National Union of Teachers Constitution, Rules and Regulations, Revised December 2015 states as follows, "1. Alteration to these Rules shall only be made by resolution voted upon by secret ballot and passed at an Annual Delegates Conference or a Special Conference. All proposals for amendments shall be submitted to the Secretary General not later than sixty days before the date of such Annual Delegates Conference or Special Conference. 2. No alteration of these Rules shall take effect until the date of registration thereof by the Registrar of Trade Unions unless some later date is specified in the Rules."
17. The petitioner's case is that the impugned alterations to the Constitution Revised 2015 took place without a secret ballot and there was no public participation involving members of the union per Article 10 of the Constitution and Article II (2) of the Union's prevailing constitution. Article II (2) of the Union's prevailing constitution states that one of the aims and objectives of the union shall be to provide means for co-operation among the teachers and the expression of their collective opinions, views and decisions upon matters affecting the interest of education and the teaching profession in Kenya. Article 10 of the Constitution of Kenya provides for the national values and principles of governance. The petitioners' further case is that the alternations to the Union's constitution have made far reaching alterations which alter the basic structure of the Union's constitution.
18. In relation to compliance with the procedure, the Court returns that by the Petitioners' submissions dated July 3, 2023 filed through Aboki Begi & Company Associates, it is admitted that the alteration was per the prevailing Union constitution. At paragraph 7 of the petitioners' submissions it was stated, "7. In response to the petition, Collins Oyuu, Secretary General of the Kenya National Union of Teachers acknowledges under paragraphs 4, 5, 6, 7, 8, 9, 10, 11 & 12 of his Replying Affidavit filed herein on 11th May, 2023 that indeed amendments to the KNUT Constitution were made on the 19th



February, 2022 at special conference of the union held at Kasarani in which 2000 delegates attended and particularly at paragraph 10 thereof avers as follows; “That, the proposed amendments were tabled for consideration before the special conference and as no objection was raised, members unanimously adopted a resolution to amend the 2015 constitution 8. We therefore submit that on admission, no vote by secret ballot, was taken by delegates in the purported special conference of the union held on the 19th February, 2022 at Kasarani where the purported alteration of the Union’s Constitution were made.” In view of that submission, the Court returns that all the prescribed steps for alteration of the Union constitution were complied with as per the affidavit of Collins Oyuu, except, the alleged failure to vote by secret ballot. The evidence is that the National Steering Committee of the union deliberated and passed proposed amendments on December 2, 2021 at Watamu per exhibited minutes. Further, per exhibited minutes the National Executive Council of the Union considered and passed the amendments at Watamu on December 4, 2021. The Advisory Council of the Union adopted the amendments on December 18, 2021 and advised they be tabled at the Special Conference which was subsequently held on February 19, 2022 at Moi Sports Center Kasarani. About the secret ballot, it is admitted for the 1st respondent that Article XVII of the Union constitution revised 2015 provides for secret ballot but Article XVIII (c) provides, “A declaration by the National Chairman that a resolution is carried and entry to the effect of the minutes of the proceedings shall be sufficient evidence of the declaration, without proof of the numbers of proportion of votes for or against the resolution.” The Court considers that the declaration of resolution by the Chairperson would not defeat the requirement that there be a secret ballot. In absence of any other thing, it appears that while a resolution was recorded, there was no secret ballot. However, the petitioners appear not to provide evidence to rebut the Collins Oyuu’s assertion that there were no objections. It would appear to the Court that if indeed there were no objections then the secret ballot would serve no purpose. It would then appear that the decision was unanimous.

19. The Court considers that there are further bars for the Court to interfere or investigate the impugned alterations to the union constitution. Section 27 of the *Labour Relations Act*, 2007 provides for change of name or constitution of trade union, employers’ organization or federation. Under the section 27 (4) of the Act, the Registrar of Trade Unions issued gazette notice No. 3343 that a notice of change of the Constitution and Rules of the Union had been received. Further, any person or member intending to raise any objection against the amendments of the Constitution was required to submit in writing any objections within twenty-one (21) days from the date of the notice being March 25, 2022. The notice further stated that the amendments were open for scrutiny at the Registrar of Trade unions. The 21 days were lapsing about April 15, 2023. The petitioners appear not to have presented any objections to the proposed amendments now impugned in the instant petition. By letter dated 05.05.2022 the Registrar of Trade Unions E.N Gicheha conveyed to the union that she registered the Notice of Amendment of the union’s constitution of rules which were sanctioned at the special delegates conference held at the Moi International Sports Centre, Kasarani on Tuesday February 19, 2022. The letter enclosed the certificate of registration dated May 5, 2022 issued per section 27 of the *Labour Relations Act*. Section 30 of the Act states, “Any person aggrieved by a decision of the Registrar made under this Act may appeal to the Industrial Court against that decision within thirty days of the decision.” The Court returns that the petitioners ought to have appealed against the Registrar’s decision to register the alterations on the union constitution by around June 6, 2022 but there is no suggestion that they did so. Instead, they filed the instant petition on February 28, 2023. The Court finds that the appropriate manner to approach the Court was by way of an appeal and only if the petitioners had objected to the registration of the alterations in the union constitution following the notice by the Registrar of Trade Unions, and, the Registrar having disallowed the objections. The Court considers that the proper procedure to object to the registration and if dissatisfied with the Registrar’s decision, appealing to the Court was completely disregarded by the petitioners. That



failure by the petitioners operate as a bar to the Court's jurisdiction to consider the instant dispute upon merits. The Court returns that the petition is not justiciable for want of compliance with the statutory procedure as highlighted and in circumstances that no good cause has been shown for failure to comply with that statutory regime for resolving the instant dispute. In that sense, the Court finds that the constitutional petition was filed in clear avoidance of the statutory procedure and it was an abuse of court process to approach the court by way of the instant constitutional petition. The preliminary objection is upheld. To answer the 1st issue, the Court returns that there exit bars, as found and highlighted, that bar the Court from disturbing the registration of the alteration of the union constitution and the petition is not justiciable as it is trapped by the doctrine of avoidance in urging constitutional petitions.

20. The 2nd issue is about failure to comply with the need for public participation. The Court has already found that it may not delve into merits of the instant petition. However, the parties have made elaborate submissions on whether the alterations received due participation. The Court considers that due public participation entails giving an opportunity to persons or communities (or their representatives) to be affected by a decision, to give their views, and if the views are given, the same are shown to have been taken into account in making the decision in issue. In the instant case, Article 10 of the *Constitution* and Article II (2) of the Union's prevailing constitution entitled the members of the union to participate. It appears that the provisions of the union constitution had inherent provisions to ensure that the members participated. The participation was reinforced by provisions of section 27 of the *Labour Relations Act* but which the petitioners have been found to have failed to invoke. Article 10(1) provides that the national values and principles of governance in the Article bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the *Constitution*; enacts, applies or interprets any law; or, makes or implements public policy decisions. "All persons" in the provision, in the Court's opinion, covers artificial legal persons or corporate persons like the trade unions. The values and principles under the Article therefore cover the trade unions. One of the binding values and principles of national governance is "... participation of the people." The scope and meaning of participation of people is an extensively litigated issue. It has been invoked in all spheres of decision making by a wide range of persons or authorities both in public and private sectors. It would appear that a time has come for the Parliament to consider and pass a codifying legislation for implementation and realization of that constitutional value and principle of participation of the people. Such legislation may encompass the values and principles of public service in Article 232 (1) (d) and (f) namely, involvement of the people in the process of policy making; and, transparency and provision to the public of timely, accurate information. Thus, the Court considers that the subject of participation of the people or simply public participation has attracted great public interest and its scope and implementation by state organs, state officers, public officers, and every person including artificial persons like trade unions should be regulated by statutory provisions. The Attorney General, the 4th respondent herein, should consider taking appropriate action towards enactment of legislation on the participation of the people or public participation for coherent realization of that constitutional value and principle.
21. To answer the 3rd issue the Court returns that indeed the 1st purported respondent has not been shown to be a person in law and it was necessary to name the individuals holding offices in the National Executive Council of the Kenya National Union of Teachers so as to have proper parties in that regard. While the 1st respondent was described in the petition as the union's national officials, they were not named as such and as required.
22. To answer the 4th issue the Court returns that indeed there was no cause of action against the 3rd respondent as there were no allegations of omission or action and no prayers against the 3rd respondent.



It appears that the 3rd respondent was not a proper party to the petition and the submissions dated 02.10.2023 by learned Counsel Isaac Ochieng are upheld in that regard.

23. To answer the 5th issue, the Court returns that in view of the findings in this judgment, the petitioners have failed to establish the justification for the remedies as prayed for.
24. The Court has considered the dispute was amongst union members and the 1st respondent is not a person in law. The Court returns that each party to bear own costs.

In conclusion judgment is hereby entered determining the petition with orders:

1. The petition is dismissed.
2. The Attorney General, the 4th respondent herein, to consider taking appropriate action towards enactment of “participation of the people or public participation” legislation towards a coherent realization of that constitutional value and principle in public, private, and other sectors.
3. Each party to bear own costs of the petition.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 10TH NOVEMBER, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

