



Union of National Research and Allied Institutes Staff of Kenya (UNRISK) v Director, National Museums of Kenya & 2 others; Principal Secretary, Public Service Commission (Interested Party) (Petition E207 of 2021) [2023] KEELRC 3407 (KLR) (29 December 2023) (Judgment)

Neutral citation: [2023] KEELRC 3407 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E207 OF 2021
K OCHARO, J
DECEMBER 29, 2023**

BETWEEN

UNION OF NATIONAL RESEARCH AND ALLIED INSTITUTES STAFF OF KENYA (UNRISK) PETITIONER

AND

**THE DIRECTOR, NATIONAL MUSEUMS OF KENYA 1ST RESPONDENT
CABINET SECRETARY, MINISTRY OF SPORTS, CULTURE AND HERITAGE 2ND RESPONDENT**

THE HON ATTORNEY GENERAL 3RD RESPONDENT

AND

THE PRINCIPAL SECRETARY, PUBLIC SERVICE COMMISSION INTERESTED PARTY

JUDGMENT

1. The Petitioner a Trade Union registered under the provisions of the Labor Relations Act, 2007 has Petitioned this Court for:
 - a. A declaration that pursuant to Articles 22 (2) (d) and 258 (2) (d) of *the Constitution* of Kenya, 2010, this suit instituted for more than one Petitioner’s members employed by the 1st Responded is constitutional and proper petition.
 - b. A declaration that the 1st Respondent is a State Corporation whose officers and staff are Public employees entitled to Public Service employment rights and privileges, and benefits with effect from May 2017.



- c. A declaration that, currently the Public Service Commissions Human Resource Policies and Procedure Manual for the Public Service is the sole authoritatively relevant and applicable for the 1st Respondent's employees' employments rights, privileges and benefits.
 - d. A declaration that by failing to give officers and staff annual increment from May 2017 the 1st and 2nd Respondent breached article 41 (1) and 2(a) of *the Constitution* of Kenya, 2010 and contravened section c, c.3-annual increment dates of the Public Service Commission's Human Resource Policies and Procedures Manual for the Public Service, May 2016.
 - e. An Order issue that, the interested party defends the legality of her Human Resource Manual relied upon in this Petition by the Petitioner.
 - f. A mandatory Order to issue that, with immediate, effect the 2nd and 3rd Respondent ensured that the 1st Respondent applies the terms and conditions of service for the Public Service employees in the Public Service Commission's Human Resource Manual upon her (1st Respondent's) employees within thirty (30) days from the date of Judgement.
 - g. An Order issue that, the 1st Respondent compute and file within sixty (60) days from the date of Judgement, a scheduled of all her employees' salary progression year by year from May 2017 up-to the date of Judgement, to be considered by this Honourable Court by a final Decree.
 - h. An order for the actual amount of cost of the Petitioner pronounced by the Court.
2. The Petition, is supported by two affidavits, a supporting affidavit sworn on 20th December, 2021 by one Zachariah Achacha, the Petitioner's Secretary General and his further affidavit sworn on 3rd March, 2023.
 3. The Respondent's have resisted the petition upon basis of the grounds obtaining in the replying affidavit sworn by the 1st Respondent's Director Administration and Human Resource, Mr. Stanvas Ongaro,
 4. This petition wan canvassed by way of written submission pursuant to direction of this Court.

Petitioner's Case

5. The Petitioner states that its constitution mandates its to recruit into a membership unionsable employees of all research and allied institutes, state or privately owned Corporation, and has recruited 228 (228) of the 1st Respondent.
6. The Petitioner states that the 1st Respondent has been enjoined in this matter as the officer in charge of the day to day management of the 1st Respondent.
7. Further, within the meaning of section (b) and seventeen of National Museum of Kenya Act, No. 6 of 2006 and pursuant to the Certificate of Registration that was issued by the National Commission for Science, Technology and Innovation, effective 18th May 2017 the National Museum of Kenya is a research Institution.
8. The Petitioner contends as a State Corporation, the National Museum of Kenya is governed by *the Constitution* of Kenya 2010, and various relevant Laws, the primary Law been the National Museum Act, No. 6 of 2006, under which it is established.
9. The Petitioner asserts that upon the above stated registration and issuance of the Certificate of Registration, the 1st Respondent's Director General through, a circular to all staff dated 24th May, 2017,



- exhibited confidence and assured that, the Institution had been enabled to lobby for terms similar to other research institutions as well as access to Government funding budgeted for research institutions.
10. The Petitioner states that it is upon registration it moved to recruit, the 1st Respondent's unionsable employees. In the course of the Recruitment process the non- salary progression (annual salary) increment was reported to it. Further, in an attempt for an amicable solution, the Petitioner wrote a letter dated 20th May to the Principle Secretary Ministry of Sports, Culture and Heritage asking for reinstatement of mandatory annual increment of salary for the 1st Respondent employees
 11. The Petitioner contends that at the time about 450 unionsable employees had not received salary progression from 2019, and about 1200 management staff had not received salary progression – the annual salary increments from 2019.
 12. The 1st Respondent's failure to give her employees salary progression is a breach of its employees' Constitutional rights, privileges and benefits provided under Article 41 (1) and (2) (a) of Constitution of Kenya 2010.
 13. The 1st Respondent has not shown willingness to have the matter amicably settled, hence the petition herein.

The Respondents' Case

14. The Respondents contends that currently there is no recognition agreement between the 1st Respondent and the Petitioner.
15. The only recognition agreement that exist between the 1st Respondent and a Trade Union is that between it and the Kenya Union of Commercial Food and Allied Workers (KUCFAW).
16. The Respondents further asserts that the Employees of the 1st Respondent are Public officers whose remuneration and benefits are paid directly out of money provided for by parliament through appropriation under Article 106 of *the Constitution* of Kenya and all other applicable Laws.
17. The 1st Respondent states since 2018/2019 and 2019/2020 financial years to-date no money for expenditure on salary increments for its employees has been appropriated for and or by availed by the National Treasury to enable it implement staff salary increments. On 5th July, 2021, it did write to the 2nd Respondent informing him of its situation through its letters dated 10th August, 2021 and 15th September 2021. The 1st Respondent explained to the Ministry of Labor and Social Protection that payment of annual salary increment for staff members was pending awaiting allocation of funds from the National Treasury.
18. The 1st Respondent – states that without funding from the National Treasury, it cannot be able to implement annual salary increment for the employees.
19. Further, a Trade dispute was reported to the Ministry of Labor and Social Protection where a conciliator, Mr. George Kisimuli was appointed in accordance with Section 65 (i) of the Labor Relations Act. The Petitioner and the 1st Respondent were invited for a conciliation meeting on 13th October 2021, vide a letter dated 27th September, 2021. The parties asked to submit their respective memorandums.
20. It is further stated that the 1st Respondent cannot be compelled to pay annual increment without allocation of funds for the same by National Treasury. Therefore, the Orders sought can only be directed against the National Treasury.



21. It is contended that the petition herein suffers from a serious mis-joinder of relevant parties rendering it defective and incompetence. It should be dismissed for that reason.

Rejoinder By The Petitioner

22. In rejoinder to the material placed forth by the Respondents, the Petitioner contends that it did obtain an Order in ELRC/E641/2022, whereby the Court directed 1st Respondent to deduct and remit union dues in respect of employees who had signed check-off forms. The 1st Respondent in compliance with the Order made some deductions and remitted the same to the Petitioner. It cannot therefore be right for the Respondents to contend that the 1st Respondent does not recognize the Petitioner union
23. In any event Article 22 of *the Constitution* allows any person to institute Court proceedings claiming that a right or a fundamental freedom in the Bill of rights has been denied, violated or is threatened to be violated. Under this Article, the Petitioner had the requisite locus to institute and pursue this petition.

The Petitioner's Submissions

24. The Petitioner identifies four issues for determination:
- [a] Whether the Petitioner has locus to represent and sue on behalf of its members in this petition.
 - [b] Whether the petition is defective for non – joinder of the National Treasury.
 - (c) Whether the Petitioner is entitled to the prayers sought.
 - (d) Who bears the cost of this petition.
25. On the first issue, the Petitioner argues that it has successfully discounted the Respondents assertion that its not recognized by the 1st Respondent. As a result of the recognition, the 1st Respondent has made deductions of Union dues from its employees and remitted the same to it. It argues further that a Trade Union needs not a recognition agreement with the employer to enable it sue on behalf of its members. To buttress this point, it placed reliance on the decision in Kenya Union of Domestic Hotels Educational Institutions and Hospitals Workers versus Bai Hong cheng (2021) eKLR.
26. It is further submitted that under Articles 22 and 258 of *the Constitution*, it had the necessary locus standi to institute and pursue the petition herein.
27. As regards the issue of non- joinder the Petitioner submits that the National Treasury is not an employer of its members. The Treasury could not be a proper party to be sued in the circumstances therefore.
28. On the reliefs sought, the Petitioner argues that it is the primary responsibility of the employer to ensure that its employees are paid their salaries. There is no doubt that the 1st Respondent's employees were at all material times entitled to a salary increment as of right. The reliefs sought are therefore merited.

The Respondents' Submissions

29. In their submissions the Respondents cite three issues as those that emerged for determination, thus:
- a. Whether the 1st Respondent has out of malicious intent withheld the annual salary increment of its employees.
 - b. Whether the Petitioner has proper authorization to act on behalf of the employees whose annual salary increments have not been remitted to them.



- c. Whether there was a mis-joinder of parties.
- d. Who is entitled to costs of the suit?
30. It is submitted that the 1st Respondent is a State Corporation duly established under National Museum Kenya Act No. 6 of 2006 and in aid of its operations has within its employees that are employed through the Public Service Commission.
31. The Respondents submit by virtual of the Human Resource Policies and Procedure manual for the Public Service 2016, the Public Service Commission made it policy that Public Officers shall enjoy annual salary increments from the date of their appointment. Since the passing of the policy, the 1st Respondent has always undertaken to ensure annual salary increments of its employees are always remitted in good times and in full amount.
32. However, in the financial year 2019/2020 the 1st Respondent started having challenges as the National Treasury failed to remit enough monies to allow the 1st Respondent pay the annual salary increments.
33. The Petitioner cannot compel the 1st Respondent to remit money that is not in its possession. The Petitioner's move is not only unfounded but arbitrary too.
34. The Respondents argue that although the Petitioner purports to act on the request of some of the 1st Respondent's employees, the Petitioner has failed to furnish a recognition agreement to demonstrate that the 1st Respondent formerly recognizes it.
35. It is further submitted that the *Labour Relations Act*, 2007 recognizes, the right of Trade Unions to be recognized by an employer in the Public Sector if the Trade Union has simple majority of unionsable employees. The right is set out under section 54 (1) thereof.
36. The Respondents that section 54 (3) of the Act, requires that recognition agreement be reduced into writing on terms agreed by the employer and Trade Union. A recognition agreement is mandatory and pivotal for any Trade Union to undertake collective bargaining activities.
37. Further, the Petitioner has not provided evidence to prove it has recruited to its membership a simple majority of unionsable works of the 1st Respondent. Courts have always interpreted the requirements of section 54 of *Labour Relations Act* as couched in mandatory terms. A Trade Union must demonstrate that it has recruited a majority of an employer's employees to warrant the recognition contemplated under the Act. To fortify this submissions reliance was placed on the decision in the case of Kenya Shoe and Leather Workers Union Versus Crown Industries Limited and another (2017) EKLR.
38. There is no collective agreement between the 1st Respondent and the Petitioner, therefore, the latter has no right to address the grievances of the 1st Respondent's employees and or campaign for their annual salary increments.
39. The Respondents submit that from the Petition, there can be no doubt that the Petitioner is purporting to act for 1200 employees of the 1st Respondent, 450 of whom it alleges to be its members. The un rebutted position of the 1st Respondent is that it has only one recognition agreement, that with KUCFAW. The Petitioner failed totally to demonstrate that it has members within the work force of the 1st Respondent.
40. On the issue of mis-joinder, the Respondents contend that joinder of the National Treasury in this matter was necessary. An effective Decree cannot be passed in their absence. According to section 18 of the National Museum and Heritage Act the primary source of the 1st Respondent's funds is the monies



appropriated by Parliament for National Museums. The National Treasury is the chief financier. Its absence as a party in this matter shall hamper this Court's ability in arriving at a proper Judgement.

41. The National Treasury is the only body capable of explaining why the annual increments of the salary for the 1st Respondent's employees has not been remitted.
42. To support their submissions on the issue of mis-joinder, the Respondents placed reliance on the case of *Werrot and Co. limited and others versus Andrew Douglas Gregory and others* (1998) EKLR.

Analysis and Determination

43. I have carefully considered the petition, the supporting and further affidavits by the Petitioner, the Respondents' response, and the submission by Counsel, the following issues emerged for determination:
 - (a) Whether the Petitioner had the necessary locus standi to institute and pursue this petition.
 - (b) Whether the petition herein is a proper represented petition.
 - (c) Whether the Petitioner has proved a violation of Constitutional rights and or Constitutional Provisions by the Respondents.
 - (d) Whether the Petitioner is entitled to the relief sought.
 - (e) Who should bear the costs of this suit?

Whether The Petitioner Had The Necessary Locus Standi To Initiate And Pursue This Petition.

44. Looking at the Petition herein as presented, there is no doubt in my mind that the same has been brought for and on behalf of 1200 management staff and 450 unionisable employees in the employment of the 1st Respondent, whose Constitutional right the Petitioner contends have been violated.
45. The Respondents contends that the Petitioner has neither a recognition agreement or a collective bargaining agreement executed between it and the 1st Respondent. Therefore, it cannot purport to have any authority to address the grievances of the 1st Respondent employees or campaign for their employment rights.
46. The Petitioner urges this Court to find Respondents argument as standing on quick sand. It had authority derived from two sources to institute the petition. First, *the Constitution* locus standi flowing from the provisions of Article 22 an 258 of *the Constitution*, second, the recognition of it by the 1st Respondent.
47. At this juncture it becomes imperative to consider the stipulations of Articles 22 and 258 of *the Constitution*, and how they apply to the instant matter if at all they do. Article 22(1) provides:

“Every person has the right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened”.
48. Article 258 of *the Constitution* provides:
 - “(1) Every person has the right to institute Court proceedings claiming that this Constitution has been contravened.



- (2) In addition to a person acting in their own interest, the Court proceedings under clause (1) maybe initiated by-
- (a) a person acting on behalf of another person who cannot act in their own name;
 - (b) a person acting as a member of, or in the interest of, a group or class of persons.
 - (c) a person acting in the public interest or
 - (d) an association acting in the interest of one or more of its members.”

49. No doubt the promulgation of the 2010 Constitution ushered in a dispensation free from the shackles and strictures of doctrines of locus standi. A liberal look at the Provisions of Articles 22 and 258 of *the Constitution* will lead to an easy conclusion that the Petitioner had the requisite standi to initiate this petition on behalf of the people it purports to. However, a critical look at them will reveal otherwise.
50. In my view, the Articles forestated providing for locus standi should not be looked at in isolation from other Provisions of *the Constitution*, and relevant statutory provisions. The liberal approach the stated Provisions posit should not be applied in a manner that shall be at conflict with, and have negation effect of other Provisions of *the Constitution* or negate statutory Provisions have not been sought to be, and declared, unconstitutional.
51. Article 10 of *the Constitution* enjoins those charged with the interpretation and or application of the Law to abide by inter alia the rule of Law. Collective bargaining is largely about representativity. The *Labour Relations Act* 2007, provides in detail about collective bargaining and who qualifies to represent who in the labour relations space. To allow the Constitutional approach to be applied in a manner that cares not about the details and qualifications, as the Petitioner wants this Court to do, shall not be in accord with the Provisions of Article 10 and the Rule of Law.
52. *The Constitution* provides the right of association, and right of employees to join and or involve themselves in activities of a Trade Union of their own choice. I hold the view that to allow a Trade Union that has not demonstrated that it is the Trade Union of the choice of those it has purported to represent, to successfully argue that the liberal approach posited under Articles 22 and 258, gives it the right to represent notwithstanding the failure to represent an accepted representativity shall negate these rights that *the Constitution* guarantees.
53. The Petitioner did not demonstrate that it had recruited employees of the 1st Respondent in to its membership and that if it did, the recruited members were of the numbers contemplated into (simple majority of unionisable employees) under section 54 of the *Labour Relations Act* 2007, to enable it get into a recognition agreement with 1st Respondent.
54. Section 54 contemplates a written recognition agreement. I do not agree with the Petitioner’s suggestion that recognition of a Trade Union by an employer can be conclusively shown through other means other than a written recognition agreement as contemplated by the Law.
55. By reason of the premises, I conclude that the Petitioner did not have the locus standi to initiate and pursue the petition herein on behalf of the employees of the 1st Respondent it purported to.
56. This finding disposes of the Petitioner’s petition. It sets it for rejection. Consequently, I find it unnecessary to turn to consider the other issues framed.



57. By reason of the premises, I dismiss the Petitioner's petition herein with costs.

READ, DELIVERED AND SIGNED THIS 29TH DAY OF DECEMBER, 2023.

OCHARO KEBIRA

JUDGE

In the Presence of :

Mr. Mokaya for the Petitioner.

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

