



**Alwala & 3 others v Kenya Universities Staff Union (Petition E083 of 2023)  
[2023] KEELRC 3223 (KLR) (7 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3223 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E083 OF 2023**

**B ONGAYA, J**

**DECEMBER 7, 2023**

**IN THE MATTER OF ARTICLES 27, 41 (1), (5), 159 (1) & (2), 162 (2),  
165, 230 (4) & (5) AND 237 OF THE CONSTITUTION OF KENYA 2010  
AND IN THE MATTER OF THE LABOUR RELATIONS ACT (2007)**

**BETWEEN**

**JOSEPH OLUKUSI ALWALA ..... 1<sup>ST</sup> PETITIONER  
HANNIEL KIPCHIRCHIR ..... 2<sup>ND</sup> PETITIONER  
JOHN WEKESA WANYAMA ..... 3<sup>RD</sup> PETITIONER  
FRANCIS CHENGOLI ..... 4<sup>TH</sup> PETITIONER**

**AND**

**KENYA UNIVERSITIES STAFF UNION ..... RESPONDENT**

**JUDGMENT**

1. The petitioners filed the petition dated 02.05.2023 through Weda & Company Advocates. The petitioner prayed for:
  - a. A declaration be made that the petitioners' fundamental rights and freedoms under Article 27 and 41 of the *Constitution* have been contravened and or likely to be contravened and violated by the respondent herein.
  - b. A declaration that the actions by the Kenya University Staff Union seeking views to amend the *constitution* of Kenya University Staff Union 2019 is ultra vires to the extent that the said constitution has been declared a nullity and unconstitutional.



- c. A declaration that the Kenya University Staff Union Constitution registered by the Registrar of trade Unions on the 03.04.2013 as reinstated by Justice Maureen Onyango take effect immediately
  - d. A declaration be made that the officials of the Kenya University Staff Union are illegally in office since they were elected pursuant to an unlawful constitution and should be removed from office
  - e. Subsequent to prayer 4 hereinabove, the registrar of trade unions be tasked with convening an all –inclusive election in compliance with the Unions Constitution registered on the 03.04.2013
  - f. Costs of this petition.
  - g. Any other orders, writs and directions the honourable court considers appropriate and just to grant for purposes of the petitioner’s constitutional rights.
2. The petition was based upon the 1<sup>st</sup> petitioner’s supporting affidavit sworn on 02.05.2023 and exhibits thereto filed together with the petition. The 1<sup>st</sup> petitioner stated as follows:
- a. That he is a member of the Kenya University Staff Union having joined on 13.08.2008 under P/F Number 0318
  - b. That he is aware that the 4<sup>th</sup> petitioner sued the respondent in ELRC Petition E026 of 2021, Francis Chengoli and others v Kenya University Staff Union. In the petition, the 4<sup>th</sup> petitioner cited that the respondent, through its officials, illegally changed the union’s constitution without following due process. That the respondent introduced draconian, illegal and unconstitutional clauses in order to protect those in the elective seats to the exclusion of other members.
  - c. The petitioner contends that those amendments were in contravention to section 34(2) of the *Labour Relations Act*, which prevents a trade union from registering union constitutions that are discriminatory in nature and fly in the face of the *Constitution* of Kenya.
  - d. That the 4<sup>th</sup> petitioner raised issue with the method with which the respondent went about the amendment of the *constitution*. The 4<sup>th</sup> petitioner stated that the officials of the respondents currently in office did not follow the guidelines set out in article 21 of the union’s constitution, which states:
 

“alterations to these rules shall only be made by resolution voted upon by secret ballot or any other mode agreed upon and passed at an Annual General Delegates Conference or a Special Delegates Conference. All proposals for amendments shall be submitted to the Secretary General not later than three weeks before the date of such Annual or Special Delegates Conference”
  - e. That the court rendered Judgment in the matter on 18.03.2022 where she determined and made the following orders:
    - i. A declaration be and is hereby issued that the petitioners fundamental rights and freedoms under Article 27 and 41 of the *Constitution* have been contravened and violated by the respondents.



- ii. A declaration be and is hereby issued that the Kenya University Staff Union Constitution registered on the 15.07.2020 by the registrar of trade unions is a nullity and unconstitutional.
  - iii. A declaration be and is hereby issued that the Kenya University Staff Union constitution registered on the 03.04.2013 by the Registrar of Trade Unions is hereby reinstated.
  - iv. A declaration be and is hereby issued that the petitioner and indeed the members of the union have a right to participate in the affairs of the union including vying for elective seats of the union.
  - v. A declaration be and is hereby issued expunging of all the discriminatory, illegal and offensive clauses hereinabove from the KUSU constitution.
  - vi. That following the aforesaid judgment and declarations of the court, the operational constitution of the respondent union is the one registered by the registrar of trade unions on the 03.04.2013. and that the current union officials are illegally and unlawfully in office having been elected into office pursuant to a nullified constitution.
  - vii. The respondents have started to work backwards to try legitimizing an already illegitimate constitution. By a letter dated 09.03.2023 the officials of the respondent through their secretary general sent out a memo to all branch secretaries titled KUSU Constitution Review. In the said letter, the respondent wrote, “The national governing council sitting in Nairobi on March 8, 2023 resolved that the KUSUS constitution 2019 be reviewed and aligned to the Kenya Constitution 2010.”
- f. The letter is unlawful for reasons that the respondents are illegally in office having been elected pursuant to a nullified and unconstitutional union constitution and therefore are under no authority and/or mandate to conduct constitutional changes. That the *constitution* to which the respondents are seeing to review has already been declared a nullity and the one registered on the 03.04.2013 declared as the operational constitution.
- g. By a letter dated 01.04.2023 the respondent through its secretary general declared the period for reviews from the branches and transmitting the same to the national office had ended.
- h. The respondent’s officials have resorted to intimidation techniques by unlawfully suspending members who raise issue with them. That at the annual delegates conference held on 09.12.2022, the petitioner states that he raised an issue regarding the respondents who were still operating under the umbrella of a nullified constitution, and what followed was a suspension letter from the respondent dated 04.01.2023. The Employment and Labour Relations Court sitting in Bungoma lifted the suspension pending the hearing of a Petition E001 of 2023 *Joseph Alwala v Kenya University Staff Union*, filed by the petitioner.
- i. The respondents have not shared any proposed amendments to the Unions constitution with the members of the union as required by law and as directed by the court.
3. The respondent in reply filed an answer to petition erroneously dated 01.09.2019 together with the replying affidavit of Dr. Charles Mukhwaya sworn on 23.08. 2023, as well as the further affidavits of Nickson Chege, John Ogwang and Tom Okello Oloo all sworn on 01.09.2023 and filed through Bruce Odeny & Company Advocates. It was stated and urged as follows:



- a. That the petitioners are members of the respondent union, the 1<sup>st</sup> and 3<sup>rd</sup> petitioners subscribe to the union through the Kibabii branch, with the 1<sup>st</sup> petitioner as the branch secretary. The 2<sup>nd</sup> petitioner is a member of the Eldoret branch while the 4<sup>th</sup> petitioner is a member of the union at the University of Nairobi branch.
- b. That the petitioner seeks a declaration that the respondent's constitution registered by the registrar of trade unions on 03.04.2013 take effect immediately, which directive was already issued by the Court in ELRC No. E026 of 2021 *Francis Chengoli & Another v Kenya Universities Staff Union*.
- c. That the re-introduction of this issue before this honourable court is not only a waste of precious judicial time, but also barred as the court ought not to canvass an issue which is res judicata, having been heard and determined by another court of equal jurisdiction.
- d. The process of amending the respondent's constitution was commenced in the year 2017, and culminated in the adoption of the Kenya universities staff union constitution, which was registered with the registrar of trade unions in April 2020.
- e. Following the decision of the court in ELRC No. E026 of 2021, *Francis Chengoli & Another v Kenya Universities Staff Union*, which declared the *constitution* unconstitutional, the affairs of the respondent are all being run in accordance with the former KUSU constitution 2013 as ordered by the honourable court.
- f. In line with the directions of the court requiring the respondent to expunge all discriminatory, illegal and offensive clauses from its constitution in the foregoing decision, the national executive council of the respondent commenced plans to revamp the KUSU constitution 2020 up until 26.07.2023 when the court gave directions halting the process.
- g. That the process of reviewing the 2020 constitution was transparent and the respondent's officials endeavoured to involve all the members at both branch and sub-branch levels by issuing proposals and receiving their views with respect to the said proposals.
- h. Following their participation in the review process, all branches submitted their views and minutes of review meetings with evidence of participation of their members to the national executive council.
- i. The respondent as the branch level has at all times circulated notices calling for review meetings to all members and the deliberate failure of the petitioners to attend and participate cannot be faulted upon the respondent who has discharged its obligation under its constitution.
- j. The court did not make any orders requiring the officials elected under the impugned constitution to vacate office, and there were no orders nullifying the elections that had been conducted under that constitution.
- k. All officials of the union including the 1<sup>st</sup> petitioner, were elected under the impugned constitution of 2020 and have already taken oath of office and are currently discharging vital functions in accordance with their mandate.
- l. The attempt to dissolve the respondent's leadership will create an undesirable vacuum that will have a catastrophic impact on the general management of the affairs and operations of the respondent.



- m. Besides mention of Articles 27 and 41 of the *Constitution* of Kenya 2010, the petitioners have failed to plead with specificity and or particularity, as they have not directed this court to the manner in which the said rights have been violated.
3. Final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows.
4. To answer the 1<sup>st</sup> issue, the Court returns that the petition must fail as it is substantially chained and barred by the doctrine of res judicata. The cause of action is similar to the one in ELRC No. E026 of 2021, *Francis Chengoli & Another v Kenya Universities Staff Union*, The instant petition is about the same issues as the previous one and the parties are the same or claiming in same right as those in the earlier suit. The issues raised were raised or ought to have been raised in that previous petition including the issue of if the officials elected under the impugned union constitution had been validly elected. Thus while at interlocutory stage the Court found against res judicata, nothing before the Court, no new or further evidence having been provided, would save the petition from being barred accordingly.
5. To answer the 2<sup>nd</sup> issue, any process of amending union constitution would be governed with the provisions of the union constitution and disputes as well resolved by way of the means provided in the union constitution and the applicable statutory provisions. In that consideration, no violation of constitutional provisions has been established and the respondent's submissions are upheld in that regard. The steps taken after the judgment in the previous petition have not been shown in any manner to offend Constitutional provisions as alleged. The petition will fail.

In conclusion, judgment is hereby entered for the respondent against the petitioner for dismissal of the petition with costs.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 7<sup>TH</sup> DECEMBER, 2023.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

