



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

PETITION NO. 6 OF 2020

AGNES WANGECI MANDERU.....1ST PETITIONER

GEORGE SHIVEKA.....2ND PETITIONER

DAMON KWARAA.....3RD PETITIONER

BENSON KIPKORIR BIWOTT.....4TH PETITIONER

MUTUNGA L. KIOKO.....5TH PETITIONER

RUTH MWIHAKI.....6TH PETITIONER

VERSUS

SETH PANYAKO THE GENERAL SECRETARY

KENYA NATIONAL UNION OF NURSES.....1ST DEFENDANT

KENYA NATIONAL UNION OF NURSES.....2ND DEFENDANT

RULING

1. By a motion dated 24th May, 2021 the petitioner applicant sought orders among others that :

- a) That this Honourable Court be pleased to grant the petitioner/applicants leave to file an amended petition.
- b) That the draft amended petition be deemed as duly filed upon payment of the court fees.

2. The application was based on grounds inter alia that:

a) The petitioner/applicants filed a petition dated 8th May 2020 simultaneously with an application seeking for orders:

i) Freezing of all the 2nd Respondent's bank accounts held at Barclays Bank, Queensway Branch, Account Number 2027765079 and Co-operative Bank, Aga Khan Walk Branch Account Number 01120309515200 save for the mandatory expenses which include and limited to employees' salaries, rent, office utilities and minimum miscellaneous expenses on a need be basis to be withdrawn by constitutionally mandated officials.

ii) The 1st respondent be restrained from withdrawing and/or transacting from the 2nd Respondent's bank accounts held at Barclays Bank, Queensway Branch, Account Number 2027765079 and Co-operative Bank, Aga Kahan walk branch Account Number 01120309515200 save for the mandatory expenses which include and limited to employees' salaries, rent, office utilities and minimum miscellaneous expenses on a need basis.

iii) An audit exercise be conducted with respect to all of the 2nd respondents' books of account, bank statement, vouchers, and all ancillary documents within 60 days and a report tabulated before this court.

iv) The Parties agree on an independent Auditor within 7 days of the court making Order (a) above failing which the court to appoint an auditor.

v) Suspension of the 1st respondent from office until the audit referred to in paragraph c above is conducted.

vi) Costs of this suit.

vii) Interests on (d) above at Court rates until payment in full.

b. However, during the pendency of these proceedings, the 1st respondent has continued to operate the above stated bank accounts in violation of Court Orders in particular Orders issued on 5th June, 2020, 27th October 2020 and 8th February 2021.

c. Vide a letter dated 12th April 2021, the Secretary General Central Organization of Trade Unions wrote to the 1st Respondent advising on the disaffiliation of the 2nd Respondent from COTU for breach of COTU's Constitution Rules Numbers 3,12,13.

d. The disaffiliation from COTU will prejudice the 2nd Respondent as COTU is the umbrella body of all Trade Unions.

e. The 1st Respondent is also embroiled in Court Battles and in particular High Court of Kenya at Kakamega Election Petition 5 of 2017, Seth Ambusini Panyako -v- The Independent Electoral & Boundaries Commission & 2 others whereby he is facing execution up-to the tune of 1.2 million.

f. The 1st Respondent secured a loan from Co-operative Bank which loan is not being serviced.

g. The 1st Respondent is also in the process of disposing of assets of the 2nd Respondent and in particular Motor Registration Number KCC 757R.

h. The Petitioners/Applicants are apprehensive that the continued running of 2nd Respondent's affairs by the 1st Respondent will paralyze the 2nd Respondent.

i. In further violation of Court Orders issued in Employment & Labour Relations Court at Nairobi JR E016, the 1st Respondent purported to hold elections on 26th February, 2021, which elections were a sham. The 1st Respondent also caused the said charges to be affected with the Registrar of Trade Unions.

j. From the foregoing, it is clear that the 1st Respondent will not stop disobeying Court Orders and violating the 2nd Respondent's Constitution unless suspended and/or removed from office.

k. The petitioner/Applicants wishes to amend the Petition to include prayers for:

i) Orders freezing the accounts of 2nd Respondent until proper independent audit is done by an independent firm of auditors to be appointed by the Court.

ii) Orders directing the Chairman of the Institute of Internal Auditors Kenya Chapter to avail to court 3 audit firms from which one can be selected to carry out an independent audit and same be fully paid for by the 2nd Respondent.

iii) Orders directing the Officer Commanding Police Division (OCPD)- Central Police Station to provide for the security during the period of audit.

iv) Orders suspending the 1st Respondent together with all bank signatories from office to pave way for peaceful and independent exercises of audit.

v) The proposed amendment will not prejudice the respondents

3. The respondents opposed the application and filed grounds of opposition in which they stated among others that:

a) The substratum of this matter has been overtaken by events since elections of the 2nd respondent were held on 26.2.2021 and changes of official effected in which none of the petitioners was (re)elected back into office therefore the Petitioners have no legal legitimacy to purport to proceed with the matter when they are no longer in office and/or have no business whatsoever and/or connection and/or dealing of whatever nature with the 2nd respondent.

b) That all the orders sought in the Amended Petition dated 31.5.2021 are spent as registration of officials of the 2nd respondent was effected on 26.3.2021 before the instant Amended petition was filed in Court.

c) Further the Amended Petition has been over taken by events since the Court issued Orders on 5/6/2021 and 27/10/2020 and ordered for a financial inquiry to be undertaken and be filed by the Registrar of Trade Unions on the issue of alleged misappropriation of funds of the Union. The Petitioners prayers for another audit to be undertaken outside the inquiry already undertake is thus superfluous and an abuse of Court process.

d) That the Amended Petition does not disclose any cause of action against the respondent's hence should be struck out as the suit has been overtaken by events.

e) The petitioners are guilty of material non-disclosure and wherefore disentitled to any of the orders sought.

f) Court do not act in vain.

g) The Amended Petition is misconceived and bad in law.

h) That the Amended Petition is frivolous, scandalous, and vexatious as it seeks to introduce extraneous matters that have no bearing and/or connection whatsoever with the management of the Union and matters under consideration in this case. The Petitioners have trivialized this matter to the extent of becoming too personal and malicious by pleading on unverified personal issues and life about the 1st respondent that he took out a loan facility with a financial institution which allegedly he is not servicing.

4. The 1st respondent further filed an affidavit in which he stated on the claim that:

a) That, the amended Petition is a nonstarter and otherwise an abuse of court process since its principal substratum as crafted by the Petitioners being leadership wrangles has since been resolved through an election held on 26/2/2021 that was conducted peacefully and in accordance with the law, the union constitution, the election by-laws and practice; and now the Union has new officials; and none of the Petitioner was (re)elected back into office. Attached herewith and marked SAP-01 is a letter from the Registrar of Trade Unions dated 26/3/2021 confirming that indeed her office registered notice of change of officers covering the appointments made on 26/2/2021.

b) I verily believe that the vague and general occasions in the petition and depositions in the affidavit are imprecise without particulars and incapable of direct rejoinder due to their generality.

c) That, therefore, it is not true that:

i) The 1st Petitioner is the National Treasurer and member of the 2nd Respondent;

ii) The 2nd petitioner is the National Deputy Treasurer and member of the 2nd Respondent;

iii) The 3rd Petitioner is the National Deputy Organizing secretary and member of the 2nd Respondent;

iv) The 4th Petitioner is the Elgeyo Marakwet Branch Secretary and member of the 2nd Respondent;

v) The 5th Petitioner is a member of the 2nd Respondent;

vi) The 6th Petitioner is a member of the 2nd Respondent;

d) In response to paragraph 9 of the Amended Petition, I wish to state that I have not violated any Court Orders as alleged or at all. This issue is res judicata since the Petitioners filed a contempt application dated 2/11/2020 against me which was canvassed culminating into a ruling on 27/10/2020 whereby the same was dismissed. The issue of alleged violation of the court orders of 5/6/2020, 27/10/2020 and the buildup order of 8/2/2021 has already been handled conclusively and a ruling delivered thereto. The Petitioner', if any, lies in only appealing but not to invite the Court to sit on an appeal of its own decision. Attached herewith and marked SAP-3 is a copy of the Court ruling of 27/10/2020 capturing all the aforesaid issue.

e) In response to paragraph 10 and 11 the Amended Petition on the disaffiliation of 2nd respondent from COTU on alleged breach of COTU's Constitution Rules Numbers 3,12, and 13, I wish to state that this issue is sub judice since the 2nd Respondent has filed Claim No. E321 of 2021 in which it has challenged the procedure adopted in disaffiliating it from COTU as well as the justification for the same. It is therefore against the sub judice rule for the Petitioners to purport to argue on the merits of the decision of Cotu when the matter is alive before another court of competent jurisdiction. In any event, the issues of disaffiliation and breach of Cotu rules have no nexus at all with this matter and this is just an affirmation of how the Petitioners are desperate to clutch at straws naming anything that is completely pedestrian and immaterial with the subject matter under consideration. Attached herewith and marked SAP-4 is a copy of the Memorandum of Claim in Cause No. E 321 OF 2020 challenging the alleged disaffiliation.

f) In response to paragraph 12 and 13 of the Amended Petition on the issue that I am embroiled in a court battle over 2017 General Election, I wish to state that the same has no nexus and or no connection whatsoever with this current matter. In any event I deny that I have an outstanding loan with the bank and invite strict proof to the contrary.

g) In response to paragraph 14 of the Amended Petition that I am in the process of disposing of assets of the 2nd Respondent and in particular M/V Reg. No. KCC 757R I deny that I am involved in such a plan and invite strict proof to the contrary. In any event, the 2nd Respondent does not own such a Motor Vehicle. Strict proof to the contrary is invited.

5. An amended of pleadings ought usually not to attract so much contestation. However, my experience with the parties before me has been that anything and everything must be vehemently opposed.

6. The purpose of amendment is to enable a party seeking such amendment to bring all issues in controversy before the court in order for the court to conclusively determine the matter. The Court will usually allow amendment of pleadings as a matter of course unless a party seeks to introduce issue or issues that are either statute barred or outside the jurisdiction of the court. Furthermore, an amendment if allowed gives the party affected by the same the right to amend their pleadings to align with the amendment by the opposing party.

7. The question whether the applicant no longer has the locus to sustain this dispute is matter which can be decided at the full hearing of the petition.

8. In conclusion, the court will allow the amendments sought and direct that the parties set the petition down for direction on hearing and disposal within 30 days of this ruling.

9. The matter is set for mention on 21st March, 2022 for directions on hearing and disposal.

10. It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 25TH DAY OF FEBRUARY, 2022

Abuodha Nelson Jorum

Judge ELRC