



**Munderu & 6 others v Panyako, the General Secretary, Kenya National Union of Nurses  
& 2 others (Cause E681 of 2020) [2022] KEELRC 1417 (KLR) (13 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1417 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E681 OF 2020  
MA ONYANGO, J  
MAY 13, 2022**

**BETWEEN**

**AGNES WANGECI MUNDERU ..... 1<sup>ST</sup> CLAIMANT  
GEORGE SHIVEKA ..... 2<sup>ND</sup> CLAIMANT  
DAMON KWARAA ..... 3<sup>RD</sup> CLAIMANT  
BENSON KIPKIROR BIWOTT ..... 4<sup>TH</sup> CLAIMANT  
PAUL NZEI NZIOKI ..... 5<sup>TH</sup> CLAIMANT  
PEPELA KHAOYA PETER ..... 6<sup>TH</sup> CLAIMANT  
NOAH CHESIRE KAMPALA ..... 7<sup>TH</sup> CLAIMANT**

**AND**

**SETH PANYAKO, THE GENERAL SECRETARY, KENYA NATIONAL UNION  
OF NURSES ..... 1<sup>ST</sup> RESPONDENT  
KENYA NATIONAL UNION OF NURSES ..... 2<sup>ND</sup> RESPONDENT  
REGISTRAR OF TRADE UNIONS ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The Claimants are members of the Kenya National Union of Nurses, a trade union registered under the *Labour Relations Act* to represent nurses in Kenya, who is the 2<sup>nd</sup> Respondent herein after referred to as the union. The 1<sup>st</sup> Respondent is the General Secretary of the Union. The 3<sup>rd</sup> Respondent is the Registrar of Trade Unions appointed under Section 31(1) of the *Labour Institutions Act* and is responsible for the registration and regulation of trade unions, employers' organizations and federations.



2. In the memorandum of claim dated 22<sup>nd</sup> October 2020 as amended on 2<sup>nd</sup> November 2020, the Claimants seek the following reliefs –
  - a. This Court be pleased to grant an Order Staying the Election Notice dated 1<sup>st</sup> October 2020 issued by the 1<sup>st</sup> Respondent until the 1<sup>st</sup> and 2<sup>nd</sup> Respondents commits to the requirement by the Registrar of Trade Unions issued for purposes of ensuring fair, credible and transparent elections issued for purposes of ensuring fair, credible and transparent elections.
  - b. This Court be pleased to grant a mandatory injunction directed at the 3<sup>rd</sup> Respondent restraining her from adopting and/or registering and/or approving the changes made to the 2<sup>nd</sup> Respondent's Constitution at a Special National Governing Council held at Daichi hotel in Isiolo on 23<sup>rd</sup> October 2020.
  - c. Costs of the suits and the interest therein
3. The substantive issue for this Court's determination is the registration of changes to the 2<sup>nd</sup> Respondent's Constitution. The amendments to the 2<sup>nd</sup> Respondent's Constitution were forwarded to the 3<sup>rd</sup> Respondent for approval. According to the Claimants, the amendments are unlawful for the following reasons:
  - i. The requirement that the post of the General Secretary he/she must possess a degree seeks to block majority would-be opponents who may be qualified but lack the academic qualification. It should be judicially noticed that majority of the nurses attend tertiary institutions and in particular the Kenya Medical Training College. It also goes against a member's right to seek elective position.
  - ii. The requirement that an Applicant for the post of Secretary General must pay a non- refundable fee of KES. 300,000.00, non-members KES.1 million and a person seeking an elective position at the branch level must pay Kshs.50,000. These charges are unrealistic, exorbitant and discriminatory and would block many qualified persons but less economically empowered. It gives the incumbent the latitude to carefully vet his way and that of his cronies to retain the status quo in leadership.
  - iii. The requirement that for one to contest one must have been in the Union for a minimum of 5 years. This is biased because this presents only the incumbents most of who were just handpicked since the inception of the Union with undue advantage thus locking out any potential leader whose been a member for less than 5 years. The 2<sup>nd</sup> Respondent is only 7 years old; the 5 year threshold is highly prohibitive to the majority of members.
  - iv. The draft constitution being pushed for registration specifically offends the provisions of Chapter XXII (1) and (2) of the 2<sup>nd</sup> Respondent's Constitution, Sections 4 (2)(b), (c), and (d), 34(2)(a) of the *Labour Relations Act* 2007, as read together with Articles 24, 27(2) and (3), 41(1), (2)(c) of *the Constitution* of Kenya, 2010
3. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a response to amended claim in which they aver that the claim is sub judice as there is a similar petition filed as Eldoret ELRC Petition No. 6 of 2020 between the same parties.
4. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents further aver that the issue of discipline of former National Executive Council and National Governing Council members is also sub judice as the issue is pending under ELRC Cause No. 1637 of 2019. That the suit herein is therefore an abuse of court process.



5. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents aver that the union complied with due procedure when convening the meeting at which the constitution was amended.
6. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents further aver that the complaints about the election notice have since been overtaken by events since elections of the 2<sup>nd</sup> Respondent were held on 26<sup>th</sup> February, 2020 and change of officials effected in which none of the Petitioners was re-elected back into office. That the Claimants 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 2<sup>nd</sup> Respondent. That the Claimants are neither officials nor members of the 2<sup>nd</sup> Respondent.
7. That the challenge of the resolutions of the Special National Governing Council held on 23<sup>rd</sup> October, 2020 has been overtaken by events since a subsequent meeting properly convened has since been held on 14<sup>th</sup> July, 2021 with all the new office holders in attendance and resolutions passed accordingly.
8. They aver that the entire claim is premature, incompetent and bad in law. That the same is an afterthought, misadvised, frivolous, scandalous, vexatious and the same ought to be struck out.
9. Also pending before this Court for determination are two applications.
  - i. Application dated 2<sup>nd</sup> November, 2020 filed by the Claimants seeking a number of orders revolving around the Special Governing Council Meeting held at Daichi Hotel on 23<sup>rd</sup> October, 2020.
  - ii. The application dated 20<sup>th</sup> February, 2021 by the 2<sup>nd</sup> Respondent seeking to have the orders of this court issued on 2<sup>nd</sup> November, 2020 set aside.
10. In response to the application dated 2<sup>nd</sup> November 2021, the Respondents filed a replying affidavit sworn by the 1<sup>st</sup> Respondent on 8<sup>th</sup> November 2021. The Respondents also filed a preliminary objection, which was dismissed by this Court on 22<sup>nd</sup> January 2021.
11. In response to the application dated 20<sup>th</sup> February 2021, the Claimants have filed a replying affidavit sworn by the 1<sup>st</sup> Claimant on 3<sup>rd</sup> May 2021.
12. On 27<sup>th</sup> September 2021 the Court directed that all pending applications be argued concurrently with the main claim. The Court further directed that the parties file written submissions. The Claimants and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents file submissions.
13. The 3<sup>rd</sup> Respondent did not participate in the proceedings.

### **Determination**

14. Having considered the submissions on record, the issues for determination are the following: -
  - i. Whether the suit herein is sub judice;
  - ii. Whether the amended claim is in breach of Section 30 of the Labour Relations Act;
  - iii. Whether the 2<sup>nd</sup> Respondent complied with the procedure for amendment of the constitution;
  - iv. Whether the proposed changes to the constitution of the union are unlawful and/or unconstitutional.



## Whether the suit is sub judice

15. It is the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' averment that at paragraph 11 of the amended memorandum of claim the Claimants have admitted that there are proceedings pending over the same subject matter as this suit in ELRC 633 of 2019; *Newton Kimanthi v Seth Panyako and others*. Further that Eldoret ELRC Petition No. 6 of 2020 also pending relates the registration of the amended constitution which is an issue in dispute in the instant suit.

16. For emphasis the 1<sup>st</sup> and 2<sup>nd</sup> Respondents rely on the decision in *Safepark Limited v Henry Wambega & 11 others* [2019] eKLR where the Court stated –

“The petitioners are guilty of abuse of Court process by failing to bring the two claims in one suit and or electing

which of the two they wish to pursue.”

17. The Respondents further relied on the decision of the Supreme Court in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR

“The term ‘sub-judice’ is defined in Black’s Law Dictionary 9<sup>th</sup> Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

18. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents further rely on an except in the ruling of the Court in Petition 6 of 2020 delivered on 5<sup>th</sup> June 2020 where the Judge observed that –

“Counsel for the Petitioners Ms. Ngeresha admitted that the issues in the present petition are similar to those in the Kericho Petition (now decided) and Nairobi ELRC No. 12 of 2017 and 747 of 2018 in terms of the orders sought and not facts leading up to the filing of the case. Whereas the facts may be different but one common denominator that runs through is the issue concerning wrangles in the 1<sup>st</sup> Respondent’s (KNUN) leadership and allegations of financial mismanagement. The number of suits filed or parties filing those suits and facts upon which those suits are founded become irrelevant if ultimately the issue to be decided by the Court concern the leadership wrangles in the union and allegations of financial mismanagement.

...

If the Court’s advice were to be sought, I would say that a time is ripe to call a special Delegates Conference or any such supreme organ of the union to discuss what is ailing the Union’s leadership. The petitioners on the other hand need to exhaust all the dispute



resolutions mechanism available under the *Labour Relations Act* including seeking assistance of the Central Organization of Trade Unions (COTU) to reign in and bring harmony in the Union leadership. The numerous suits and the tendency to rush to Court on issues which can be adequately resolved within the framework of the union's constitution is to some extent an abuse of the Court process and ought to be discouraged.”

19. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents further relied on a report prepared by the Registrar of Trade Unions, the 3<sup>rd</sup> Respondent herein, in Eldoret Petition No. 6 of 2020 where the Registrar recommended as follows –
1. That the Court directs the Secretary General to call for a Special National Governing Council meeting to effect its mandate under the powers provided for under Chapter VI of the Union Constitution. This includes laying down the policy of the union and giving directions regarding the organization of the union as provided in Chapter V (4). All the raft of issues concerning the Union noted by the Court in paragraph 5 of the Ruling should then be fully addressed and resolved. The SNGC has all the powers to restore order in the union and ensure that proper service delivery to members is restored.
  2. The Court at its discretion, to set out the time frame within which the Secretary General should call the SNGC meeting and set out any other parameters it may deem fit to ensure that the process is democratic and transparent bearing in mind that the KNUN Constitution contains some provisions that may be very difficult to implement.”
20. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submit that arising from the Court's advice and recommendations of the Registrar, the 2<sup>nd</sup> Respondent duly organised and convened a Special National Governing Council meeting on 23<sup>rd</sup> October 2020 to discuss a raft of issues inter alia the registration of its amended constitution.
21. As I stated in the ruling on the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's preliminary objection delivered on 22<sup>nd</sup> January 2021, the Respondents did not produce to Court the pleadings in Eldoret Petition No. 6 of 2020 to enable the Court ascertain the cause of action therein which would inform a determination whether or not the issues herein are similar to those in the Eldoret Petition 6 of 2020.
22. Again, from the ruling that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents rely on there is no mention of the main issue in contention herein, being the registration of changes made to *the constitution* of the 2<sup>nd</sup> Respondent.
23. The report of the Registrar of Trade Unions also does not make any reference to the issue in dispute herein, being that the amendments made to *the constitution* of the Respondent on 23<sup>rd</sup> October 2020 are unlawful.
24. From the foregoing, I find that the subject matter, and the parties to this suit and those in Eldoret ELRC Petition No. 6 of 2020 are not the same and the suit herein is therefore not sub judice.

#### **Whether the amended claim is in breach of Section 30 of the Labour Relations Act**

25. Section 30 of the *Labour Relations Act* provides that any person aggrieved by the decision of the Registrar of Trade Union made under the Act may appeal to the Employment and Labour Relations Court against that decision within 30 days of the decision.
26. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submit that the Registrar of Trade Unions vide a letter dated 5<sup>th</sup> July 2018 made a finding in respect of amendments to *the constitution* of the union. That the Claimant ought to have challenged the same within 30 days pursuant to Section 30 of the *Labour Relations Act*.



27. The relevant portions of the letter from the Registrar of Trade Unions as produced by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents is reproduced below: -

“RE: Amendments To The Union Constitution

...

Lastly, by a copy of this letter, I wish to inform the members who objected to the amendments on the grounds that due process was not followed as contained in the current constitution, that as per the letter by the General Secretary Ref. NBI/KNUN/TRU/Vol. III 6/218/18 dated 26<sup>th</sup> March, 2018, due process was followed. The referendum was carried out between 10<sup>th</sup>-19<sup>th</sup> December, 2014.

A referendum question on the union's constitutional review dated 10<sup>th</sup> December, 2014, was sent to all the 47 counties for members to state whether they were in favour of comprehensive amendments to *the constitution* being undertaken.

After members approval, a questionnaire was sent to get views again from members (samples of which are in our records) on the areas that needed amendment. According to the records in our office, the referendum results were compiled by the chair of the National Election Board, where among the 24 counties which responded out of the 47 counties, 91% of them responded positively. Ballot papers to this effect are retained in the union's head office. Thereafter, a special National Governing Council held on 9<sup>th</sup>-12<sup>th</sup> November, 2016, ratified the constitutional review.

Further, members are advised to read *the Constitution* in totality and the relevant laws thereto as some of the complaints raised are already addressed under the law. It is paramount to note that new amendments have also been made under the following clauses: 5.3, 6.12, 7.22, 7.4.3, 11.2, 11.9, 13.3, 15.1, 15.2, 15.3, 15.4 and 21.2 to address some of the objections that had been raised. A copy of the amended constitution under these clauses is still open for scrutiny in the undersigned office.”

28. From the letter it is evident that the amendments referred to were those made at the Special National Governing Council meeting of the Union held on 9<sup>th</sup> to 12<sup>th</sup> November 2016. The amendments that are the subject matter of the suit herein were made on 23<sup>rd</sup> October 2020.
29. Further, the Registrar did not make any determination on the issue before this Court, which is that the amendments to the union constitution made on 23<sup>rd</sup> October 2020 are unlawful and should not be registered.
30. I find that Section 30 of the *Labour Relations Act* is not applicable in the circumstances of this suit.

**Whether the proposed changes to *the constitution* of the union are unlawful and/or unconstitutional**

31. The Claimants have specified the amendments which in their view were unlawful. The first is that the position of General Secretary must possess a degree. Their argument is that this will block the majority of the members whose training is provided by tertiary institutions and in particular Kenya Medical Training College. The Claimants argue that this violates a member's right to seek elective position.
32. The second provision in *the constitution* of the union that the Claimants object to is the requirement that an aspirant for the position of General Secretary, pays a non-refundable fee of Kshs.300,000/=



while non-members pay Kshs. one (1) million, while a fee of Kshs.50,000/= is payable by an aspirant at branch level. They argue that the fees are exorbitant, discriminatory and favour the incumbent.

33. The other provision the Claimants object to is the requirement that one must have been a member of the union for at least five years to qualify to vie for an elective position. They argue that this favours the incumbents who were never elected to office and locks out a majority of members from vying for elective positions as the union was only seven years old at the material time.

34. The Claimants submit that the amendments offend the provisions of Chapter XXII, (1) and (2) of the 2<sup>nd</sup> Respondent's constitution which provides as follows:

Chapter Xxii: Amendment And Alteration of *The Constitution*

1. Alteration to these chapters shall only be made by resolution voted upon by secret ballot at a National Referendum and ratified at National Governing Council Meeting or Special Governing Council Meeting.

2. All proposals for amendments shall be submitted to the Secretary General not later than eight weeks before the date of such National Referendum.

35. The impugned constitution provides for amendment thereof at Article XXIII as follows:

Article Xxiii: Amendments

23.1. A member desirous of initiating amendments to this Constitution shall present a memorandum to the General Secretary for consideration by the National Executive Board.

23.2. Proposals for amendments to this Constitution shall be made by the National Executive Board upon a memorandum presented to the National Quinquennial Conference by the General Secretary.

23.3. An amendment shall form part of this Constitution upon ratification by Two thirds (2/3) majority decision of the National Quinquennial Conference.

23.4. The amendments shall become effective from the date they are presented to the Registrar of Trade Unions by the General Secretary in line with Article 41(4) of *the Constitution* of Kenya.

36. Section 4(2)(b), (c) and (d) and Section 34(2)(a) of the *Labour Relations Act* which the Claimants allege to have been breached by the amendments provide as follows:

35. Section 4(2)(b), (c) and (d)

(2) Every member of a trade union has the right, subject to *the constitution* of that trade union to—

- a. participate in its lawful activities;
- b. participate in the election of its officials and representatives;
- c. stand for election and be eligible for appointment as an officer or official and, if elected or appointed, to hold office; and
- d. stand for election or seek for appointment as a trade union representative and, if elected or appointed, to carry out the functions of a trade union representative in accordance with the provisions of this Act or a collective agreement.

Section 34(2)(a)

(2) *The constitution* of a trade union, employers' organisation or federation shall—



- a. not contain a provision that discriminates unfairly between incumbents and other candidates in elections; and Article 24(1), 27(2) & (3) and 41(1), 2(c) of *the Constitution* provide as follows:

37. 1. Article 24(1), 27(2) & (3) and 41(1), 2(c) of the Constitution provide as follows:

Article 24(1)

- (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
  - a. the nature of the right or fundamental freedom;
  - b. the importance of the purpose of the limitation;
  - c. the nature and extent of the limitation;
  - d. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
  - e. the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

Article 27(2) and (3)

- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

Article 41(1) and 2(c)

- (1) Every person has the right to fair labour practices.
- (2) Every worker has the right—
  - a. ...;
  - b. ...;
  - c. to form, join or participate in the activities and programmes of a trade union;

38. The Claimants further rely on the decision in *Johnson Muthama v Minister for Justice & Constitutional Affairs & another* [2012] eKLR in which the Judge observed –

“By excluding everyone who does not have a ‘post-secondary qualification,’ a term which is not defined in the Act, from running for any elective office established under *the Constitution*, the Act discriminates directly on the basis of status and social origin, for almost invariably, and as noted from the analysis of the socio-economic context above, it is the poor in society, those 18 million Kenyans living in poverty, who will not get an opportunity to acquire an education, let alone a post-secondary education.”

39. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents on the other hand submit that the claim herein is a disguised petition and the Claimants have not pleaded the specific constitutional issues being raised, having only pleaded the articles of *the constitution* without stating the rights violated or the manner of violation.



40. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents rely on the case of the *Anarita Karimi Njeru v The Republic* No. 1 of 1978 as read with *Mumo Matemu v Trusted Society of Human Rights Alliance and 5 others* [2013] eKLR.
41. They further rely on the decision in *Greys Jepkemoi Kiplagat v Zakayo Chepkonga Cheruiyot* [2021] eKLR where the Court stated that it is not enough to merely cited constitutional provisions; that the particular infringements must be particularised to enable the Respondents answer the allegations or complaints.
42. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents further relied on the decision in *Julia Mwenje Nyinkuri v Kenya County Government Workers Union* [2021] eKLR where the Court made similar observations.
43. On the averments of the Claimants that the requirement for a degree, five years minimum service and the exorbitant non-refundable fees, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submit that Article 41(4)(a) of *the Constitution* allows every trade union to determine its own administration, programs and activities, to organise and to form or join a federation. That the impugned amendments are member driven decisions as the 2<sup>nd</sup> Respondent involved the members before making the amendments as observed in the 3<sup>rd</sup> Respondent's letter dated 5<sup>th</sup> July 2018, affidavit of the 1<sup>st</sup> Respondent dated 8<sup>th</sup> November 2020 and the referendum question dated 10<sup>th</sup> December 2014.
44. It is further the averment of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that out of the 24 counties, out of 47 which responded to the referendum question, 91% responded positively. That thereafter the 2<sup>nd</sup> Respondent's Special National Governing Council held on 9<sup>th</sup> to 12<sup>th</sup> November 2016 ratified the constitutional amendments.
45. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents distinguish this case from the case of *Johnson Muthama v Minister for Justice & Constitutional Affairs & another* [2012] eKLR on the basis that this case was in respect of members of Parliament and not a trade union as the instant suit.
46. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents further submitted at length on the validity of process of the amendments which I will not delve into as the main focus of the Claimants in this suit is the legality of the amendments in terms of impact on members who wish to vie for elective positions in the union, a matter that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have not responded to.
47. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have further not submitted any evidence to prove that there was a referendum question which was shared with all 47 counties and that only 24 counties responded.
48. There is no evidence that the provisions of Chapter XXII of the Union Constitution were complied with when the proposed amendments were approved. According to the 1<sup>st</sup> Respondent, the amendments to *the constitution* were approved by the National Governing Council Meeting held on 14<sup>th</sup> July 2021 virtually. *The constitution* of the union does not provide for such a mode of approval but for secret ballot vote. *The constitution* further does not provide for a referendum question.
49. Besides the First Schedule to the *Labour Relations Act* provides for matters for which provision must be made in *the constitution* of a trade union or employer's organisation. Among them at paragraph 3 is "The manner of making, altering, amending and rescinding *the constitution*."
50. In addition to the issues raised on the procedure for amendment of *the constitution*, the Claimants have raised concern over the specific amendments with respect to the requirement for the Secretary General to possess a university degree, the amendments to the fees for aspirants and the requirement that for a member to view for any elective position they must have been members of the union for a minimum of five years.



51. The First Schedule further provides at paragraphs 8, 9, 10 and 12 as follows:
8. The taking of all decisions in respect of the election of officials, the amendment of *the constitution*, strikes, lock-outs, dissolution and any other matters affecting members of the trade union or employers' organisation generally, by secret ballot.
  9. The right of any member to reasonable opportunity to vote.
  10. The amount of subscription and fees payable by members, and the discrimination of a member from voting on any matter concerning the union and from receiving benefits if the members' subscription is in arrear.
  12. That the secretary and treasurer of the trade union or employers' organisation shall be persons sufficiently literate in the English or Swahili language to be able adequately to perform the duties of such office.
- [Emphasis added]
52. A constitution of a union cannot make provisions contrary to those in the Act. Specifically, the Act provides for all decisions on amendment of *the constitution* and other matters affecting members to be decided by secret ballot of all members, not delegates. The amendments on educational qualifications and fees should therefore be by secret ballot. Further, the exclusion of members who do not hold a university degree is contrary to the requirements of the Act which provide only for literacy in English and Kiswahili.
53. Section 31 of the *Labour Relations Act* provides as follows in respect to qualifications for union officials –
31. Officials
1. 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.
  2. No person shall be an official of more than one trade union or employer's organisation.
  3. An official of a trade union may also be an official of a federation of trade unions to which the trade union is affiliated.
  4. Notwithstanding the provisions of subsection (1)—
    - a. the general secretary of a trade union or the chief executive or association secretary of an employers' organisation may be a person not engaged or employed in the sector concerned;
    - b. a person may be an official of more than one employer's organisation; and
    - c. the Registrar may, on application by a trade union or employers' organisation, permit any other office to be filled by a person not engaged or employed in the sector concerned.
  5. No person who has been convicted of a criminal offence involving fraud or dishonesty shall be an official of a trade union or employer's organisation.
54. Further, Section 34(2)(a) of the *Labour Relations Act* provides that *the constitution* of a trade union shall not contain any provision that discriminates unfairly between incumbents and other candidates.



55. The exclusions based on a university degree is discriminatory as it is not a requirement for membership. The only legal exclusion are those in the membership clause of the union constitution and those in Section 30 of the *Labour Relations Act*. Any exclusion that discriminates among the members based on a requirement outside the law is unconstitutional.
56. As pointed out by the Claimants, a university degree is not a requirement for union membership or even for employment as a nurse. The majority of members of the 2<sup>nd</sup> Respondent do not possess university degrees. This means that the position of Secretary General would become a preserve of a select few and therefore discriminates against the majority of the members.
57. Article 41 of *the Constitution* provides for an opportunity for every member to form, join and participate in activities and programs of the union, not for only a few select members to enjoy these rights and freedoms.
58. With respect to amendment of the fees payable by aspirants, Section 34 of the *Labour Relations Act* provides that provisions in the union constitution of a trade union shall not contain any provision that discriminates unfairly between incumbents and other candidates in elections.
59. Any changes in fees must be done democratically by giving members, an opportunity to vote by secret ballot at the branch level for any change. Delegates should only present to the national organs of the union the proposals that have already been voted for and passed by the rank and file of the membership of the union at branch level.
60. Raising fees per se is not unconstitutional. What is unconstitutional is for delegates to sit in a meeting and pass resolutions to raise fees without first having the members to propose and vote for the changes.
61. On the provision that members must have been in the union for a minimum of five years before becoming eligible to vie for an elective position, the *Labour Relations Act* is explicit that officials of a trade union shall be persons who are or have been engaged in the sector for which the trade union is registered as provided in Section 31 of the *Labour Relations Act*. Section 31 has been reproduced at paragraph 53 above.
62. In addition, the person must be eligible to vote as provided in Section 33 of the *Labour Relations Act* which provides –
33. Voting members of trade union
- No person shall be a voting member of—
- a. a trade union unless that person is employed in the sector for which the trade union is registered;
  - b. an employers’ organisation unless that person has a physical address or an office in Kenya; or
  - c. a registered trade union or employer’s organisation if that person’s subscriptions are more than thirteen weeks in arrears.
- [Emphasis added]
63. Any limitations that are not in accordance with the provisions of Sections 31 and 33 of the Act are unlawful. In other words, any member of a union whose subscriptions are not in arrears for thirteen weeks is eligible to vote and to vie for an elective position in the union.



## Conclusion

64. From the foregoing, I find that the amendments in the constitution of the Kenya National Union of Nurses, the 2<sup>nd</sup> Respondent herein are in contravention of the union constitution with respect to the amendment procedure and secondly, the requirements in respect of qualifications for the Secretary General, the fees payable by aspirants and the length of qualifying service before a member qualified to vie for an elective position violates both the constitution and the Labour Relations Act.\*\*
65. For the foregoing reasons, a mandatory injunction be and is hereby issued directed at the 3<sup>rd</sup> Respondent restraining her from adopting and/or registering and/or approving the changes made to the 2<sup>nd</sup> Respondent's constitution at the Special National Governing Council held at Daiichi Hotel in Isiolo on 23<sup>rd</sup> October 2020.
66. The 2<sup>nd</sup> Respondent shall pay the Claimant's costs of this suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 13TH DAY OF MAY 2022**

**MAUREEN ONYANGO**

**JUDGE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 Civil 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.

**MAUREEN ONYANGO**

**JUDGE**

