



**Kiende (Branch Secretary Kudheihā Tharaka Nithi County & 11 others v Registrar of Trade Unions & 11 others; Kudheihā Workers Union (National) (Intended Interested Party); Attorney General (Interested Party) (Appeal 2 of 2021) [2022] KEELRC 13116 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13116 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU**

**APPEAL 2 OF 2021**

**DKN MARETE, J**

**OCTOBER 31, 2022**

**BETWEEN**

**KIENDE (BRANCH SECRETARY KUDHEIHA THARAKA NITHI COUNTY & 11 OTHERS ..... APPELLANT**

**AND**

**REGISTRAR OF TRADE UNIONS & 11 OTHERS ..... RESPONDENT**

**AND**

**KUDHEIHA WORKERS UNION (NATIONAL) .... INTENDED INTERESTED PARTY**

**AND**

**THE HONOURABLE ATTORNEY GENERAL ..... INTERESTED PARTY**

**JUDGMENT**

1. This matter was originated by way of a memorandum of appeal dated February 23, 2021. It comes out as follows;
  - a. This appeal be allowed.
  - b. That the court be pleased to issue a permanent injunction restraining the 2nd to 12 respondents from assuming office of KUDHEIHA Tharaka Nithi County Branch.
  - c. The registration of the 2nd and 12th respondents as the new office bearers of KUDHEIHA Tharaka Nithi County Branch be cancelled and in place the 1st and 12th appellants be



registered as the legally and lawfully, procedurally elected new office bearers of KUDHEIHA Tharaka Nithi County branch after the election held on January 23, 2021 at transit motel.

- d. In the alternative the court be pleased to order the repeat of KUDHEIHA Tharaka Nithi County Branch election and all qualified members to be at liberty to participate and repeat election, and the election be presided over by such person who is qualified to preside over such election save for the labour officer Meru County.
  - e. Cost of this appeal be borne by the respondents.
2. The appellants case and appeal is that the 1st respondent (the Registrar) failed, ignored or refused to give them a hearing on complaints that they had not the 2nd-12th respondents were the lawfully elected members of the Union.
  3. The appellants submit that it is a cardinal rule of natural justice that a person should not be condemned unheard. Therefore, the registrar's refusal to hear them on their presentation on issues relating to the elections of the union were unwarranted and violation of their legal and constitution rights relating to fair labour practices. This is as follows;

"2. The 1st respondent having dismissed the appellant complaints demonstrated impunity of the highest order on the part of the registrar of trade union. The registrar ought not have listened to both parties the appellants and the 2nd to 12th respondents and hear the two sides of the story before leaning to the 2nd to 12th respondents and registering them as the duly elected officials of Kudheiha Tharaka Nithi County Branch. The registration of the 2nd to 12th respondents was not justified, granted that appellants had lodged a complaints that they had not been regularly elected in the election of 23rd complaints that they had not been regularly elected in the election of January 23, 2021. My Lord on behalf of the appellants, we are submitting that this appeal should at least succeed on ground 1 and 2 of the memorandum of appeal.

3. The appellants round number 3 is couched in the following manner. ...

"the registrar of trade union erred by failing to make an enquiry and satisfy herself that the 2nd to the 12th respondents (the current registered office bearers of Kudheiha Tharaka Nithi County Branch) and applied to the incumbent branch secretary (the 1st appellant) which was a requirement by the unions constitution before one could vie for any office. 'The said registrar of trade unions ought not have conducted and find out whether the purported elected office bearers (2nd to 12th respondents) were in breach of the Constitution and in particular whether they applied to the incumbent branch secretary (the 1st appellant to legitimize and legalize there vying for any office."

See rule 20 (f) of the Union Constitution at page 93 of the record of appeal, which provide as follows 'if such branch official, branch committee member or industrial representative wished to be nominated for the branch election, he shall notify the branch executive committee through the branch secretary 7 days before the elections' (see page 93 of the record of appeal and page 32 of the union constitution.) There is no application of any kind that was presented to the 1st appellant (the incumbent branch secretary) by the 2nd to 12th respondents applying for election as office bearers of Kudheiha Tharaka Nithi County Branch. The Registrar of Trade Unions ought to have made an enquiry as to whether the 2nd to 12th respondents followed the union constitution and she the registrar of trade union conducted an enquiry after the appellants had complained nothing would have stopped her from finding out. The purported election by the 2nd to 12th respondents was richly irregular and in breach of the



unions constitution. A constitution is fundamental to any organization and the registrar ought to have satisfied herself that the unions constitution was adhered to, to the letter and spirit. My lord this is a good ground upon which this appeal should be allowed."

4. The appellants further submit that the proponents of the election that Transit Motel thereby birthed the current officials was a mixed bunch of members and non-members of the union. As we stand, there are three officials from one employer which is a violation of a union constitution and five purported officials are not members of KUDHEIHA and therefore did not meet the threshold of being elected office bearers. They also bring in a case of renewal of membership, eligibility for voting the election or being a delegate as issues that marred the elections at Transit Motel.
5. The appellant's further submission is that union elections must be presided over by an appointee of the labour office. This is as follows;
  9. There is no requirement of the unions constitution that the branch elections should be presided over by an appointee of the labour officer. The labour office were wrong to try and micro manage the elections of Kudheihia Tharaka Nithi County Branch when they do not have any constitutional or legal pedestal upon which to micro manage the election of any union branch. We must point out here your lordship that the appointee from the commissioner's office failed to attend and be present at Transit Motel where the elections took place, upon realizing that there was a fraudulent scheme fronted from the commissioner's office.

#### Labour office not a requirement by the Union Constitution

The issue as to who should preside over union branch election was interrogated by Honourable Lady Justice Hellen Wasilwa in Employment and Labour Relation Court at Nairobi, [\*Appeal No 6 of 2016\*](#) page 4 of the judgment which read as follows

"the court has not seen anything in the union constitution and the Labour Relation Act that calls for the mandatory joinder registrar or his designates in trade union elections dispute, there omission is not fatal to the claim. Public authorities attend to trade union elections at the invitation of the trade union. The presiding law of ministry of labour officials in such elections is good practice, but not the law. The trade union is at liberty to invite church ministers, public servants and any other persons to preside over its electro processes. This is the essence of freedom of association. The role of the registrar of trade union under section 31 of the Labour Institution Act No 12 of 2007, and section 34 of the [\*Labour Relations Act\*](#) is to register and regulate trade unions and not to conduct their elections or determine their electoral dispute."

We urge the court to be persuaded by this authority by Honourable Lady Justice Hellen Wasilwa ELR Judge.

14. The long and short of these submission my lord is that the appellant on the balance of probability have proved their case. They have established many malfide acts, omissions and commissions of the respondent and in particular



the 1st respondent. That makes the registration of the 2nd to 12th respondents as the new officials of Kudheisha Tharaka Nithi County a nullity. Their parallel election if at all was not transparent and it was not beyond reproach like Cesar's wife. We are therefore urging this honourable court to deliver a judgment in favour of the appellants as prayed in the memorandum of appeal.

6. It is their case and submission that the failure by the 1st respondent to hear and determine their complaints on the subject amounted to breach of their rights and therefore resulted in the registration of union officials borne out of a sham election process.
7. The appellants further submits that the irregularities adduced in their case again demonstrate that the elections by the respondent were illegal and irregular and therefore should be quashed on their placement as such officials of the union vacated.
8. The interested party opposes the appeal for being unfounded and frivolous in nature. They fault the list of documents relied on by the appellants and further aver that a legitimate election of the union was held at Transit Motel on January 23, 2021. This was successful and lawful. In this event, the appellants failed to present themselves for the election and therefore have nobody to blame. They cannot be heard to complain or raise issues after the event with they deliberately boycotted.
9. The respondent further seek to rely on section 34 (1) of the *Labour Relations Act* provides as follows;

“The election of officials of a trade union, employers’ organization or federation shall be conducted in accordance with their registered constitutions. (2) The constitution of a trade union, employers’ organization or federation shall (a) not contain a provision that discriminates unfairly between incumbents and other candidate in elections; and (b) provide for the election, by secret ballot, of all officials of a trade union at least once every five years; (3) Notice of the election of officials under this section shall be given to the Registrar in the prescribed form within fourteen days of the completion of the election.(4) Disputes arising from, or connected directly or indirectly to, elections held under this section may be referred to the Industrial Court. (5) The Registrar may issue directions to a trade union, employers’ organization or federation to ensure that elections are conducted in accordance with this section and their respective constitutions.”
10. It is their further submission that trade union elections must be presided over by the Ministry of Labour. They submit thus;

As to supervision of elections by an independent party we submit that this dates back to 1965 set out in the policy on trade union organization in Kenya which provides that the elections be supervised by Government. Failure to involve the government in the elections has not been explained by the appellant which contributed to non-registration. The Ministry of Labour and social protection on the September 25, 2020 released a memo to all trade unions notifying them about elections from which paragraph 5(ii) states that the commissioner for labour and the respective County labour officer be furnished with certified copies of the trade unions constitution at least sixty days before elections. 5(iii) further states that the commissioner for labour be furnished with the planned schedule of the national election and the respective count labour officers with schedules of the branch election at least sixty days before elections to allow the ministry for adequate planning. This in effect shows that the elections were to be presided over by the County labour officers and not the purported reverend John Gitari Njagi.



Union elections fall under the purview of ministry of labour and that is the reason why KUDHEIHA elections are presided over by officials from the ministry of labour which has been the practice of the union over the past elections. The actions by the appellant to conduct elections illegally and presided over by a reverend amount to an election irregularity. These elections that infringes on the rights of members who are entitled to vote and vie is not a fair and just election. This elections by the appellants were in blatant disregard of the unions constitution, procedure and guidelines on elections and in hence are irregular to be upheld and or be the basis to nullify the legitimate elections that saw the respondents being elected as the legitimate branch officials. The appellants were ignorant with what is applicable and the procedure of the law.

11. The issues for determination therefore are;
  1. Whether the appellants are entitled to the relief sought.
  2. Who bears the costs of this cause.
12. The 1st issue for determination is whether the appellant are entitled to the relief sought. A look at the respective cases of the parties tilts this in favour of the appellants. This is because they have demonstrated an overwhelming case of irregularities and illegalities involving the elections at the Transit Motel. Issues of membership of the union, delegates attending the meeting and a cross-breed of who was elected and which sector they represent are apparent.
13. The appellants on a balance of probability and preponderance of evidence propel a case of sham elections. That the 1st respondent denied them audience on their complaints against these elections makes it even worse. She should have heard the appellants complain to fruition before registration of the elected union officials. The right to a hearing is sacrosanct and undeniable. I therefore find that the appellants are entitled to the relief sought and hold as such.
14. This is an extremely confusing situation. It would appear that the affairs of the union were conducted in an extremely haphazard manner. In the ensuing confusion all wrong happened in the conduct of the union elections. This must now be corrected.
15. I am therefore inclined to allow the appeal and order relief as follows;
  - i. This appeal be and is hereby allowed.
  - ii. That a permanent injunction be and is hereby issued restraining the 2nd to 12 respondents from assuming office of KUDHEIHA Tharaka Nithi County Branch.
  - iii. The registration of the 2nd and 12th respondents as office bearers of KUDHEIHA Tharaka Nithi County Branch be and is hereby vacated.
  - iv. That fresh elections be and are hereby for KUDHEIHA Tharaka Nithi County Branch election within 45 days of this judgment of court.
  - v. That all qualified members of the union be and are hereby at liberty to participate and repeat elections.
  - vi. That the election be presided over by such person who is qualified to preside over with the supervision of the Commissioner of Labour.
  - vii. That each party shall bear the cost of the Appeal.

**DATED AND DELIVERED AT NYERI THIS 31ST DAY OF OCTOBER, 2022. .**



**DK NJAGI MARETE**

**JUDGE**

Appearances

1. Miss Nyaga holding brief for I C Mugo & Company Advocates for the appellants.
2. Miss Kungu instructed by State Law Office for the 1st respondent.
3. Mr Gitonga for the intended interested party/ Union

