



Matheka v Nyaga & another; Registrar of Trade Unions (Interested Party) (Employment and Labour Relations Petition E015 of 2022) [2022] KEELRC 12945 (KLR) (27 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 12945 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E015 OF 2022**

MN NDUMA, J

OCTOBER 27, 2022

**IN THE MATTER OF ARTICLES 10, 19, 20, 22, 23, 47, 162
AND 258 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF SECTIONS 3, 4, 5(2) (C), AND 7 OF
THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

AND

**IN THE MATTER OF SECTION 12 OF THE EMPLOYMENT
AND LABOUR RELATIONS COURT ACT**

AND

**IN THE MATTER OF BREACH AND THREATENED
CONTINUED BREACH OF THE BILL OF RIGHTS UNDER
ARTICLE 47 OF THE CONSTITUTION OF KENYA, 2010**

BETWEEN

JOHN BOSCO MATHEKA PETITIONER

AND

MURITHI NYAGA 1ST RESPONDENT

KENYA AIRLINE PILOTS ASSOCIATION 2ND RESPONDENT

AND

REGISTRAR OF TRADE UNIONS INTERESTED PARTY



JUDGMENT

1. The petitioner is the erstwhile Treasurer of the 2nd respondent Kenya Airline Pilots Association. The petitioner was elected to serve as Treasurer on April 1, 2021, the proverbial fool's day. The elections were presided over by the 2nd respondent on or about the October 15, 2021. The 2nd respondent, through the 1st respondent issued a Special Conference Notice to the 2nd respondent's members stating that the Special Conference was to be held on December 3, 2021. The said conference did not materialize and the 1st respondent instead called for a consultative meeting of the Executive Council on December 16, 2021 with a section of the 2nd respondent's members.
2. That on December 2, 2021, the petitioner sent an internal memo to members of the 2nd respondent indicating that he would not accede to a personal request by the 1st respondent to pay him Kshs one hundred thousand (100,000) among other financial requests which the petitioner believed were not in the best interest of the 2nd respondent. That the petitioner, was not informed of the consultative meeting in which the petitioner was unlawfully removed from office in violation of Rule 7 of the Kenya Airline Pilots Association (KALPA) 2015 Constitution which provides that any member of the Executive Council may be removed from membership by the Executive Council upon recommendation carried out by a majority vote of the Executive Council.
3. Rule 8 on the other hand provides that National officials of Kenya Airline Pilots Association may be removed from office by a majority vote of the Annual/Special Conference provided that prior to removal such National official shall be accorded every right to state his case against such removal and shall have every right to appear before the Annual Special Conference to state his case against such removal and to call witness(s) if any to prove his/her case against removal.
4. The petitioner was such, national official but was purportedly removed by the Executive Council Consultative meeting to which the petitioner was not invited nor given an opportunity to know the allegations made against him and have opportunity to state his case against such intended removal.
5. The petitioner received an email circular stating that the Executive Council in Consultation with members had unanimously removed the petitioner from the position of Treasurer.
6. The circular further directed that the ongoing audit of the 2nd respondent would be presided over by the Trustees and the report would be presented to the upcoming special conference to be held on February 7, 2022.
7. That this was in violation of Rule 15 of Kenya Airline Pilots Association which mandates external auditors to conduct the audit of the 2nd respondent.
8. On January 10, 2022, the petitioner wrote a demand letter to the 1st Respondent citing aforesaid irregularities. The 1st respondent upon receipt of the demand letter served the petitioner with a show cause letter dated January 10, 2022 in an attempt to sanitise the done unlawful removal. The petitioner was falsely accused of leaking confidential information of the 2nd respondent to the media.
9. The petitioner responded to the false accusations. On January 7, 2020, the petitioner learnt that he had been removed as a signatory of the 2nd respondent's bank accounts.
10. The petitioner had also not been paid his monthly remuneration of Kshs 35,000 for the month of December, 2021.



11. The petitioner pleads and submits that the conduct by the respondents not only violated the stated provisions of the Kenya Airline Pilots Association Constitution but in addition violated Articles 10 and 47 of the Constitution of Kenya, 2010 read together with Section 3, 4, 5(2) and 7 of Fair Administrative Action Act, 2015.
12. The petitioner prays for the following reliefs: -
 - (a) A declaration that the Petitioner's right to fair administrative action, guaranteed under Article 47 of the Constitution of Kenya has been contravened.
 - (b) A declaration that the decision of the 2nd Respondent's Executive Council made on the December 6, 2021 was illegal, unconstitutional, unreasonable and therefore null and void to the extent that the same purported to remove the petitioner from office without according him a hearing and/or to the extent that the same was ultra vires the powers of the said consultative meeting and not in accordance with the 2nd Respondent's Constitution.
 - (c) An order of certiorari bringing into this Court the decisions of the 2nd Respondent's Executive Council made on the December 6, 2021, and quashing the same forthwith, to the extent that the same purported to remove the petitioner from office without according him a fair hearing and/or to the extent that the same was ultra vires the powers of the said Executive Council and not in accordance with the 2nd Respondent's Constitution.
 - (d) An order of Mandamus for reinstatement of the Petitioner as National Treasurer of the 2nd Respondent, and grant of access to the physical office.
 - (e) An order of Mandamus for petitioner to continue with his roles of being signatory to the 2nd Respondent's Bank accounts, authorizing payments out of the 2nd Respondent's funds, and in general supervising the financial affairs of the 2nd Respondent alongside other authorized officials as per the 2nd Respondent's Constitution.
 - (f) An order of Mandamus directing that a fresh audit takes place in accordance with the 2nd Respondent's Constitution.
 - (g) An Order of permanent injunction barring the Respondents from removing the Petitioner from office in any manner not provided for in the 2nd Respondent's Constitution or law.
 - (h) An Order for payment of Kenya Shillings thirty-five thousand (Kshs 35,000) as the Petitioner's December, 2021 monthly allowance.
 - (i) Costs of this suit.
 - (j) Any other relief deemed fit to grant by this honourable Court.

Responses

13. The respondents filed replying affidavit of Captain Murithi Nyagah, the 1st respondent who is the General Secretary and Chief Executive Officer of the 2nd respondent who deposes that the petitioner was removed as a member of the Executive Council on December 16, 2021 by the Executive Council



pursuant to Rule (7) (e) of Kenya Airline Pilots Association (KALPA's) Constitution. That Rule (7) (e) gives the Executive Council power to remove or suspend a member of the Council.

14. That the removal or expulsion of a member from the 2nd respondent is guided by Rule 19 of the Constitution. That the Executive Council is empowered to exercise the power of removal if a member infringes any of the terms of the 2nd respondent's Constitution or acts in a manner detrimental to the interests of the association.
15. That on January 10, 2022, the Executive Council wrote to the petitioner to show cause why disciplinary action should not be taken against him for infringement of the terms of the Constitution and acting in a manner detrimental to the interests of the 2nd respondent.
16. That the petitioner responded to the show cause letter on January 11, 2022 stating his innocence and making various allegations. That the petitioner's response was found wanting and he was invited for a hearing before the Executive Council to take place on February 7, 2022 to be given opportunity to answer to the charges against him.
17. The petitioner failed to respond to the letter dated January 21, 2022 in writing nor did he appear at the disciplinary hearing held on February 7, 2022 and therefore the Executive Council on February 7, 2022 voted to expel the petitioner from membership of the 2nd respondent immediately in accordance with rule 19(ii) of the Constitution pending review or ratification of the decision during the next special or annual conference. That the decision by the Council is above board and the petition lacks merit and it be dismissed with costs
18. That the petitioner did not exhaust internal process of appealing the decision of Executive Council within 14 days at the annual/special conference. The petition is therefore premature and should be dismissed as aforesaid.

Determination

19. The parties filed written submission in support of the evidence adduced in their respective depositions and attachments thereof.
20. The Court has carefully considered all the above stated and has delineated the following issues for determination
 - (i) Whether the petitioner has discharged the onus of prove placed on the petitioner in terms of Section 107,108 and 109 of the Evidence Act, Cap 80 Laws of Kenya, for the evidential burden of rebuttal to shift to the respondent with regard to the set out violations of the Kenya Airline Pilots Association (KALPA's Constitution, the Fair Administrative Actions Act, and Article 47 of the Constitution.
 - (ii) Whether the petitioner is entitled to the reliefs sought.
21. With regard to issue (i) above, the petitioner stated in paragraph 16 of the petition and paragraph 11 of the supporting affidavit that the Executive Council sent an email circular to the petitioner and other members stating that the Executive Council, in consultation with members held in a meeting held on December 6, 2021 unanimously removed the petitioner from the position of Treasurer. The petitioner proceeded to seek a declaration in part D paragraph (b) of the petition filed that the decision of the 2nd respondent's Executive Council made on the December 6, 2021 was illegal, unconstitutional, unreasonable and therefore null and void to the extent that the same purported to remove the petitioner from office without according him a hearing and/or to the extent that the



same was ultra vires the powers of the said consultative meeting and not in accordance with the 2nd Respondent's Constitution.

22. The 1st respondent in the replying affidavit at paragraph 5 admits that the petitioner was removed as a member of the Executive Council on December 6, 2021 by the Executive Council pursuant to Rule 7(e) of the 2nd respondent.

Rule 7 (e) of the Constitution provides: -

' (e) e) Any member of the Executive Council may be removed from membership thereof by the Executive Council and upon recommendation carried out by a majority vote of the Executive Council. Provided that the Executive Council shall have powers to suspend any members thereof, if such member absents himself from three consecutive meetings without reasonable cause and without the Chairman's permission.'

23. Despite the petitioner stating that he was not invited to the meeting of December 6, 2021 and that the said meeting was a consultative meeting and had not notified the petitioner of the intended Agenda by the Council to remove him as a member, the 1st respondent did not expressly deny those allegations and did not table before Court, any notice of the Executive Council meeting of December 6, 2021 with the Agenda for the meeting; the minutes of the meeting indicating who attended the meeting and whether the meeting had quorum in terms of Rule 7(b) as read with 7 (i) in which the composition of the Executive Council is stated and the quorum is stated to be one third of its elected members who are entitled to attend and vote. The said membership includes the Treasurer, which position was held by the petitioner and was clearly not notified of the meeting and its intended Agenda.
24. Further more Rule 7(e) provides that a member of the Executive Council may be removed from membership thereof by the Executive Council and upon recommendation carried out by a majority vote of the Executive Council.
25. The respondent has by its failure to produce the minutes of the meeting of the Executive Council held on December 6, 2021 failed to demonstrate by way of credible evidence that the petitioner was removed from the position of Treasurer lawfully and in compliance with Rule 7(b), (e) and (i) of the 2nd Respondent's Constitution. The petitioner has therefore discharged his onus of proving on a balance of probabilities that he was removed as a member of the Executive Council in the position of the Treasurer in violation of the 2nd respondent's Constitution and to the extent that he was not, notified of the intended action and the reasons for his alleged removal, the conduct by the respondent violated Section 3, 4, 5(2) and 7 of the Fair Administrative Action Act, read with Section 47(1) and (2) of the Constitution of Kenya, 2010 and the petitioner is to that extent entitled to be granted prayers (a) (b) (c) (d) (e) of the petition.
26. The subsequent action taken by the respondents in terms of Rules 19, was fatally tainted by the initial illegal action by the Executive Council against the petitioner on December 6, 2021. The notice to the petitioner to show cause why he should not be expelled as a member dated January 10, 2022, was written to the petitioner upon being removed as a member of the Executive Council without being given a hearing and reasons for the removal. The Executive Council, apparently relying on the same allegations against the petitioner now wanted him to defend himself failing which he would be removed as a member of the 2nd respondent. This conduct, not only amounted to double jeopardy, the executive having already expelled the petitioner from the Executive Council but the Executive Council was in the circumstances clearly biased or vulnerable to bias against the petitioner having considered the same



set of facts against the petitioner in his absence, without notice nor opportunity to be heard and had already made an adverse decision against the petitioner on December 6, 2021.

27. The petitioner cannot be expected to defend himself before officials who had already concluded that the petitioner had misconducted himself sufficiently to warrant his removal as a member of the Council.
28. The Court's finding on the set of facts before it is that the petitioner was not treated fairly and in compliance with sections 3, 4, 5(2) (c) and 7 of the Fair Administrative Action Act read with Article 47(1) of the Constitution of Kenya, 2010.
29. The Court therefore declares that the subsequent removal of the petitioner as a member of the 2nd respondent also violated the petitioner's right to fair Administrative action guaranteed under Article 47 of the Constitution.
30. In the final analysis, the Court makes the following orders in favour of the petitioner as against the respondents: -
 - (a) A declaration that the Petitioner's right to fair administrative action, guaranteed under Article 47 of the Constitution of Kenya has been contravened.
 - (b) A declaration that the decision of the 2nd Respondent's Executive Council made on the December 6, 2021 was illegal, unconstitutional, unreasonable and therefore null and void to the extent that the same purported to remove the petitioner from office without according him a hearing and/or to the extent that the same was ultra vires the powers of the said consultative meeting and not in accordance with the 2nd Respondent's Constitution.
 - (c) An order of certiorari bringing into this Court the decisions of the 2nd Respondent's Executive Council made on the 6th December, 2021, and quashing the same forthwith, to the extent that the same purported to remove the petitioner from office without according him a fair hearing and/or to the extent that the same was ultra vires the powers of the said Executive Council and not in accordance with the 2nd Respondent's Constitution.
 - (d) An order of Mandamus for reinstatement of the Petitioner as National Treasurer of the 2nd Respondent, and grant of access to the physical office.
 - (e) An order of Mandamus for petitioner to continue with his roles of being signatory to the 2nd Respondent's Bank accounts, authorizing payments out of the 2nd Respondent's funds, and in general supervising the financial affairs of the 2nd Respondent alongside other authorized officials as per the 2nd Respondent's Constitution.
 - (g) An Order of permanent injunction barring the Respondents from removing the Petitioner from office in any manner not provided for in the 2nd Respondent's Constitution or law.
 - (h) An Order for payment of Kenya Shillings thirty-five thousand (Kshs 35,000) as the Petitioner's December, 2021 monthly allowance and subsequent allowances as they fall due.
 - (i) Costs of this suit.

Dated and delivered at Nairobi (virtually) this 27th day of October, 2022.

Mathews N. Nduma

Judge

Appearances



Mr. Achola for petitioner

Mr. Ogola for Respondent

Ekale – Court Assistant

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