



**Mshihiri v Dock Workers Union (Petition 11 of 2022)
[2022] KEELRC 13098 (KLR) (4 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13098 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
PETITION 11 OF 2022
B ONGAYA, J
NOVEMBER 4, 2022**

BETWEEN

QUEEN ELIZABETH MSHIHIRI PETITIONER

AND

DOCK WORKERS UNION RESPONDENT

RULING

1. The petitioner filed an application on September 28, 2022 by way of the notice of motion through Akanga Alera & Associates Advocates. The application was under section 34(4) of the *Labour Relations Act*, rule 17 (8) of the *Employment and Labour Relations Court (Procedure) Rules, 2016* and Order 51 rule 1 and 4 of the *Civil Procedure Rules, 2010* and all other enabling provisions of the law. The petitioner prayed for orders as follows:
 1. (spent).
 2. (spent).
 3. That pending the hearing and determination of the application, the application dated July 1, 2022, and the main suit, the respondent be and is hereby restrained by themselves, their servants, and agents from convening, holding or proceeding with the Annual General Meeting scheduled for September 29, 2022 at 2.00pm at Mbaraki Sports Club, Mombasa or any other day thereafter.
 4. That the Honourable Court be pleased to issue any other orders as it may deem appropriate.
 5. That the costs of this application be borne by the respondent in any event.
2. The petition is based on the attached petitioner's affidavit and upon the following grounds:



- a. The respondent carried out elections of its Trustees on July 13, 2022 whose outcome is in dispute in the instant petition. The Court has issued orders directing the Registrar of Trade Unions to undertake an inquiry as to validity and propriety of the disputed elections as envisaged in section 35(3) and (4) of the *Labour Relations Act*, 2007. The Registrar is yet to issue the inquiry report. By a temporary Court order the Registrar has been restrained from registering new Trustees elected at the disputed elections pending the inquiry report and further Court's directions.
 - b. The respondent's General Secretary has convened an Annual General Meeting (AGM) then scheduled for 29.09.2022 but which was stayed temporarily pending the inter-partes hearing of the application.
 - c. Under section 36(1) of the *Labour Relations Act*, 2007 a trade union like the respondent must have at least three duly appointed or elected Trustees.
 - d. The respondent's National Executive Committee is currently not properly constituted per Article 12(1) of the respondent's constitution and the membership include the Trustees. The tenure of the last trustees has lapsed. The trustees purportedly elected in the disputed elections have not been registered. The AGM agenda includes Treasure's report on financial status, proposed budget and all information regarding the respondent's funds. The petitioner's case is that under Article 14 (2) of the respondent's constitution, the respondent's immovable and moveable assets are vested in the trustees. Further, if the AGM proceeds in absence of Trustees, then resolutions may be carried that may be prejudicial to the respondent's assets whose protection is vested in the Trustees but who are not currently in office – and sections 36(1) and 37(1) may in the process be breached.
 - e. Further, if orders sought are not granted, the interim orders on inquiry into the disputed elections and restraining the Registrar from registering Trustees purportedly elected at the disputed elections may be rendered nugatory.
2. The respondent has opposed the application by filing on October 7, 2022 the replying affidavit of its General Secretary one Simon Kiprono Sang. It is urged as follows:
- a. It is admitted that in the instant petition the Court has issued interim orders on inquiry by the Registrar into the disputed elections and restraining registration of Trustees elected at the disputed elections. However, the petitioner (applicant) has misdirected, misapplied and misinterpreted the respondent's constitution as it applies to the issues in the application.
 - b. The present application goes beyond the scope of the substantive pleadings in the petition and it has no roots to stand on.
 - c. The AGM was convened per Articles 9 and 10 of the respondent's constitution per the circular dated September 21, 2022 setting out the Agenda of the AGM. The agenda does not include conducting elections in the office of the Trustees. In that sense the meeting did not set out to undermine the interim Court orders on record.
 - d. There have been no changes in the office of the respondent's Trustees because those elected on June 30, 2022 have not been registered while those who were so registered are still in office as duly registered. Thus the composition of the National Executive Committee and then the convened AGM are not impaired at all. The offices of the trustees suffer perpetual succession and by dint of law, there is no time when the said offices are vacant as claimed by the applicant.



- e. The stoppage of the AGM was fatal because under the respondent's constitution the AGM can only be held in the month of September and under section 43 of the [Labour Relations Act](#), the respondent's statutory duty is to render accounts to the Registrar annually. The accounts must be approved at the AGM as had been convened on September 29, 2022. The interim order of September 29, 2022 therefore impeached the statutory powers of the respondent's members and the respondent under sections 4 and 8 of the [Labour Relations Act](#).
 - f. The issue of the AGM is not pleaded in the petition and therefore, the respondent will not be heard about it at the hearing of the petition.
 - g. The claimant was always aware about the AGM scheduled for September 29, 2022 and moved the Court on September 28, 2020, a day to the date of the AGM – so that she acted clothed with malice and bad faith and she should meet expenses which went into the organisation of the botched AGM.
3. Submissions on the application were filed for the parties. The Court has considered all the material on record. The Court returns as follows.
 4. To answer the 1st issue, the Court returns that as urged for the respondent, the applicant has moved the Court belatedly and without an explanation in that regard. The claimant has exhibited the circular to all members dated September 1, 2022 and convening the AGM fixed for September 29, 2022. In absence of any other explanation, the Court finds that the claimant must be taken to have had knowledge of the AGM on or about September 1, 2022. She moved the Court on September 28, 2022, a day to the date of the AGM. As at September 28, 2022, it could be that the respondent had finalised or was in final stages of preparing for the AGM. The Court finds that in the circumstances, the respondent's concerns that the application was filed belatedly without due promptness is well founded. In view of that finding, the balance of convenience favours denial rather than granting of the order as prayed for.
 5. The 2nd issue for determination is whether, consequential to the disputed elections and the purportedly elected Trustees not having been registered, there is a vacuum in the respondent's three offices of Trustee or, the registered out-going Trustees duly registered prior to the elections are holding over in office. The answer to the issue is to be found in the respondent's constitution as read with the provisions of the [Labour Relations Act, 2007](#).
 6. Article 14(1) of the respondent's constitution states that there must be 3 Trustees of the Union elected for a term of 5 years. Article 14 (1) (f) thereof provides that in event of a vacancy in the office of a Trustee, the National Executive Committee appoints another person to fill the vacancy for six (6) months pending election at the Annual General meeting or Special Conference. Now, is there a vacancy in the offices of Trustees on account of the disputed elections? The Court considers that the answer is in the negative. Section 35 of the [Labour Relations Act, 2007](#) provides for notification of trade union officials. There is a prescribed form Q being for notice of change of officials of a trade union to be submitted to the registrar within 14 days after the change together with the prescribed fees and the Registrar will register the change subject to subsection (4) and (5) thereof. Subsection (4) states that after an inquiry and the Registrar is not satisfied of the validity of any appointment or the propriety of the proposed correction, the Registrar may refuse to register the officials or correct the register. Subsection (5) states that no change of officials shall have effect until it is registered by the Registrar. Subsection (6) states that no person who is not registered by the Registrar in accordance with the section shall act or purport to act as an official of a trade union, employers' organisation, or federation or any branch. The Court has considered the provisions and returns that whereas under the respondent's constitution the tenure of the respondent's registered Trustees lapsed and elections were



held, the Trustees as duly registered continue to hold office until the new Trustees are registered per section 35 of the Act. The Court upholds the respondent's submission that there is no vacancy in the office of Trustees. If for any reason such vacancy is reported with respect to registered Trustees while the present dispute is persisting, the Court's opinion is that provisions of Article 14 (1) (f) will take effect. Accordingly, the applicant was misconceived in urging that in view of the disputed elections whose elected Trustees may not be currently registered by reason of the interim orders, then, there was a vacancy in the office of the three Trustees. The Court finds that the design of section 35 of the Act is that there is a seamless replacement of union officials and until the Registrar registers an official, the one on the register continues in office. By that finding, the Court returns that it cannot be said that the applicant has established a *prima facie* case with a probability of success.

7. To answer the 3rd issue, the Court finds that indeed, the current application lacked roots in the present petition as it is not founded on the cause of action in the petition. There is nothing in the petition about the holding an AGM now subject of the present application. As submitted for the respondent, at the hearing of the main petition there will be no inquiry about the AGM in issue. The petition purely challenges the outcome of the elections with respect to the offices of Trustees. Thus, the Court returns that the application indeed went beyond the scope of the petition as it was founded on a cause of action outside the one in the petition. To that extent the application is found to amount to an abuse of the Court process.
8. In conclusion, the application by the notice of motion dated and filed on September 28, 2022 is hereby dismissed with costs in the cause.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 4TH NOVEMBER, 2022.

BYRAM ONGAYA

JUDGE

