



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

PETITION NO. E108 OF 2020

DUNCAN MWANGI.....1ST PETITIONER

GEORGE GITAHIL.....2ND PETITIONER

BENSON MUANGE.....3RD PETITIONER

KENNEDY KEBUTT.....4TH PETITIONER

JESSE MUIGAI.....5TH PETITIONER

THADEUS WASWA.....6TH PETITIONER

(On their own behalf and on behalf of another 162 Petitioners)

VERSUS

KENYA PETROLEUM OIL WORKERS UNION.....RESPONDENT

RULING

1. Before this Honourable Court for determination is the Notice of Motion Application dated 21st December 2020 by the Petitioners and the Notice of Motion Application dated 30th December 2020 by the Respondent.

2. In regard to the Petitioners' Notice of Motion Application dated 21st December 2020, the Petitioners seek for Orders:

1. *Spent.*

2. *Spent.*

3. That pending hearing and determination of this Petition *inter-partes*, this Court be pleased to issue a conservatory order staying any pending elections of the Respondent due to start from 4th January 2021.

4. That in the alternative to 2 and 3 above, this Honourable Court be pleased to issue an order compelling the Respondent to allow the Petitioners herein participate whether as voters and/or candidates in the elections of the Respondents due to start from 4th January 2021.

5. That costs of this application be provided for.

3. The Application is premised on the grounds that the Petitioners, who are all stated to be employees of the Kenya Pipeline Company Limited, are also members of the Respondent Union having filled up membership application forms and forms for check-off system as per the Respondent's constitution. They assert further that they paid up their membership or entry fees sometime in May 2019 and the deposit slips for the said payments were forwarded to the Respondent vide a letter dated 24th May 2019. They contend that they should therefore be in the members' register but that their pleas to be included in the said register have been refused, neglected and ignored by the National Secretary General of the Respondent. They assert that they consequently cannot participate in the activities of the Union which infringes or risks infringing upon their rights under the Labour Relations Act (Sections 4, 33 and 34), Articles 27, 36 and 41 of the Constitution of Kenya

and Rule 25 of the Respondent's constitution. They assert that further; the Registrar of Trade Unions has through a circular dated 25th September 2020 demanded that all trade unions commence elections of their officials from 4th January 2021. The Petitioners assert that they are however wary that the Respondent will not allow them to exercise their rights as members to participate in the elections, either as voters and/or candidates. They contend that they stand to suffer irreparable damage and be greatly prejudiced if the orders of a conservatory nature are not issued pending hearing and determination of the Petition. The Application is supported by the affidavit sworn by the 1st Petitioner on his own behalf and on behalf of 162 others. He deponed that the Respondent herein is an interested party in **ELRC Cause No. 424 of 2019 - Duncan Mwangi & Others v Kenya Pipeline Company Ltd** where the issues relate to the refusal by the Petitioners' employer to deduct and remit the Respondent's dues, and not to the issues raised in the Petitioner's Application herein.

4. In regard Respondent's Notice of Motion Application dated 30th December 2020, the Respondent Union seeks for Orders that this Court be pleased to stay, vary or review with a view of setting aside the *ex-parte* orders granted on 28th December 2020 by this Honourable Court staying the Respondent's elections. It further seeks this Court to issue any further or other orders it may deem fit, just and expedient to grant and that costs of the Application be provided in the cause. The Application is based on the grounds that the orders of 28th December 2020 were issued based on misconceived facts and that the Petition and Application by the Petitioners are meant to influence the outcome of **ELRC Cause No. 424 of 2019** now pending before Hon. Lady Justice Maureen Onyango. The Respondent asserts that the issue of whether the Petitioners are unionisable employees is pending before a court of law and therefore *sub judice*. It denies that the Petitioners have at any point been deducted union dues since their eligibility to have the dues deducted is still subject of determination in the said **ELRC Cause No. 424 of 2019**. Further, it is asserted that it is only the unionisable employee whose union dues are deducted and remitted by an employer who can participate in the lawful activities of the Union. The Respondent asserts that the Petitioners do not as such have any right to participate in the Respondent's activities until the claim in **ELRC Cause No. 424 of 2019** is heard and determined. The Respondent contends that it will be subjected to irreparable damages in case the said *ex-parte* orders stopping it from conducting elections are not stayed, varied or reviewed as prayed and that the Petitioners' rights shall not be infringed/violated if the Respondent is allowed to continue with its election activities. The Respondent asserts that its Application is made without undue delay and ought to be granted in the interest of justice. The Respondent's Application is supported by the affidavit sworn by its General Secretary, Raphael Olala who avers that the basis for refusal to deduct union dues by employer is that the Petitioners cannot be unionisable employees as they are in managerial cadres (as shown at para 7 of the respondent's response to the claim in Exhibit 5 of the Petitioners' bundle). He avers that until the claim in ELRC Cause No. 424 of 2019 is heard and determined, the Respondent being compelled to include the Petitioners as its members is a miscarriage of justice. He further avers that if the orders issued on 28th December 2020 are not set aside/stayed, the Respondent risks being locked out of any Trade Union activities for the next five (5) years such as in the Trade Union umbrella body elections. He deponed that some of the alleged Petitioners are deceased and the signatures and authority to sue are a result of forgery. To support his argument, he produces a copy of a death announcement of one of the alleged Petitioners in Exhibit RO3 and further avers that some Petitioners like one Mr. Aggrey Ochola retired from service and were never signatories to any document relating to the whole issue of union membership. He questions the authenticity of all the instructions shown from pages 27 – 169 and specifically page 139 and 156 of the Petition. He alleges that the Petitioners forgot to alter document as it bears the names of 10 Claimants whereas the Petition is filed by 6 Petitioners. Further, that the total number of members' instructions as forged is for 129 people and not 152 as could be expected and that the deficit of 33 people proves that the Petitioners' application is not ripe for adjudication by Court. He further avers that the Petitioners have failed to show whether they obtained receipt for the alleged payment of membership fee; whether they were provided with membership cards upon payment for membership; and whether they ever attempted to invoke section 52 of Labour Relations Act to pay their union dues directly to the Union. He refers to Rule 3:2:1 of the Union's Constitution which provides as follows:

“The Membership or entrance fee for joining the Union shall be Kshs. 100 each payable to the Union on admission to membership. Thereafter, a member shall be bound to pay the Union a monthly subscription of 2% (two percent) of monthly basic salary either through receipt or check-off form system”

5. The Respondent asserts that the Petitioners have never subscribed even for a single month and must therefore not stop scheduled Union elections and that the orders sought in the Petitioners' Notice of Motion must not be awarded to non-eligible members at the expense of valid, paid-up, eligible members. He further avers that Rule 7 of the Union's Constitution demands that the Annual Delegates Conference (ADC) be held in the month of March after completion of 5 years, which can only be if branches conduct their elections one month before then. The Respondent asserts that consequently, any conservatory order shall disorganize the calendar of elections in the Respondent Union and even in COTU-K, the Umbrella Trade Union.

6. After hearing the parties *in extenso*, the Court held that Per Section 4(1) of the Labour Relations Act 2007, every employee has a right to participate in joining a Trade Union or federation of Trade Unions, join a Trade Union or leave a trade union. Per Section 4(2) of the Labour Relations Act, every member of a Trade Union has the right, subject to the Constitution of the Trade Union to participate in its lawful activities and participate in the election of officials and representatives *inter alia*.

7. The Constitution of the Trade Union herein has elaborate procedure of getting to be a member. There is provision per Rule 3.1 and 3.2.1 that a member can be anyone above 18 years working in the relevant sector being the Petroleum Sector – oil and gas – provided said person is one who fills up an application form and fills a form for check off. There is an entrance fee for joining the union and thereafter a payment of monthly subscription of 2% of monthly basic through either checkoff or receipt.

8. Since the Trade Union has conceded it would not mind getting the Petitioners on board provided they comply with the Rules of the Union, it is clear the Petitioners would have to go beyond filling membership forms and checkoff form. Payment of the joining fee (Kshs.100/-) as well as the 2% basic are part and parcel of the requirement to be a member. In any event if only Kshs.100/- was paid, the member would not be in good standing of the union.

9. The orders that commend themselves for me to make is to grant in regard to the matters at hand, the following: The Petitioners shall have a window between 20th January 2020 and Friday 22nd January 2021 3.00 pm to regularise their joinder by paying the joining fee and the monthly subscription of 2% of monthly basis in order to be placed on the Register. The members are reminded that Section 52 of the Labour Relations Act allows for direct payment meaning check off is not the only way they can pay their union dues. As the substratum of the Petition is basically achieved, the Petition herein now abates and is accordingly marked as such. As social partners the parties will bear their

own costs since the essence of the Petition was not to seek monetary damages but the achievement of representation by the Union.

It is so ordered.

Dated and delivered at Nairobi this 26th day of January 2021

Nzioki wa Makau

JUDGE