



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. E681 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

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

VERSUS

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

THE REGISTRAR OF TRADE UNIONS.....3<sup>RD</sup> RESPONDENT

RULING

Before me for determination is a preliminary objection filed by the 2<sup>nd</sup> Respondent seeking the striking out of the claim and application by the Claimants on the following grounds:

a. This matter is *sub judice* and therefore legally untenable for the reason that there exist similar suits with similar or cross cutting issues in **Eldoret Petition No. 6 of 2020** and **Nairobi ELRC No. 633 of 2019** between the same parties.

b. The common denominator between this suit and the **Eldoret ELRC Petition No. 6 of 2020** and **Nairobi ELRC No. 633 of 2019** are issues revolving around the registration of the amended Union Constitution, need for a Special National Governing Council meeting and removal of Claimants from office.

c. The Claimants are in breach of Section 30 of the Labour Relations Act in that the Registrar of Trade Unions through her letter dated 28<sup>th</sup> October 2020 declined to accede to the Claimant's application inviting her to reject the composition of the 2<sup>nd</sup> Respondent's National Elections Board and nullification of the Union's election notice dated 1<sup>st</sup> October 2020; instead of appealing the said decision as the law mandatorily requires, they have prematurely filed this case;

d. The Claimants are further in breach of section 30 of the Labour Relations Act: The Registrar in her letter dated 5<sup>th</sup> July 2018 returned a finding that due process was followed with respect to making amendments to the Union Constitution. The Claimants were supposed to challenge the same to this court within thirty (30) days of the date of that decision of which they did not thus the belated attempt is an obvious afterthought and abuse of court process;

e. This Court is deprived of jurisdiction to hear and adjudicate on this matter by dint of Article 41(4) of the Constitution of Kenya as read with **Chapter VII Clause 1 of the Union's Constitution, Section 28 and 30** of the **Labour Relations Act**, and the **ILO Convention 98 Articles 1 and 2**.

In the submissions in support of the preliminary objection the 2<sup>nd</sup> Respondent submits that in Eldoret Petition No. 6 of 2020 between the Claimants and the Respondents the Claimants filed an application dated 28<sup>th</sup> August, 2020 that is still under consideration in which the Claimants seek injunctive reliefs against their removal from the National Executive Council. That at the *ex parte* stage, the Court granted an order restraining the Registrar of Trade Unions from effecting any changes and in particular, the removal of the 1<sup>st</sup> to 3<sup>rd</sup> claimant herein from the National Executive Council pending the hearing and determination of the application. That the court granted orders in part as follows:

*“It is hereby ordered that:*

*a. The Application dated 28<sup>th</sup> August, 2020 is hereby certified urgent and admitted for hearing during the current court recess.*

*b. The same be served on the respondents and interested parties who shall file a response within 14 days of service.*

*c. The matter is set for mention for further directions on 16<sup>th</sup> September, 2020.*

*d. Injunctive orders be and are hereby issued against the Registrar of Trade Unions restraining her office from effecting any changes and in particular the removal of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners as the 2<sup>nd</sup> Respondent's National Treasurer, National Deputy Treasurer and National Deputy Organizing Secretary respectively pending the hearing and determination of this application.”*

That the Claimants have admitted under paragraph 11 of the Amended Claim that the issues as raised in the current case are similar to **ELRC No. 633 of 2019**.

The 2<sup>nd</sup> Respondent submits that it associates itself with the decision in **National Union of Water & Sewerage Employees v Kenya County Government Workers Union & 2 Others [2018] eKLR** where the Court returned a finding that this court does not have original jurisdiction to entertain a suit on a decision of a Registrar of Trade Unions. That on 5<sup>th</sup> July, 2018, the Registrar of Trade Unions addressed the Claimants on an issue about amendment of the Union Constitution and made it clear that due process was followed including the requisite referendum conducted between 10<sup>th</sup>-19<sup>th</sup> December, 2014 with regard to all the proposed amendments. That the Claimants never filed an appeal against the decision of the Registrar within the meaning of section 30 of the Labour Relations Act. That therefore to attempt to belatedly challenge the amendments to the Union Constitution at this time is an afterthought and an abuse of court process.

On whether this matter is *sub judice* pursuant to section 6 of the Civil Procedure Act, the 2<sup>nd</sup> Respondent submits that the three issues that shall fall for determination in this matter if the PO is disallowed are follows:

a. Whether this Court should issue an order directing the Respondents to maintain the status quo in the National Executive Council composition of the Union;

b. Whether this Court should issue an order staying the Union's election notice dated 1<sup>st</sup> October 2020;

c. Whether this Court should issue a mandatory injunction against the Registrar of Trade Unions from adopting and/or registering and/or approving the changes made to the Union's Constitution;

That these are issues that are admittedly under active consideration in other Courts of competent and concurrent jurisdiction. That for instance the Eldoret Petition concerns the issue of the alleged unlawful removal of the claimants as the National Executive Council members of the Union. The Claimants have expressly pleaded under paragraph 6 clause iii, iv, v, and vi of the Amended Statement of Claim this fact. That it is therefore unreasonable that they are again seeking similar orders of protection against their removal from office in this suit.

The 2<sup>nd</sup> Respondent relied on the decision in **Fleur Investment Ltd v Permanent Secretary Ministry of Roads & 4 Others [2012] eKLR** where the court held as follows:

*“In my view, this petition is another suit filed to litigate the same matter between the same parties seeking similar relief. It is an abuse of the court process to file a multiplicity of suits seeking similar relief in respect of the same subject matter.”*

The 2<sup>nd</sup> Respondent further relies on the decision in **Nairobi Cause No. 390 of 2015 Hilary Kibiriti Marakaru v Kenya National Union of Nurses and Others** where Nduma J. when faced with a similar situation of claimants filing multiple of suits on the same subject matter had the following to say:

*“The Claimant has embarked in collusion with 3<sup>rd</sup> Respondents to file multiplicity of suits between the parties on the same subject matter seeking similar reliefs. This to my mind is an abuse of court process and the Claimant need to be disabused of these tendencies by the dismissing the suit with costs to the 2<sup>nd</sup> and 4<sup>th</sup> Respondents. The other suits will suffer the same fate if not withdrawn and/or consolidated to mitigate this abuse of the court process.”*

On whether this Court is deprived of jurisdiction pursuant to Article 41(4) of the Constitution of Kenya as read with Chapter VII Clause 1 of the Union's Constitution and Section 28 and 30 of the Labour Relations Act, and the ILO Convention 98 Articles 1 and 2 the 2<sup>nd</sup> Respondent submits that the Claimants and specifically the 1<sup>st</sup> Claimant alleges that she is a member of the National Executive Council (NEC) which is established under Chapter VII of the Union Constitution. That NEC is an organ responsible for the management of the affairs of the Union and exercises control over individual officers of the Union in addition to formulating all by-laws of the Union. That this is the organ where they should raise the concerns and find solutions. That the Registrar of Trade Unions advised the Claimants vide her letter dated 28<sup>th</sup> October 2020 to present these issues to the Union to resolve them internally within the relevant functional internal mechanisms. That they have refused to heed to this directive and instead rushed to court prematurely.

The 2<sup>nd</sup> Respondent submits that granting the reliefs sought in the Claim and the Application would be tantamount to using the Court's process to rewrite the Union's Constitution, tamper with the internal administration and/or otherwise stop the operations of the 2<sup>nd</sup> Respondent as well as stop the 1<sup>st</sup> Respondent from performing his legal and fiduciary duties to the members without following the relevant rules and procedures as set out in

- a. Article 41(4)(a) of the Constitution of Kenya as read with Chapter VII of the Union's Constitution;
- b. Section 28 and 30 of the Labour Relations Act;
- c. ILO Convention 98 Articles 1 and 2.

The 2<sup>nd</sup> Respondent submits that Wasilwa J. had a chance to handle a similar circular issued by the Registrar of Trade Unions in **Kenya National Union of Nurses v Registrar Of Trade Union & 8 Others [2016] eKLR**. She had the following to say:

*“In this regard, the only provision in law is that Trade Unions should give a notice of the election of officials to the Registrar of Trade Unions within 14 days of completion of the election and should issue direction or conduct of elections in accordance with the Unions' respective Constitutions.*

*It is good practice but not mandatory that the Registrar of Trade Unions issues directions to ensure that elections are conducted in accordance with the law and respective Constitutions. To expect a Trade Union to therefore conduct elections in a particular way other than as per their Constitution and as per the members agreed norm is to interfere in the running of the affairs of the Union and is therefore against ILO convention 98 on Freedom of Association and of the right to organize.*

*It is the finding of this Court therefore that the circular by the Registrar of Trade Unions of 25<sup>th</sup> November 2015 was unconstitutional and null and void to the extent of waiting to micro manage the affairs of the Appellant and insisting on who should supervise the elections without consideration of the Unions Constitution and provisions of the law and I declare it so.”*

The 2<sup>nd</sup> Respondent urges this court to find that the issues raised are issues that fall within the province of the internal structures of the Union and which the Union should be allowed to handle in strict conformity with its constitution.

In conclusion the 2<sup>nd</sup> Respondent summarizes its submissions as follows:

1. The issue of the alleged removal of the Claimants from office is admittedly under consideration in Eldoret Petition. No. 6 of 2020;
2. The impugned SNGC meeting of 23<sup>rd</sup> October, 2020 was held pursuant to the advice of the court ruling of 5<sup>th</sup> June, 2020 in the Eldoret Petition and the Report of the Registrar of Trade Unions of 29<sup>th</sup> June 2020 thus any protestations about the same should have been filed within the Eldoret Petition;
3. The Claimants have breached section 30 of the Labour Relations Act by refusing and/or failing to file an appeal to this court within the meaning of that section;
4. The issue of the amendments to the Union Constitution is admittedly under consideration in **Nairobi ELRC No. 633 of 2019**;
5. The election notice dated 1<sup>st</sup> October 2020 was issued pursuant to **Article 41(4) of the Constitution of Kenya and ILO Convention 98 Articles 1 and 2** therefore any attempt to challenge the same should first be presented to internal organs of the Union under Chapter VII Clause 1 thereof;
6. The Claimants are abusing the court process by filing multiple suits and applications seeking similar reliefs in courts of concurrent jurisdiction.

For the Claimant it is submitted that in the Notice of Motion dated 6<sup>th</sup> November, 2020 it seeks for **ORDERS** that:

1. *That this matter be certified urgent and heard ex parte in the first instance.*
2. *That prayers no. 3, 5 and 7 be granted ex parte in the first instance.*

3. That pending the hearing and determination of this Application inter partes, this Court be pleased to grant an Order restraining the 3<sup>rd</sup> Respondent her office or any officer in her office from registering any resolutions arising from the purported Special National Governing Council meeting held at Daiichi Hotel in Isiolo county on 23<sup>rd</sup> October 2020.

4. That pending the hearing and determination of the Suit, this Court be pleased to grant an Order restraining the 3<sup>rd</sup> Respondent her office or any officer in her office from registering any resolutions arising from the purported Special National Governing Council meeting held at Daiichi Hotel in Isiolo County on 23<sup>rd</sup> October 2020.

5. That pending the hearing and determination of this Application inter partes, this Court be pleased to grant an Order restraining the 1<sup>st</sup> and the 2<sup>nd</sup> Respondent and or their agents from executing or implementing any such resolutions arising from the purported Special National Governing Council meeting held at Daiichi Hotel in Isiolo County on 23<sup>rd</sup> October 2020.

6. That pending the hearing and determination of this suit, this Court be pleased to grant an Order restraining the 1<sup>st</sup> and the 2<sup>nd</sup> Respondent and or their agents from executing or implementing any such resolutions arising from the purported Special National Governing Council meeting held at Daiichi Hotel in Isiolo County on 23<sup>rd</sup> October 2020.

7. That pending the hearing and determination of this Application inter partes, this Court be pleased to grant an Order directing the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents to maintain the leadership status quo in the National Executive Council composition of the 2<sup>nd</sup> Respondent.

8. That pending the hearing and determination of this suit, this Court be pleased to grant an Order directing the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents to maintain the leadership status quo in the National Executive Council composition of the 2<sup>nd</sup> Respondent.

9. That the costs of this Application be awarded to the Claimants/Applicants.

That the grounds upon which the Applicant relies are found in the Supporting Affidavit sworn by the 1<sup>st</sup> Claimant **Agnes Wangechi Munderu** authorized as such on 6<sup>th</sup> day of November, 2020.

The Claimant urges this court to take cognizance that Grounds 3, 5, 7, 8, 9, 10 in the Notice of Preliminary Objection of the 2<sup>nd</sup> Respondent raise issues that do not fit within the doctrine of an objection, that is: *a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of the judicial discretion.*"

The Claimant submits that the notice of Preliminary Objection by the 2<sup>nd</sup> Respondent does not raise any pure point of law. That all grounds relied upon by the 2<sup>nd</sup> Respondent would require proof by way of evidence and raise facts that need to be ascertained hence incompetent and unmerited.

On whether the instant suit is *sub judice* the Claimants submit that the matter before this court is separate and distinct from Eldoret ELRC Petition 6 of 2020. That whereas the matter before the court in Eldoret deals substantively with Union accounts, the matter before this court deals with the SNGC held on 23<sup>rd</sup> October 2020.

On whether the instant suit is *res judicata* the Claimants submit that Section 7 of the Civil Procedure Act defines the doctrine of *Res Judicata* as applying to a suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties. The Claimant's application dated 6<sup>th</sup> November, 2020 is not a new application and is not intended to introduce new facts other than the prevailing substances within the knowledge of the Respondents.

The Claimants submit that there is no final determination both for **Nairobi ELRC Cause No. 633 of 2019** and **Eldoret Petition 6 of 2020** to justify the mandatory requirements of *Res Judicata* and as such the Preliminary objection of the 2<sup>nd</sup> Respondent is premature and an abuse of Court process.

That the conditions for application of the doctrine of *res Judicata* were authoritatively laid down in **Judith Gathoni Willie v George Kihara Muchuki & 2 others [2004] eKLR** where the court cited **Nairobi HCCC No 1322 of 1993 Caltex Oil (Kenya) Ltd v Mohamed Yusaf & Others**, wherein Bosire J. (as he was then) stated as follows:

*'For the doctrine of res judicata to apply, three basic conditions must be satisfied. The party relying on it must show;*

- a. That there was a former suit or proceeding in which the same parties as in the subsequent suit litigated.*
- b. The matter in issue in the latter suit must have been directly and substantially in issue in the former suit.*
- c. That a court competent to try it had heard and finally decided the matters) in controversy between the parties"*

That in **Musa Hassan Bulhan & Another v Eastern and Southern African Trade and Development Bank. (2004) eKLR** it was stated by the court that "*matter in issue*" under section 6 of the Civil Procedure Act does not mean any matter in issue in the suit but has reference to

the entire subject in controversy.

That the court put it succinctly that: *"The subject matter must be covered by the previously instituted suit and not vice versa."* The court in the above case was clear that for *res judicata* to apply, the issues alleged to be similar must have been raised in the earlier suit, heard and finally determined or decided by the court, which is not as in the instant case before this Court.

The claimants submit that the definition of a preliminary objection was set out in the case of **Mukisa Biscuits Manufacturing Co. Ltd v Westend Distributors Limited [1969] EA 696**. *"So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."*

On whether this Court lacks jurisdiction to entertain this suit on its merits, facts and Law the Claimants submit that under **Article 162(2) of the Constitution of Kenya, 2010** this court has been established and ordained with inherent duty to hear and determine all matters relating to employment and Labour relations and as such this court cannot be barred from exercising its judicial obligations.

1. They submit that the instant suit is properly before this Court as it is relevant to judicial demarcations of Employment and Labour Relations.
2. The Claimants further submit that under Section 12(1) of the Employment and Labour Relations Court Act No. 20 of 2011 (Revised in 2014), this Court has exclusive original jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution of Kenya and all other relevant legislations.
3. Further, that Section 12(1)(i) of the said Act expressly bestows upon this Court such powers to determine matters relating to disputes concerning registration and election of Trade Union officials.

That in **United States International University (USIU) v The Attorney General [2012] eKLR** the Court in arriving to its conclusion held that;

*"Since the Court is of the status of the High Court it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret the Constitution and fundamental rights and freedoms is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of Section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce not only Article 41 rights but also fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the Constitution within a matter before it."*

In conclusion the Claimants submit that this court has judicial discretion to hear and determine this matter on merit.

The claimants urge that this court be pleased to preserve the Motion dated 2<sup>nd</sup> November 2020 and the subsequent substantive suit.

### **Analysis and Determination**

I have considered the grounds raised in the Notice of Preliminary Objection and in the submissions of the parties.

A preliminary objection was defined in the case of **Mukisa Biscuits Manufacturing Co. Ltd v Westend Distributors limited [1969] EA 696** as consisting of *"a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."*

Ground 1 of the preliminary objection is a statement of facts. These statements of fact would obviously not fit within the definition of a preliminary objection as set out in the **Mukisa Biscuit** case.

The second ground in the preliminary objection is that this matter is *sub judice*. The 2<sup>nd</sup> Respondent has not filed the pleadings in **Eldoret ELRC Petition No. 6 of 2020**. I am therefore unable to determine whether or not the issues in the instant suit are the same as those in **Eldoret ELRC Petition No. 6 of 2020**. What was filed are orders issued by the court in the said petition. The orders restrained The Registrar of Trade Unions from effecting changes in the Register of the Union's officials and in particular removing the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners from office as National Treasurer, National Deputy Treasurer and National Deputy Organizing Secretary of the Union. The Petitioners in **Eldoret ELRC Petition No. 6** are not even the same as those in the instant petition. Only Petitioner 1, 2, 3 and 4 are the same. Petitioners 5, 6 and 7 in this petition are not parties to **Eldoret Petition 6 of 2020**. Petitioner 8 and 6 in the **Eldoret Petition No. 6 of 2020** are also not parties to this petition.

The Petitioners herein have submitted that the matter before this court is separate and distinct from **Eldoret ELRC Petition 6 of 2020**. That whereas the matter before the court in Eldoret deals substantively with Union accounts, the matter before this court deals with the SNGC held on 23<sup>rd</sup> October 2020. These are matters which this court can only ascertain by looking at evidence that is presently not before this court. This therefore means that the issues raised by the 2<sup>nd</sup> Respondent are not matters that can be dealt with by way of a preliminary objection which by definition only considers facts on record as pleaded by the parties.

The issue of jurisdiction as pleaded in the preliminary objection arises from the doctrine of exhaustion of remedies. Again this is a matter that would require this court to consider the Constitution of the Union which would make it ineligible for consideration in a preliminary objection.

**The upshot is that I find the issues raised in the 2<sup>nd</sup> Respondent's preliminary objection to be matters that are not suitable for determination by way of preliminary objection. The same is accordingly dismissed with costs.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22<sup>ND</sup> DAY OF JANUARY 2021**

**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**