



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATION COURT**

**AT NAIROBI**

*(Before Hon. Lady Justice Maureen Onyango)*

**PETITION NO. E001 OF 2021**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE CONSTITUTION IN ARTICLES 2, 3(1), 10, 19, 20, 21, 22, 23(2),  
41(1), 47(1), 258 AND 259**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS IN ARTICLES 27,  
36(1), 41(1)(c), 47(1) AND 50(1) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ARTICLE 3(1) AND 3(2) OF THE ILO CONVENTION NO. 87 CONCERNING FREEDOM OF  
ASSOCIATION AND PROTECTION OF THE RIGHT TO ORGANISE**

**AND**

**IN THE MATTER OF ARTICLE 22 AND 26 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS  
(ICCPR)**

**AND**

**IN THE MATTER OF ARTICLE 8 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL  
RIGHTS (ICESR)**

**AND**

**IN THE MATTER OF ARTICLE 23(4) OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)**

**AND**

**IN THE MATTER OF THE LABOUR INSTITUTIONS ACT, NO. 12 OF 2007**

**AND**

**IN THE MATTER OF SECTIONS 4(2) AND 34 OF THE LABOUR RELATIONS ACT, NO. 14 OF 2007**

**AND**

**IN THE MATTER OF KETAWU CONSTITUTION REGISTERED ON 20<sup>TH</sup> APRIL 2016**

**AND**

**IN THE MATTER OF KETAWU BRANCH AND NATIONAL ELECTIONS SCHEDULED FOR 9<sup>TH</sup> JANUARY 2021 AND 23<sup>RD</sup>  
JANUARY 2021 RESPECTIVELY**

**BETWEEN**

DAVID K. SONGOK.....1<sup>ST</sup> PETITIONER  
AGNES GITHUMBI.....2<sup>ND</sup> PETITIONER  
ELLY WABWIRE.....3<sup>RD</sup> PETITIONER  
BEATRICE OMULINDI.....4<sup>TH</sup> PETITIONER

**VERSUS**

**KENYA ELECTRICAL TRADERS AND**

ALLIED WORKERS UNION.....1<sup>ST</sup> RESPONDENT  
VINCENT OCHIENG OKULLO.....2<sup>ND</sup> RESPONDENT  
ERNEST NAKENYA NADOME.....3<sup>RD</sup> RESPONDENT  
BERNAD WANYAMA KHAGABO.....4<sup>TH</sup> RESPONDENT  
FRANCIS OGUTU.....5<sup>TH</sup> RESPONDENT  
OSWALD NGETI.....6<sup>TH</sup> RESPONDENT  
AGNES NDUNGE MULWA.....7<sup>TH</sup> RESPONDENT  
CAROL C RUTO.....8<sup>TH</sup> RESPONDENT  
DANIEL K MARU.....9<sup>TH</sup> RESPONDENT  
JAMES MAINA.....10<sup>TH</sup> RESPONDENT  
KENNEDY MAGANA.....11<sup>TH</sup> RESPONDENT  
CYPRIAN OBWOGE.....12<sup>TH</sup> RESPONDENT

**AS CONSOLIDATED WITH**

**PETITION NO. E107 OF 2020**

**N THE MATTER OF VIOLATION OF ARTICLES 27 AND 41(2),(c) OF THE CONSTITUTION OF THE REPUBLIC OF  
KENYA, 2010**

**AND**

**IN THE MATTER OF SECTION 34(2)(a) OF THE LABOUR RELATIONS ACT**

**BETWEEN**

DANIEL ODHIAMBO OTIENO.....1<sup>ST</sup> PETITIONER  
ELPHAS SONGOK.....2<sup>ND</sup> PETITIONER  
DORINE OMOLO ANYANGO.....3<sup>RD</sup> PETITIONER  
APPOFIA SAOINA KETUKEI.....4<sup>TH</sup> PETITIONER  
LILIAN AUMA OMITA.....5<sup>TH</sup> PETITIONER

VERSUS

KENYA ELECTRICAL TRADES AND

ALLIED WORKERS' UNION.....RESPONDENT

RULING

The Section 34 of the Labour Relations Act provides for election of trade union officials as follows –

**34. Election of officials**

**(1) The election of officials of a trade union, employers' organisation or federation shall be conducted in accordance with their registered constitutions.**

**(2) The constitution of a trade union, employers' organisation or federation shall—**

**(a) not contain a provision that discriminates unfairly between incumbents and other candidates 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' organisation or federation to ensure that elections are conducted in accordance with this section and their respective constitutions.**

Union officials so elected hold office for 5 years. The last elections of trade unions and employers' organisations were held in 2016.

Pursuant to the provisions of Section 34(3) the Registrar of Trade Unions, by notice dated 26<sup>th</sup> September 2020, gave directions on the holding of all trade union and employers' organisations elections. The directions were to the effect that branch elections be held from 4<sup>th</sup> January 2021 and be concluded by 30<sup>th</sup> March 2021, national elections from 1<sup>st</sup> April to 30<sup>th</sup> June 2021 and elections of federations be completed by 30<sup>th</sup> August 2021.

The Kenya Electrical Trades and Allied Workers Union, by letters dated 26<sup>th</sup> November 2020, issued notice to branch secretaries of the union to convene Branch General Meetings on 9<sup>th</sup> January 2021 for election of branch officials and to strictly observe the provisions of the union Constitution.

On 23<sup>rd</sup> December 2020, Daniel Odhiambo Otieno, Elphas Songok, Dorine Omolo Anyango, Appofia Saoina Ketukei and Lillian Auma Omita filed Petition No. E107 of 2020 in which they seek the following orders –

*(a) That Honourable Court do make an order suspending the branch and national elections of the Respondent scheduled for 9<sup>th</sup> January, 2021 and 23<sup>rd</sup> January, 2021 respectively.*

*(b) That a declaration do issue that Clause 4:4 of the constitution of the Respondent is discriminatory and offends Article 27(2), (3), and (5) of the Constitution of Kenya.*

*(c) That a declaration do issue that Clause 4:4 of the constitution of the Respondent offends Article 41(2)(c) of the Constitution of Kenya.*

*(d) That a declaration do issue that Clause 4:4 of the constitution of the Respondent offends Section 34 (2) (a) of the Labour Relations Act.*

*(e) That the Honourable Court restrains the Respondent from barring the Petitioners and other contract staff from vying for principal national and branch positions.*

*(f) That any other or further orders as this Honourable Court deems fit and appropriate*

*(g) That costs be provided to the Petitioner.*

Together with the petition, the petitioners filed a motion seeking the following orders –

(1) Spent.

(2) That pending the hearing and determination of this Application this honourable court do make an order suspending the branch and national elections of the Respondent scheduled for 9<sup>th</sup> January, 2021 and 23<sup>rd</sup> January, 2021 respectively.

(3) That pending the hearing and determination of the Petition, honourable court do make an order suspending the branch and national elections of the Respondent scheduled for 9<sup>th</sup> January, 2021 and 23<sup>rd</sup> January, 2021 respectively.

(4) That the Court restrains the Respondent from victimizing and intimidating the Petitioners on account of instituting these proceedings.

(5) That a declaration do issue that Clause 4:4 of the constitution of the Respondent is discriminatory and offends Article 27(2), (3), and (5) of the Constitution of Kenya.

(6) That a declaration do issue that Clause 4:4 of the constitution of the Respondent offends Article 41(2)(c) of the Constitution of Kenya.

(7) That a declaration do issue that Clause 4:4 of the constitution of the Respondent offends Section 34(2)(a) of the Labour Relations Act.

(8) That cost of this application be borne by the Respondent.

The application was considered by the Duty Judge on 7<sup>th</sup> January 2021 and fixed for mention on 15<sup>th</sup> January 2021.

By another petition dated 19<sup>th</sup> December 2020 and registered as petition E001 of 2021, David K. Songok, Agnes Githumbi, Elly Wabwire and Beatrice Omulundi seek the following orders –

1. A declaration that the communication dated 26<sup>th</sup> November 2020 of the 1<sup>st</sup> Respondent through the 3<sup>rd</sup> Respondent and the subsequent planned Nairobi Central, Nairobi South and Central Rift branch and National election to be held on 9<sup>th</sup> and 23<sup>rd</sup> January 2021 is in contravention of the Petitioners rights under the Union Constitution and therefore null and void.

2. A declaration that the Respondent's conduct with regard to the planned union election violates sections 4(2) and 34 of the Labour Relations Act, Articles 10, 41 of the Constitution of Kenya, Articles 3(1) and (2) and 8(2) of the ILO Convention Concerning Freedom of Association and Article 26 of the international Covenant on Civil and Political Rights, 1966.

3. A declaration that the Petitioners' right to equality before the law and the right to equal protection and equal benefit of the law as provided under Article 27(1) of the constitution have been denied, violated, infringed, breached and threatened.

4. A declaration that the Petitioners' right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair were denied, violated and infringed, contrary to Article 47(1) of the Constitution of Kenya.

5. A declaration that the Petitioners' right under Article 36(1) of the Constitution of Kenya 2010 on the right to freedom of association which includes the right to form, join or participate in the activities of an association of any kind have been denied, violated, infringed, breached and threatened.

6. A declaration that the positions of the 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Respondents as the National Chairman, National General Secretary, Trustee 2, Acting Branch Secretary-Central Nairobi Branch, 2<sup>nd</sup> Vice Chairman, National Women Leader, National Assistant Women Leader and the National Assistant Organizing Secretary respectively of the 1<sup>st</sup> Respondent Union (KETAWU) and as registered by the Registrar were a violation of the 1st Respondents Constitution.

7. A declaration that all resolutions and done by the NEB as chaired by the 2<sup>nd</sup> Respondent and are a nullity and the same be nullified.

8. A declaration that the provisions of Clause 5.8 of the Union Constitution are in violation of section 34 of the Labour Relations Act and are thus null and void.

9. A declaration that the Petitioners' rights as to legitimate expectation of fairness from the Respondents is greatly violated.

10. A declaration that the Petitioners' have been condemned unheard contrary to the constitution and the rules of Natural Justice.

11. A declaration that as a result of the breach of rights enumerated herein above, the Petitioners have suffered damage, pain and suffering.

12. An order for compensation as enshrined and provided for under Article 23(e) of the Constitution made up of special damages for the expenses incurred and damages for exposing of the Petitioner to financial expenses and losses, General Damages and exemplary damages pursuant to the declaration prayed above.

13. *Costs of this petition and interest thereon.*

14. *Any other order(s) as the honourable court shall deem fit and just.*

The petition was filed together with an application by way of notice of motion of the same date in which the petitioners seek the following orders –

1. *Spent.*

2. *That an order of temporary injunction do issue restraining the 1<sup>st</sup> Respondent from conducting Nairobi Central Branch, Nairobi South Branch and Central Rift Branch elections scheduled for 9<sup>th</sup> January 2021 pending the inter-partes hearing and determination of this Application.*

3. *That an order of temporary injunction do issue restraining the 1<sup>st</sup> Respondent from conducting National elections scheduled for 23<sup>rd</sup> January 2021 pending the inter-partes hearing and determination of this Application.*

4. *That an order of temporary injunction do issue restraining the 1<sup>st</sup> Respondent from conducting Nairobi Central Branch, Nairobi South Branch and Central Rift Branch elections scheduled for 9<sup>th</sup> January 2021 pending the hearing and determination of this Petition.*

5. *THAT an order of temporary injunction do issue restraining the 1<sup>st</sup> Respondent from conducting National elections scheduled for 23<sup>rd</sup> January 2021 pending the hearing and determination of this Petition.*

6. *That in the alternative to prayer 2, 3, 4 and 5 above, an order of mandatory injunction do issue compelling the Respondents to allow the Petitioners to vote and contest in the 1<sup>st</sup> Respondent's Branch and National elections scheduled for 9<sup>th</sup> January 2021 and 23<sup>rd</sup> January 2021 pending the hearing and determination of this application inter-partes.*

7. *That an order of temporary injunction do issue restraining the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> Respondents from contesting in the 1<sup>st</sup> Respondent's Nairobi Central, Nairobi South Branch, Central Rift Branch and National Elections scheduled for 9<sup>th</sup> January and 23<sup>rd</sup> January 2021 as branch officials and defending delegates pending the inter-partes hearing and determination of this Application.*

8. *That this court gives directions on the hearing of the Petition as a matter of urgency.*

9. *That the costs of this Application be provided for.*

When the applicants in Petition E001 of 2021 appeared before the Duty Judge ex parte on 4<sup>th</sup> January 2021 they were granted orders as follows –

1. *Spent.*

2. *Spent.*

3. *Pending hearing of the Application inter partes, the 1<sup>st</sup> Respondent is restrained from Conducting Nairobi Branch Elections on any date.*

4. *Hearing inter partes on 12<sup>th</sup> February, 2021.*

The petitioner's Counsel again appeared before the Duty Judge exparte on 7<sup>th</sup> January 2021 seeking variation of the orders of 4<sup>th</sup> January 2021 and were granted the following further orders –

1. *The orders issued on 4<sup>th</sup> January 2021 is varied to indicate temporary injunction against*

2. *Nairobi central Branch, Nairobi South Branch and Central Right Branch elections scheduled for 9<sup>th</sup> January 2021.*

3. *National elections scheduled for 23<sup>rd</sup> January 2021.*

5. *Hearing inter partes on 12<sup>th</sup> February 2021.*

On 6<sup>th</sup> January 2021 the Respondents filed a notice of motion seeking the following orders –

1. *Spent.*

2. Spent.

3. That this Honourable Court be pleased to stay, vary or review and or vacate with a view of setting aside the ex-parte orders granted on 4<sup>th</sup> January, 2021 by Hon. Justice James Rika restraining the 1<sup>st</sup> Respondent from conducting its Nairobi Branch Elections any date pending hearing and determination of this Application and the main suit.

4. That this Honourable Court be pleased to issue any further or other order that it may deem fit, just and expedient to grant.

5. That the costs of this Application be provided in the cause.

On 12<sup>th</sup> January 2021 the Respondents filed another an application under certificate of urgency in Petition No. E001 of 2021 seeking the following orders –

1. That this Application be certified as urgent and service thereto be dispensed with in the first instance;

2. That the Honourable Court be pleased to hear this Application at the earliest possible moment during the Vacation of this Honourable Court;

3. That this Honourable Court be pleased to grant such other or further orders as it may deem fit to grant;

4. That costs of this Application and suit be met by the Respondent.

The application was certified urgent and fixed for hearing together with Petition No. 107/2020 on 15<sup>th</sup> January 2021.

When parties appeared before the Judge on 15<sup>th</sup> January 2021, the following directions were made: -

1. Petition No. E107 of 2020 is consolidated with Petition E001 of 2021 to proceed under E001 of 2021.

2. Mr. Dan Odhiambo shall serve his notice to act in person and authority to act for his colleagues on the other parties.

3. The application by the Respondent seeking to set aside ex parte orders made on 4<sup>th</sup> January 2021 and 7<sup>th</sup> January 2021 shall be heard on 22<sup>nd</sup> January 2021.

4. The Respondent to ensure service has been effected on all the other parties.

5. Any reply should be filed on or before 20<sup>th</sup> January 2021.

6. Mr. Lilan's clients be served with Petition No. E107 of 2020

By letter addressed to the Deputy Registrar dated 18<sup>th</sup> January 2021, the Respondents requested that the applications be heard expeditiously in view of the delegates' conference scheduled for 23<sup>rd</sup> January 2021.

The parties in Petition E001 of 2021 appeared before me for directions on 19<sup>th</sup> January 2021. The petitioners in petition E107 of 2020 were however absent on that day. After hearing lengthy submissions by Counsels present on whether or not to bring forward the date for hearing the application, I fixed the matter for further directions on 20<sup>th</sup> January 2021 and directed that the Petitioner in Petition E107 of 2020 be served.

On 20<sup>th</sup> January 2021 all parties were present and again made elaborate submissions before me. After hearing the parties, I directed that since they had basically argued the applications, the Petitioners who had not filed their submissions by 20<sup>th</sup> January 2021 as directed by the Court on 15<sup>th</sup> January 2021 do so by close of day and reserved the ruling in respect of the applications for 21<sup>st</sup> January 2021. This was in consideration of the Respondent's submission that the delegates needed sufficient time to travel to the venue of the meeting taking into account the curfew imposed under Covid-19 regulations should the court allow the delegates conference to proceed, or time to call off the meeting in good time for the delegates to terminate their travel plans should the court decline to set aside the orders injuncting the conference.

### **Petitioner's Submissions**

It is submitted for the petitioners that they have established a prima facie case and are entitled to the grant of injunctive orders sought relying on the principles set out in the celebrated case of **Giella v Cassman Brown**. That their reasons for stopping the elections in the three branches was their exclusion from contesting contrary to the union Constitution and that the petition has high chances of success. They rely on Article 4.7 of the Union's Constitution which provides that a member is entitled to vote and to be elected in any election.

They submit that by letter dated 26<sup>th</sup> November 2020, the Respondent's Secretary General informed the petitioner that they would not participate in the elections. They submit that they were suspended as officials and not as members. That if national elections are allowed to proceed the three branches will be denied an opportunity to participate in the elections. That Article 5.6 of the union constitution provides

that the branch of a union has a right to send six delegates to the National congress.

That the Respondent's position that 9 out of 12 branches constitute a quorum is not correct as delegates should be from each of the 12 branches of the union.

That allowing the elections to proceed would perpetuate illegalities. That the petitioners seek protection of both the Union's Constitution and the Constitution of Kenya 2010. They rely on the decision in **Mrao Limited v First American Bank of Kenya Limited** to the effect that –

*“all that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation”*

On irreparable loss, the petitioners submit that their right to association under Article 36 of the Constitution and under the Labour Relations Act and Employment Act will be irreparably infringed. Further, that the branches which have not voted will be locked out of the national elections and that such injury will not be capable of compensation by way of damages.

On balance of convenience the petitioners submit that the Registrar's letter dated 26<sup>th</sup> September 2020 required branch elections to be held between 4<sup>th</sup> January and 31<sup>st</sup> March 2021 while national elections are to be held between 1<sup>st</sup> April and 30<sup>th</sup> June 2021. That the date of the union elections is not cast in stone as there is no immediate urgency to hold the elections or 23<sup>rd</sup> January 2020. Further, that no prejudice will be suffered by the Respondents as the incumbent officials will still be in office. Further, that no money has been spent.

The Petitioners further submitted that the 2<sup>nd</sup> Respondent's election was nullified by in Cause No. 15 of 2016.

For the respondents it is submitted that the issue of suspension of the petitioners is the subject of Nairobi Cause No. 2079 of 2017 wherein the Petitioners were directed to exhaust the internal dispute settlement machinery. That the issue of suspension having been the subject matter of a determination of this court, is res judicata relying on the decision in **Uhuru Highway Development Limited v Central Bank of Kenya**.

It is further the Respondent's submissions that decisions made by the 2<sup>nd</sup> Respondent while in office were within the confines of the 1<sup>st</sup> Respondent's Constitution and have never been set aside or voided by a court order.

On the issue of academic qualifications of the 2<sup>nd</sup> Respondent, the Respondents submit that the same is pending determination of a review application and is not final. That the issue should therefore be raised in the suit in **Kisumu Cause No. 15 of 2016**.

On whether the rights of the petitioners to a fair hearing have been violated the Respondents submit that the petitioners did not at any time request for a special delegates meeting for the purposes of challenging this suspension. That equity aids the vigilant, not the indolent. That the next delegates meeting is scheduled for 23<sup>rd</sup> January 2021 and their appeal shall be heard at the delegates conference.

On whether Articles 4.4 and 5.8 of the union's Constitution are unconstitutional, the Respondents submit that the petitioners cannot contest the said provision which have been in force and through which they were elected to office. That in any event there are already proposals made for amendment of a raft of provisions of the Constitution that are to be discussed at the delegates meeting slated for 23<sup>rd</sup> January 2021.

It is the submission of the Respondents that the petitioners have failed to establish a prima facie case as they have not demonstrated that their rights have been violated. That the Constitution of the 1<sup>st</sup> Respondent prohibits a member under suspension from participating in union activities including vying for any office. That the petitioners in Cause E001 of 2021 are still under suspension and therefore not eligible to vie or vote. That the petitioners have not at any point sought clearance to vie for any elective position nor have they been denied the opportunity to do so. That the petitioners have not demonstrated that the process leading to their suspension was not procedural.

The Respondents pray for discharge of the orders restraining the Respondents from conducting elections.

### **Determination**

I have carefully considered the pleadings, the written and oral submissions made by the parties herein.

It is not contested that all the petitioners in both petitions are members of the 1<sup>st</sup> Respondent union. It is further not in dispute that the Petitioners in Petition No. E001 of 2021 were suspended from office on 2<sup>nd</sup> September 2017.

It is further not in dispute that the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Petitioners filed Cause No. 2079 of 2017 contesting the said suspensions and in a ruling delivered on 22<sup>nd</sup> February 2018, their application was dismissed and they were ordered to exhaust their internal disciplinary process before further redress from the court.

It is further not in dispute that since the ruling of the court the petitioners have not come back to court for redress.

It is on record that the petitioners on 8<sup>th</sup> September 2017, while their suit was pending in court, appealed against their suspension. It is however apparent from the evidence on record that since the decision of the court on 22<sup>nd</sup> August 2018, the petitioners have not taken any action to have their pending suspension case concluded in the manner directed by the court.

In the letter of the Secretary General notifying members of the date of the branch and national elections to take place on 9<sup>th</sup> and 23<sup>rd</sup> January 2021 respectively, which is dated 26<sup>th</sup> November 2020, it is stated at paragraph 7 thereof that “*the officials currently under suspension will not qualify to vote or be voted for in accordance with Article 19.5 of our Constitution. Their appeal will be heard during the delegates congress scheduled from 23<sup>rd</sup> January 2021 at Tom Mboya Labour College, Kisumu, where they shall be expected to appear in person to defend themselves.*”

Article 19.5 of the 1<sup>st</sup> Respondent’s Constitution provides as follows

*“19.5. A member shall cease to be entitled to any benefits of membership including the right to vote and hold office if: the subscriptions or other charges due to him/her are more than thirteen (13) weeks in arrears and during any period while he/she is under suspension in terms of this constitution.”*

Among the prayers in petition E001 of 2021 are a declaration that the letter notifying the members of the 1<sup>st</sup> Respondent of branch and national elections is null and void and a declaration that positions of the 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Respondents as registered are irregular and in violation of the Constitution, and that all NEB resolutions are a nullity. These are matters that can only be determined after full hearing of the petition. There are other prayers seeking nullification of Article 5.8 of the Constitution of the Union which provides for election procedure and nomination of candidates.

The Registrar of Trade Unions, who is the custodian of the union constitution and Register of Officials of Trade Unions has however not been joined in Petition E001 of 2021 and no orders are sought to deregister either the Constitution or parts thereof, or any official from the registrar held by the Registrar of Trade Unions.

Further, in view of the orders in Cause No. 2079 of 2017, this court cannot make any other orders with respect to the suspension of the petitioners as they have not complied with the said orders. The court specifically directed in the ruling that the claimant/applicants exhaust their internal disciplinary process before seeking further redress from this court.

The issue of suspension of the petitioners is therefore a matter still pending before this court and is therefore *sub judice*. They aver also by the same orders barred from coming back to this court before exhausting the process under the union Constitution.

The petitioners have pointed out that this court in **Kisumu Cause No. 15 of 2016** which was delivered on 27<sup>th</sup> November 2020, nullified the election of Vincent Ochieng Okullo, the 2<sup>nd</sup> Respondent in petition E001 of 2021. Although the Respondents have demonstrated that they have filed an application for review and the matter is therefore not concluded, the petitioners have not applied to the Registrar to remove the 2<sup>nd</sup> Respondent’s name from the Register of Trade Union officials. That decision, or the holding of office by the said 2<sup>nd</sup> Respondent is therefore not relevant to the determination of this application or petition.

The principles for granting injunctive orders are stated in the case of **Giella v Cassman Brown**. These are –

- a. An Applicant must show a prima facie case with a probability of success;*
- b. if the temporary injunction is not granted, the Applicant stands to suffer irreparable harm for which damages would not be an adequate remedy;*
- c. if the Court is in doubt as to whether the Applicant stands to suffer irreparability then it will determine the application on the balance of convenience.*

Further, in **Halsbury’s Law of England 4<sup>th</sup> Edition Volume paragraph 863**, it is stated that principles to guide the court are as follows;

*“Interim injunctions are generally grounded only when the Applicant has established a serious issue to be tried, damages will not be adequate remedy, the balance of convenience lies in favour of granting the injunction in that it will do more good than harm and the Applicant is and will be able to compensate the Respondent for any loss which the order may cause him in the event that it is later adjudged that the injunction should not have been granted.”*

From the foregoing, I find that the petitioners have not established a prima facie case with probability of success as the subject matter herein is sub judice and the court barred them from coming back to this court before exhausting internal disciplinary process which they have not.

On the second principle on irreparable loss, in view of my finding that the issue of their suspension is *sub judice*, and in view of the provisions of Article 19.5 of the Union’s Constitution, there is no likelihood of their eligibility to vie for union elective posts until their suspension is lifted. Having not done anything towards getting the suspensions cleared since the court’s decision in February 2018 and taking into account that their term of office is to expire on the 5<sup>th</sup> anniversary of their election as union officials which is January 2021, their loss if the orders sought in the application are not granted is only a matter of speculation.

On the balance of convenience test, it is not in contest that 9 out of 12 union branches have held elections. It is also out of the orders obtained by the petitioners herein that the other 3 branch elections were stopped. The interests of the petitioners must therefore be weighed against the interests of all the other delegates in the 9 branches who have no dispute.

The Court also notes that the Delegates Conference scheduled for 23<sup>rd</sup> January 2021 has other agenda besides national elections. The

Respondents have exhibited proposals to discuss amendment to the Constitution, and the suspension of the petitioners in Petition E001 of 2021 at the congress.

The petitioners mentioned protests by some members against the elections. Those protests have not been escalated to complaints and it is a matter of conjecture whether they will be. They cannot be the basis for the decision of the court.

Furthermore, this court has the power to nullify elections should they be found to be irregular.

The timing of the filing of these petitions is also not lost to the court. The petitioners had the opportunity to approach the court immediately after the notice for elections was issued on 26<sup>th</sup> November 2020 but they waited until just a couple of days before the elections to come to court.

Again, having been officials of the union, they were aware from the very date of their elections and suspensions, that there will be elections at this time. All the issues they complain about should have been raised in good time to avert this last minute filing of court cases.

I find that the balance of convenience is in favour of letting the delegates conference and elections take place so that the members who have nothing to do with the issues for which the petitioners are in court are not affected by the petitioner's issues.

**For these reasons, I dismiss the application dated 19<sup>th</sup> December 2020.**

**As I mentioned earlier, no injunctive orders were granted in respect of the application dated 23<sup>rd</sup> December 2020. The same is however also dismissed in view of the fact that the reasons advanced by the applicants for stay of elections are matters that ought to be proposed for amendment of Constitution at the Delegates Congress. Proposals for the said amendments have already been made as demonstrated in the proposed amendments to the Union Constitution exhibited at pages 109 to 122 of the application by the Respondents dated 6<sup>th</sup> January 2021.**

There shall be no orders for 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**