



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. E004 OF 2021

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF ARTICLE 36 OF THE CONSTITUTION

AND

IN THE MATTER OF SECTIONS 34 AND 56 OF THE LABOUR RELATIONS ACT

AND

IN THE MATTER OF RULES 21(i)(d) & (e) OF THE TAILORS AND WORKERS UNION CONSTITUTION

AND

IN THE MATTER OF THE CIRCULAR FROM THE MINISTRY OF LABOUR AND SOCIAL PROTECTION

DATED 25TH SEPTEMBER 2020 TO ALL REGISTERED TRADE UNIONS, EMPLOYERS’

ORGANIZATIONS AND FEDERATIONS ON TRADE UNION ELECTIONS

BETWEEN

MUTHAMA NGUMBI.....1ST PETITIONER

ABDULLAHI HASSAN.....2ND PETITIONER

SARAH OWANO..... 3RD PETITIONER

VERSUS

TAILORS AND TEXTILES WORKERS UNION.....1ST RESPONDENT

REGISTRAR OF TRADE UNIONS.....2ND RESPONDENT

JUDGMENT

The petition herein is filed by three petitioners. The 1st Petitioner describes himself as a member and incumbent Treasurer of the 1st Respondent, the Tailors and Textiles Workers Union, a trade union registered under the Labour Relations Act to represent the interests of workers in the textiles sector.

The 2nd and 3rd Petitioners describe themselves as members of the 1st Respondent.

The 2nd Respondent is the Registrar of Trade Unions as established under the Labour Relations Act.

The Petitioners allege that the 1st Respondent has violated their rights under Articles 36 of the Constitution of Kenya, Sections 4, 34, 56 of the Labour Relations Act and Rule 21(d) and (e) of the Respondent's Constitution.

The petitioners seek the following orders in the petition dated 13th January 2021 –

- a) An order of CERTIORARI to quash the election and outcome conducted by the 1st Respondent on 10th January 2021;
- b) An order of CERTIORARI to quash the letters dated 28th November 2020 and 8th January 2021 addressed to the 3rd Petitioner disqualifying her from contesting for the position of Secretary General in the 1st Respondent Nakuru branch since the same is in contravention of Articles 27, 41 and 47 of the Constitution;
- c) An order of PROHIBITION to prevent the 2nd Respondent from registering any changes regarding the change of officials of the Tailors and Workers Union members Athi-River/Kitengela branch (TTWU) as a result of the elections held on 10th January 2021.
- d) That the Court issues an order of MANDAMUS to compel the 1st Respondent to issue fresh notices to ALL MEMBERS of TTWU Athi-River/Kitengela Branch and the said elections be overseen by independent labour officers appointed by the 2nd Respondent where all the contestants' agents will be allowed to monitor the elections.
- e) The Court issues an order of MANDAMUS to compel the 1st Respondent to hold elections for its TTWU Athi-River/Kitengela branch and Nakuru and Nairobi branches in accordance with Rule 21(e) of the Tailors and Textile Workers Union Constitution and rule and Section 56 (1)(d) of the Labour Relations Act specifically to issue the 14 day notice and to hold the elections in the premises of the employer with the election being supervised by independent labour officers appointed by the Court or the 2nd Respondent and in the presence of security and the contestants agents.
- f) Costs of the Petition.

Together with the petition, the petitioners filed an application by way of notice of motion of even date. The application is made under Rules 23(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. They seek the following orders –

1. Spent.
2. Pending the inter-partes hearing of the Application herein, there be conservatory orders restraining the 2nd Respondent from registering any changes regarding the change of officials of the Tailors and Workers Union members Athi- River/Kitengela branch (TTWU) as a result of the elections held on 10th January 2021.
3. Pending the inter-partes hearing of the Application herein, there be conservatory orders suspending the 1st Respondent branch elections in Nakuru and Nairobi.
4. Pending the inter-partes hearing of the Petition herein, there be conservatory orders restraining the 2nd Respondent from registering any changes regarding the change of officials of the Tailors and Workers Union members Athi-River/Kitengela branch (TTWU) as a result of the elections held on 10th January 2021.
5. The costs of the Application to be provided.

The grounds in support of the application are that –

- a. Without notice the 1st Respondent purported to conduct its Athi-River/Kitengela branch elections to elect officials on 10th January 2021.
- b. The said elections are illegal for reasons that:
 - i. The 1st Respondent did not give the mandatory 14 days' notice to members as required under Rule 21(e) of the Tailors Workers Union Constitution;
 - ii. The purported elections were not held within the employer's premises contrary to section 56(1)(d) of the Labour Relations Act;
 - iii. The 1st Petitioner who is the incumbent treasurer was locked out of the elections due to no notice and hence prevented from contesting contrary to Rule 21(d)(i) of the Tailors and Textile Workers Union Constitution;
 - iv. The 2nd Respondents was incarcerated by police on the material date of the election to prevent him from participating, voting and contesting on the elections in the said elections despite having met all the requirements and paid a cash deposit as prescribed under Rule 21(d) of the Tailors and Textile Workers Union Constitution;

v. The 3rd Petitioner has been disqualified from contesting for the position of the branch secretary Nakuru on unsubstantiated allegations that she is 'a busy body' contrary to her rights to a fair administrative action and the right to be heard as enshrined under Articles 47 and 50 of the Constitution.

vi. The 3rd Petitioner was physically assaulted for raising concerns on the manner in which the elections were to be conducted.

c. The 2nd Respondent is set to effect the changes in officials within 14 days following the outcome of the said illegal elections pursuant to section 34(3) of the Labour Relations Act.

d. The 1st Respondent intends to conduct similar branch elections in Nairobi and Nakuru.

The application is supported by the affidavit of MUTHAMA NGUMBI, the 1st Respondent sworn on 13th January 2021.

In the supporting affidavit which is made on his own behalf and on behalf of the 2nd and 3rd petitioners pursuant to authority filed with the affidavit as annexure MN1, Mr. Ngumbi deposes that by letter dated 6th January 2021, the 2nd Petitioner wrote to the 2nd Respondent complaining about branch elections of the 1st Respondent's Athi River/Kitengela Branch but there was no response. That he was not aware about the branch elections held on 10th January 2021 as no notice thereof had been issued to all members of the branch.

The affiant deposes that on the eve of the branch elections he was arrested by police at the main gate of Athi River EPZ in a bid to lock him out of the elections which he was opposed to.

Mr. Ngumbi deposes that he is aware the 2nd Petitioner applied to contest as Branch Secretary of Athi River/Kitengela Branch and paid a deposit of Kshs.80,000/- as required by the 1st Respondent's constitution and further that the 2nd Respondent was held by the police until after the date of the elections when he was granted bail.

Mr. Ngumbi deposes that the elections did not comply with the 1st Respondent's constitution which provides for 14 days' notice. That further the elections were not held within the employer's premises as provided under Section 56(1)(d) of the Labour Relations Act.

The affiant deposes that he is aware the 3rd petitioner applied to contest the elections for Nakuru Branch as Branch Secretary and paid a deposit of Kshs.80,000/- as required, but was notified by letter dated 8th January 2021 through the 1st Respondent's branch secretary one Wycliffe O'kusinyo that she was disqualified as she was a "busy body". That the said Mr. O'kusinyo assaulted the 3rd Petitioner when she visited the branch office regarding her clearance in the upcoming elections. That she was hospitalised as a result as evidenced by the report in OB No. 32/11/1/2021 and P3 form attached as exhibits M.N.10 to the affidavits.

In response to the application and the petition, the 1st Respondent filed both grounds of opposition and replying affidavit of Rev Joel Kandie Chebii (OGW).

It is the position of the 1st Respondent that the 1st, 2nd and 3rd

Petitioners are not members of the union and thus have no locus standi to file the petition, specifically that the 2nd Petitioner stopped being a member 7 years ago. That the 3rd Respondent who is vying for the position of Branch Secretary in Nakuru has no locus standi to file a petition in respect of Athi River/Kitengela Branch.

It is the 1st Respondent's position that there is no evidence that the 2nd Petitioner complied with Rule 21(d)(1) of the 1st Respondent's Constitution as he has not proved that he paid any money into the Athi River/Kitengela branch account and presented the banking slip to the branch office to issue a receipt. That further there is no application by the 1st and 2nd Petitioners to show that they presented their applications to vie for any positions to reach the branch secretary at least 14 days before the elections.

With respect to the letter of complaint by the 2nd Petitioner to the 2nd Respondent, Rev. Chebii wonders how he anticipated on 6th January 2021 that elections to be held on 10th January 2021 would be a sham before the branch elections were held. He further wonders how he knew elections would be held on 10th January 2021 if he alleges there was no notice.

With respect to the allegation of violation of Section 56(1)(d) of the Labour Relations Act, the 1st Respondent states that it is not applicable to branch elections.

Both parties filed further affidavits. In the further affidavit of Muthama Ngumbi he deposes that the Respondents defied the orders of this court issued on 14th January 2021 by holding Nakuru Branch elections on 24th January 2021 despite having been served with the orders.

Rev. Joel Kandie Chebii also filed a further replying affidavit in which he deposes that the order dated 14th January 2021 was not directed at the Registrar of Trade Unions but to Central Planning and Monitoring Unit and as such it was not binding upon the Registrar, the 2nd respondent herein. Further that there was no extension of the orders which were valid up to 20th January 2021.

The petition and the application were heard together on 26th January 2021. Mr. Malenya appeared for the petitioners/applicants' while Mr.

Omondi appeared for the Respondent. The 2nd Respondent did not file any reply to the petition or application, and did not attend court for the hearing.

Issues for Determination

1. Whether the petitioners have capacity to vie for positions in the
2. 1st respondent's elections.
3. Whether the Respondents violated the provisions of the Constitution, Labour Relations Act and the 1st Respondent's Constitution.
4. Whether the petitioners are entitled to the orders sought.

Petitioners' capacity to vie for elective positions

The Labour Relations Act provides at Section 34 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.**

The Respondent's constitution further provides for elections for branches at Rule 21(d) and (e) as follows –

(d) (i) Branch Members Quinquennial General Meeting shall be held after every five (5) years at such a date, time and place as shall be decided by the Branch Executive Committee in consultation with the National General Secretary and in accordance with the Government directions (Registrar of Trade Unions) on Trade Union Elections; The applications for the positions in Branches shall be addressed to the Branch Secretary to reach him two (2) weeks before the date of the election meeting and the application shall be accompanied by cash deposit for non-members, of eighty Thousand Shillings (Ksh.80,000/-).

The Incumbent Branch Officials shall not be required to pay any deposit of the same amount, which shall have been received by the Branch Treasurer for the purpose of defraying the cost and such sum shall be paid by the Branch Treasurer into the Union's Branch Account and shall not under any circumstance be subject to refund.

(ii) Paid up members who wish to vie for the position of fulltime Branch Secretary shall resign from his/her place of work/employment one (1) month prior to the date of the Branch Members Quinquennial General Meeting.

(iii) Paid up members vying for other positions other than that of a full time Branch Secretary shall not be required to resign from their employment.

(iv) Paid up members who hold positions in Co-operatives or Saccos shall not contest Trade Union Elections, unless they resign one (1) month prior to the date of Branch Union Elections.

(e) The Branch Secretary shall give notice to all members of the date, time and place at least two (2) weeks before the date for the said meeting. Branch Officers and Committee Members shall be elected at such Branch Quinquennial General Meeting provided that no person, not actually employed in any of the Industries listed under Rule 2(a) of these rules shall under any circumstances be eligible to vote or be elected to office and no member shall be eligible to vote or be elected to office, if he/she is more than thirteen (13) weeks in arrears of subscriptions. The quorum for the Branch Members Quinquennial General Meeting shall not be less than one tenth () of the Branch Members who are not more than thirteen weeks (13) in arrears with their subscriptions.

From the foregoing, there are two requirements for eligibility to vie for an elective position at the branch of the 1st Respondent. The first is

that the applicant sends an application to the Branch Secretary. None members are to pay Kshs.80,000/- to the branch account at the time of application.

There is a separate requirement for branch secretaries that is different from other positions as set out in Rule 21(d)(ii) and (d)(iii) to the effect that a person vying for the position of branch secretary must resign from other employment at least one month before the date of election.

The second requirement as per Rule 21(e) is that no person who is not actually employed in any of the industries listed under Rule (2)(a) of the Rules is eligible to either vote or be elected to office. And further, that no member who is in arrears of more than 13 weeks' subscriptions is eligible to vote or be elected.

Rule 2(a) provides as follows –

RULE 2: OBJECTS

(a) To secure the complete organization in the Union of all workers employed in the following industries: -

- (1) Tailoring, Garment and Dressmaking*
- (2) Tent, Canvas goods and Sailmaking*
- (3) Gunny Bags Cordage and Jute*
- (4) Matting and Carpets*
- (5) Mattress, Cushion and Upholstery*
- (6) Knitting, Weaving and Spinning*
- (7) Cotton Ginneries*
- (8) Ropes and Twines*
- (9) Textiles*
- (10) Sewing Machine*
- (11) Fishnet and Mosquito Net*
- (12) Lamp Shade*
- (13) Synthetic Fibres and Cotton Yard, and*
- (14) Allied Industries*

This therefore means that to be eligible to vote or to vie for the position of a branches secretary, a person must qualify as follows –

- (i) Be an employee in the sectors set out in Rule 2(a) of the 1st Respondent's Constitution.*
- (ii) Be a member and not be in arrears of more than 13 weeks' subscriptions,*
- (iii) If not a member, pay a deposit of Kshs.80,000.*

This means a non-member can vie only if he/she works in the industries listed in Rule 2(1) of the 1st Respondent's Constitution. The 1st Respondent has denied that the petitioners are its members.

In the affidavit and further affidavit of Muthama Ngumbi, the 1st petitioner, he has not controverted this averment. The only averment he makes is that the 2nd and 3rd Petitioners deposited Kshs.80,000/- as required under Rule 21(d)(i) which provides that only non-members of the 1st Respondent are liable to pay. Payment of Kshs.80,000/- is therefore proof that the 2nd and 3rd Petitioners are not either members or incumbent officials of the 1st Respondent.

The petitioners are silent on whether or not they qualify under Rule 21(e) of the 1st Respondent's constitution which requires that even if they are non-members and liable to pay Kshs.80,000/-, they must in addition be engaged in the industries listed under Rule 2(a) of the Constitution.

From the foregoing, I find that the 2nd and 3rd Petitioners have not proved that they qualify to vie for elective positions of the 1st Respondents as they have not proved that they are either members of the 1st Respondent or if non-members that they are engaged in the industries set out under Rule 2(a) of the 1st Respondent's constitution. All that is evident from the pleadings is that they were branch secretaries of Athi River/Kitengela and Nakuru Branches respectively between 2012 and 2016.

With respect to the 1st Petitioner, I find that he was the incumbent Treasurer of the 1st Respondent's Athi River/Kitengela Branch and therefore eligible to vie for an elective position of the 1st respondent as well as to vote.

Whether the Respondents violated the provisions of the constitution, the Labour Relations Act and the 1st Respondent's Constitution

It is the contention of the petitioners that their rights under Article 36 of the Constitution and Sections 4, 34 and 56(1) of the Labour Relations Act were violated. Further that the 1st Respondent violated Rule 21(d) and (e) of the Constitution by failing to give mandatory 14 days' notice to members not holding elections in the employer's premises as provided in Section 56(1)(d) of Labour Relations Act, locking out the 1st Petitioner due to lack of notice, incarceration of the 2nd Petitioner by police to prevent him from participating and voting at the elections.

For the 3rd Petitioner, it is submitted that she was disqualified by letter from the 1st Respondent's branch secretary who branded her a "busy body" thus she was discriminated.

For the 1st Respondent it is submitted that the petition does not mention the officers alleged to have committed the wrongs that the Petitioners complain about, that the Constitution is clear that the branch committee shall be responsible for the activities of the branch. That each branch conducts its affairs differently and independently of the head office.

It is further the 1st Respondent's position that the 1st Petitioner did not apply to vie for any position in the Athi River/Kitengela branch as there is no application. Further, that his deposit was made in Nairobi Branch and not Athi River/Kitengela Branch where he alleges he intended to defend his position.

The 1st Respondent further states that the letters from both the 2nd Respondent and the Labour Officer who presided over the elections for Athi River/Kitengela Branch confirmed that there was notice of elections and no application was received from the 1st Respondent. Mr. Omondi submitted that notices were served at the places of work where the 1st Respondent's members received the notices as it was not possible to serve each member individually. Mr. Omondi submits that the 1st Respondent is not aware about the arrest of the 2nd Petitioner as that is a security issue and the 1st Respondent had no hand in it.

On the averment that the elections were not held in the premises of a company, Mr. Omondi submitted that elections cannot be held in the premises of any company as it involves employees from different companies.

Article 36 of the Constitution which is alleged to have been violated by the Respondents provides for freedom of association. As I have already found above, the 2nd and 3rd Petitioners, having not proved that they were members of the 1st Respondent, cannot complain that they were denied the right to association. Association in terms of the 1st Respondent's Constitution was only open to persons engaged in the industries set out in Rule 2(a) thereof, which the 2nd and 3rd Petitioners have not proved.

I therefore find no proof of denial of the right to association. This also applies to violation of Sections 4 and 34 of the Labour Relations Act which provide for the right to membership of trade unions and the right to vote and vie for positions in trade unions.

Section 56(1) of the Act provides as follows –

56. Trade union access to employer's premises

(1) Without limiting the matters that may be dealt with in a recognition agreement, a recognition agreement shall provide for an employer to grant a trade union reasonable access to the employers' premises for officials or authorised representatives of the trade union to pursue the lawful activities of the trade union, including but not limited to—

- (a) recruiting members for the trade union;**
- (b) holding meetings with members of the trade union and other employees outside of working hours;**
- (c) representing members of the trade unions in dealings with the employer; and**
- (d) conducting ballots in accordance with the constitution of the trade union.**

The Section is not relevant to union elections as it provides for access to employers' premises by union officials for conducting union activities. As pointed out by the 1st Respondent, union branch elections bring together employees of different organisations and therefore cannot be held within the premises of one employer.

On the mandatory 14 days, the 1st Respondent has produced notices of the branch elections dated 17th December 2020. There is one

addressed to All Union Members, Tailors and Textiles Workers Union, Athi River/Kitengela Branch and another one addressed to County Labour Officer, Machakos County. Both notices were received by the County Labour Officer's office and at least two companies, New Wide Apparel EPZ Ltd and Royal Garments Industries EPZ Limited. The notices clearly state the date, time and venue of the elections as Sunday, the 10th day of January 2021 from 9.00 am at NITA Hall Athi River. The 2nd and 3rd petitioners having not been members and having not been eligible by virtue of employment, in sectors set out under Rule 2(1) of the 1st Respondent's Constitution would therefore not have been eligible to receive the notice as it is addressed to union members only. For the 1st Petitioner, it is conceivable that as a full time member of the 1st Respondent's Athi River/Kitengela Branch he was not aware of the elections yet it is him who would ordinarily receive deposits by non-member applicants, and pay for expenses such as those for the premises where the elections were held. The fact that he had not submitted his application to defend his position is an indicator that perhaps he was not interested in defending his seat.

The petitioner did not adduce any evidence of any other member of the union who was not aware of the date, time and venue of the elections other than the 1st petitioner as alleged in the petition.

In the letter from E. N. Gicheha, the Registrar of Trade Unions dated

12th January 2021 and the letter for Barack Owange, County labour officer who presided over the Athi River/Kitengela Branch elections dated 14th January 2021 as well as the further letter from the Registrar of Trade Unions dated 15th January 2021, it is stated that the allegations of Abdullahi Hassan that notice was not issued to members is not true as due notice of 2 weeks was issued. The letters further state that the elections were in conformity with union elections rules as contained in the union's registered constitution.

On the allegation of incarceration of the 1st and 2nd Petitioners, there is no evidence to link the same with the 1st Respondent. No allegation was made of a report to the police by any of the 1st Respondent's officials that led to the arrest of the said petitioners.

In the same breath, the 3rd Petitioners averments of assault by the Respondent's branch secretary are not directed at the 1st Respondent. The said branch secretary has not been joined to these proceedings to defend himself against the allegations of assault. There is no prayer to hold the 1st respondent vicariously liable for the assault of the 3rd Petitioner by tis Nakuru Branch Secretary.

From the foregoing, I find that the petitioners have no proved any violation of their rights under Article 36 of the Constitution, Sections 4, 35 or 56(1) of the Labour Relations Act or under the 1st Respondent's Constitution.

There are other issues that have been raised by the parties. One of them is the 1st Respondent's averment that the signatures of the Petitioners are forged. As correctly pointed out by Counsel for the petitioners, the 2nd and 3rd Petitioners gave authority to the 1st Petitioner to sign documents on their behalf. The authenticity of the signatures of any of the petitioner cannot be an issue as the subject matter of this suit is not the signatures. Further, as submitted by Counsel for the Petitioners, an affiant to an affidavit can signify signature by "*a mark, a sign or any hieroglyphic which is intended to authenticate the notice or memorandum*" as was held by Apaluo JA in **Wagichiengo v Gerald (1988) eKLR**.

I find that the signatures of the petitioner as affixed in the documents before the court are valid. The 1st Respondent also raised the issue that the 3rd petitioner being from a different branch, should have filed a separate suit. In view of the fact that the issues complained about were broadly similar, that is, denial of right to participate in the trade union elections. I do not find any prejudice caused by the joinder of the 3rd Petitioner to this suit.

The final issue is whether the petitioners are entitled to the orders sought. Having found that the 2nd and 3rd petitioners were not eligible to vie of the positions of branch secretary for Athi River/Kitengela and Nakuru branches respectively, and further having found that the 1st Petitioner did not prove that he applied for the position of Branch Treasurer, the court finds that the orders sought are not merited. I thus dismiss the petition with orders that each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF FEBRUARY 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 15th March 2020 and subsequent directions of 21st 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