



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. 39 OF 2020

(Originally Kisumu High Court Petition No. E007 of 2020)

IN THE MATTER OF: ARTICLES 1, 2, 3, 10, 232 AND 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: SECTION 3, 4, 7, 8 AND 9 OF THE LEADERSHIP AND INTEGRITY ACT NO. 19 OF 2012

AND

IN THE MATTER OF: SECTIONS 4, 5, 6, 7, 31(5) OF THE LABOUR RELATIONS ACT, 2017

AND

IN THE MATTER OF: SECTIONS 4, 5 AND 10 OF THE PUBLIC SERVICE (VALUES AND PRINCIPLES) ACT, 2015

AND

IN THE MATTER OF: SECTION 7 OF THE NATIONAL COHESION ACT NO. 12 OF 2008

BETWEEN

SAMUEL MARENDE

PETITIONER

v

JACOB OSIDA

1st RESPONDENT

KENYA UNION OF SUGAR PLANTATION AND ALLIED WORKERS

2nd RESPONDENT

COUNTY LABOUR OFFICER, KISUMU

3rd RESPONDENT

RULING

1. On 25 September 2020, the Registrar of Trade Unions issued a Circular directing trade Unions to prepare to conduct elections.
2. On 16 November 2020, the Kenya Union of Sugar Plantation and Allied Workers (the Union) notified the Commissioner for Labour that its elections would take place from 16 January 2021 to 30 January 2021.
3. On 18 December 2020, Samuel Marendé (the applicant) filed a Petition before the High Court alleging that Jacob Osida (the 1st Respondent) was unfit to hold any elective position with the Kenya Union of Sugar Plantation & Allied Workers (the Union) because of his past conduct which had led to his dismissal from employment by Chemelil Sugar Co. Ltd.
4. The applicant sought the following orders in the Petition

(i) **THAT** a declaration that the proposed nominee by the name JACOB OSIDA whose name is to be presented to the 3rd Respondent for approval and vetting is unconstitutional and hence unlawful, null and void.

(ii) **THAT** this Honourable Court be pleased to issue a permanent conservatory order barring and/or prohibiting the 2nd Respondent from submitting to the 3rd Respondent the name of JACOB OSIDA or any other name other than in compliance with the Constitution as nominees for the position of the Secretary of the 2nd Respondent or any other position.

(iii) **THAT** this Honourable Court be pleased to issue a permanent conservatory order barring and/or prohibiting the 3rd Respondent from receiving and/or accepting from the 1st Respondent the name of JACOB OSIDA as nominee for the post of Secretary-General of the Branch.

(iv) **THAT** this Honourable Court be pleased to issue an order of prohibition barring and/or prohibiting the 2nd Respondent from submitting to the 3rd Respondent the name of JACOB OSIDA or any other name other than in compliance with the Constitution as nominee for the position of the Branch Secretary.

(v) **THAT** this Honourable Court be pleased to issue an order of prohibition barring and/or prohibiting the 3rd Respondent from receiving and/or accepting from the 2nd Respondent for the purposes of the elections.

(vi) Any order that the Court may deem fit to grant.

5. Filed at the same time was a Motion under a certificate of urgency seeking orders

(i) spent

(ii) spent

(iii) **THAT** pending the hearing and determination of this Petition, this Honourable Court be pleased to grant conservatory orders restraining the 1st and 3rd Respondents from permitting, approving, sanctioning, clearing or in any way allowing the 1st Respondent to contest the position of Branch Secretary, Chemelil Branch or any other position within the Branch.

(iv) spent

(v) spent

(vi) spent

(vii) spent

(viii) spent

(ix) **THAT** costs of and incidental to this application abide the result of the intended (sic).

6. When the application was placed before the High Court on the same day, it directed that the Respondents be served and further directions be issued on 22 December 2020.

7. On 22 December 2020, the firm of R.O.Okungu & Co. Advocates filed Replying Affidavit in opposition to the Motion and a Memorandum of Appearance to act for the 1st Respondent.

8. On the same day, the Petitioner's advocate applied that the Petition be transferred to this Court for hearing and determination.

9. Being vacation, the file was taken to the Duty Court in Nairobi and on 31 December 2020, the Court granted the following orders

(i) **THAT** the application be served for *inter-partes* hearing on 20th January 2021 before the ELRC Judge KISUMU.

(ii) **THAT** pending the hearing and determination of this application, this Honourable Court hereby grants conservatory orders restraining the 1st and 3rd Respondents from permitting, approving, sanctioning, clearing or in any way allowing the 1st Respondent to contest the position of Branch Secretary, Chemelil Branch or any other position with the Branch pending the inter-partes hearing of the motion.

10. On 7 January 2021, the 1st Respondent filed an Answer to the Petition and a Cross Petition.

11. On the same day, he filed a Motion seeking an order restraining the Union and the County Labour Officer from conducting and holding branch and national elections which had been scheduled for 16 January 2021 and 30 January 2021 respectively.

12. When this latter motion was placed before the Duty Court in Nairobi on 14 January 2021 it admitted it for hearing during the vacation (but set hearing for 20 January 2021 which was after the vacation).
13. The Union's Secretary General filed a replying affidavit in opposition to the applicant's motion on 19 January 2021.
14. When the parties appeared before this Court for *inter-partes* hearing on 20 January 2021, the Court, *suo moto* raised the question of the prematurity of the Motion and the Petition.
15. The Court directed the parties to address the Issue and in this respect, the parties were directed to file and exchange submissions.
16. The Petitioner filed his submissions on 22 January 2021 and he also filed a further affidavit on the same day.
17. Since the further affidavit was filed without leave and it raised a point likely to prejudice the Respondents, the Court will not consider at this stage.
18. The 2nd Respondent also filed its submissions on 22 January 2021.
19. The 1st and 3rd Respondents submissions were not on record by the agreed timeline of 25 January 2021. These Respondents did not attend the Court on the said date to confirm compliance with the directions on filing and exchange of submissions.
20. The Court has considered the pleadings and the submissions.
21. The general challenge which was presented by the Petitioner was whether the 1st Respondent was eligible to contest for the post of branch secretary of the Union (or any other position) having been dismissed from employment in 1999 by Chemelil Sugar Co. Ltd for gross misconduct and fraud (mismanagement of workers' salaries).
22. The anchor grounds to the challenge were, that the 1st Respondent did not meet the integrity threshold set out by chapter 6 of the Constitution and the Leadership and Integrity Act, 2012; that the candidature of the 1st Respondent violated section 31 of the Labour Relations Act and Rule 14 of the Union's Constitution.
23. In contending that the dispute was not premature, the Petitioner asserted that the dispute before the Court was justiciable (*Lucy Njoki Waitaha v Tribunal appointed to investigate the conduct of Lucy Njoki Waitaha & Ar: Kenya Magistrates and Judges Association (Interested Party)* (2019) eKLR).
24. According to the Petitioner, the dispute over the eligibility of the 1st Respondent was a matter of public interest which touched on chapter 6 of the Constitution, and therefore falling squarely within the jurisdiction of the Court without any hindrance from any other person or vetting committee (*Kigula & Ors v Attorney General* (2005) 1 EA 132).
25. The assertions by the Petitioner are at odds with the declaration sought in the Petition. In the said declaration, the Petition acknowledged that the candidacy of the 1st Respondent was subject to vetting and approval.
26. In deed Rule 15(i) of the Unions Constitution envisages candidates being vetted and approved by a panel or subcommittee at the national level or the Executive Board.
27. This Court, would in the circumstances, be usurping the function of the panel or Executive Committee mandated by the Union's constitution to vet and approve candidates in purporting to restrain the approval of the candidacy of the 1st Respondent at this juncture.
28. In light of the above, the Court orders as follows
 - (i) The Petition to be canvassed in lieu of the 2 Motions on record.
 - (ii) The Respondents to file and serve responses to the Petition (if not filed already) on or before 17 February 2021.
 - (iii) The Petitioner to file any further affidavit and submissions on or before 3 March 2021.
 - (iv) The Respondents to file and serve submissions on or before 17 March 2021.
29. Judgment on 5 May 2021.

Delivered through Microsoft teams, dated and signed in Kisumu on this 3rd day of February 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Petitioner Mr. Mwamu instructed by Mwamu & Co. Advocates

For 1st Respondent R.O. Okungu & Co. Advocates

For 2nd Respondent Mr. Onyango instructed by P.D. Onyango & Co. Advocates

For 3rd Respondent did not participate

Court Assistant Chrispo Aura