



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. E188 of 2021**

DR. DOMINIC MURAGE.....1<sup>ST</sup> CLAIMANT  
DR. HASSAN KINYUA..... 2<sup>ND</sup> CLAIMANT  
DR. PRISCA JERONGO.....3<sup>RD</sup> CLAIMANT  
DR. THOMAS ONGORO OMBATI.....4<sup>TH</sup> CLAIMANT  
DR. NJAGI NJOMO..... 5<sup>TH</sup> CLAIMANT

**VERSUS**

RICHARD M. BOSIRE.....1<sup>ST</sup> RESPONDENT  
JANE WAMBUI.....2<sup>ND</sup> RESPONDENT  
GEORGE OMONDI.....3<sup>RD</sup> RESPONDENT  
JAMES KANYA.....4<sup>TH</sup> RESPONDENT  
OWITI KAKUMU.....5<sup>TH</sup> RESPONDENT  
MALOBA WEKESA..... 6<sup>TH</sup> RESPONDENT  
**UNIVERSITIES ACADEMIC STAFF UNION**  
(UON) CHAPTER.....7<sup>TH</sup> RESPONDENT

**RULING**

1. The applicants in the application dated 26/2/2021 seek an Order in the following terms *inter alia*

1. Spent

2. Spent

3. **THAT** this Honourable Court be pleased to issue an order of interim injunction restraining the Respondents, servants, agents or any person acting on their behest and instruction from proceeding with the entire process of elections vide both Notices dated 11<sup>th</sup> February, 2021 and 15<sup>th</sup> February, 2021 or any other notice or processes including nominations or any other process relating to the elections of the Chapter Officials of the 7<sup>th</sup> Respondent pending the hearing and determination of the suit herein.

4. **THAT** in addition and/or alternative to prayer 3 herein, this Honourable Court do certify and direct the elections of the 7<sup>th</sup> Respondent to proceed and be conducted based on the register of members issued vide letter dated 9<sup>th</sup> February, 2021, signed on 9<sup>th</sup> February, 2021 and based on the Notice of Elections dated 11<sup>th</sup> February, 2021.

2. The application is premised on grounds set out on the face of the application in paragraphs 1 to 23 the nub of which is that the 1<sup>st</sup> to 6<sup>th</sup> respondents are the duly registered members of the Chapter Executive Committee of the 7<sup>th</sup> respondent in charge of overseeing the elections of the union chapter officials as directed by the Registrar of Trade Unions.
3. That on 25<sup>th</sup> September, 2020, the Registrar of Trade Unions issued a Notice to all trade unions requiring them to conduct branch elections between the 4<sup>th</sup> January, 2021 to 31<sup>st</sup> March, 2021 in terms of their registered Constitution.
4. In pursuance of the notice the national office of the Universities Academic Staff Union (UASU) wrote to the 7<sup>th</sup> respondent instructing it to conduct elections as directed by the Registrar of Trade Unions by convening a Chapter Executive Committee meeting, to endorse the register of members which comprise all members registered as at 31/12/2020 and propose date of elections; date of notice of elections; and venue of elections of the chapter.
5. That on 9/2/2021, the 4<sup>th</sup> respondent after meeting on 8/2/2021 notified that verification of the register would be done between 10<sup>th</sup> and 11<sup>th</sup> February, 2021.
6. That all the claimants/applicants verified the register availed vide the letter dated 9/2/2021 and confirmed their names were indeed on the register which was then presented to the national office of Universities Academic Staff Union (UASU) duly verified.
7. The applicants state they are *bona fide* members of the 7<sup>th</sup> respondent and may vote and or be voted for as candidates.
8. On 11/2/2021, the 4<sup>th</sup> respondent issued a notice of elections for the chapter to be on 18/3/2021 in the 8.4.4. Building at the main campus from 6am to 6p.m.
9. On 16/2/2021, the 4<sup>th</sup> respondent issued a notice communicating the appointment of an electoral committee for the elections whose mandate is to conduct the chapter elections and was expected to release a schedule of events and activities leading to the elections.
10. The claimants/applicants retain legitimate expectation to participate in the elections scheduled for 18/3/2021 with majority of them intending to vie for various positions.
11. That subsequently and in blatant disregard of the decisions by the Executive Committee of the Chapter, the 4<sup>th</sup> respondent has unilaterally and unlawfully issued a counter-notice calling for elections to be conducted on 15//3/2021.
12. The 3<sup>rd</sup> respondent also issued a notice dated 15/2/2021 constituting a counter- electoral committee of 3 persons.
13. The chapter therefore is in the horns of a dilemma faced with two parallel electoral processes. The second election is said to be conducted at Chancellor's Court on 15/3/2021 at 4 p.m.
14. The 3<sup>rd</sup> respondent also proceeded to issue a completely different Register of members where he has proceeded to unilaterally and maliciously exclude the claimants from the register despite being valid registered members of the 7<sup>th</sup> respondent.
15. That the said unlawful conduct by the 3<sup>rd</sup> respondent is meant to disenfranchise the claimants in violation of their right to freedom of association under Article 36 of the Constitution.
16. The application is buttressed by a supporting affidavit of Dr. Dominic Murage the 1<sup>st</sup> claimant who restates the material grounds herein before set out.
17. The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 6<sup>th</sup> respondents have filed a replying affidavit to the application in which they concur with all facts set out by the claimants/applicants in the Notice of Motion and the supporting affidavit. It is apposite, to note that the 1<sup>st</sup> respondent is the Chairperson of the 7<sup>th</sup> respondent Universities Academic Staff Union, University of Nairobi (UON) Chapter.
18. We shall not regurgitate the facts set out in the affidavit sworn to by the 1<sup>st</sup> respondent which facts materially confirm the circumstances now faced by the 7<sup>th</sup> respondent due to the alleged unilateral and unlawful conduct of the 3<sup>rd</sup> respondent.
19. The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 6<sup>th</sup> respondent who comprise officials of Universities Academic Staff Union (UASU) University of Nairobi (UON) Chapter, pray that the application be granted pending the hearing and determination of the suit to avoid chaos at the University.
20. The 3<sup>rd</sup> respondent filed a replying affidavit sworn to on 3/3/2021 in which he deposes that he is the Chapter Secretary of the 7<sup>th</sup> respondent and is also authorized by the 5<sup>th</sup> respondent to swear the affidavit.
21. He deposes that the claimants have no *locus standi* to institute the suit as they are not registered members of the 7<sup>th</sup> Respondent.
22. That the claimants are agency fees payers and do not pay union subscriptions. That the claimants have never paid Kshs.500 registration fee as union members.

23. That Section 4(1) (b) of the Constitution provides that a person is required to pay entrance fee of Kshs.500 on application for membership. That the Registrar of Trade Unions in a communication dated 15/1/2021 stated that membership register should contain persons who pay union dues under Article 6(1) of the Constitution and that no agency fee paying member shall be allowed to vote.

24. That there is only one day for elections which is 15/3/2021 and no other.

That Article 19(d) of Universities Academics Staff Union Constitution empowers only the chapter secretary to issue notice to members on the date, time and place of chapter general meeting to elect officials.

25. That the 3<sup>rd</sup> respondent issued that notice on 15/2/2021 fixing the chapter election for 15/3/2021.

26. That the notice issued by the chapter assistant secretary general on 11/2/2012 for elections to be held on 18/3/2021 is irregular and contrary to the provisions of the Constitution.

27. That by dint of Article 20(c) (iv) of the Universities Academics Staff Union Constitution, the chapter secretary is the custodian of the register of members and he is to maintain it with the names, addresses, occupations, date of joining, date of resignation, suspension, or expulsion and particulars of all payments made by such members.

28. That the true register is the one produced by the 3<sup>rd</sup> respondent and it has no names of the claimants.

29. That the application be dismissed with costs.

30. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Claimants filed further affidavit sworn to by the 1<sup>st</sup> claimant upon reading the replying affidavit of 3<sup>rd</sup> and 5<sup>th</sup> respondents. They join issues with the 3<sup>rd</sup> respondent and reiterate the position as set out in the Notice of Motion and supporting affidavit.

31. The 3<sup>rd</sup> respondent is not entitled to file a further affidavit in answer to further affidavit of the applicants without leave of Court.

32. The further affidavit by the 3<sup>rd</sup> respondent is therefore struck out as being irregular and matters set out there in ought to have been canvassed in the replying affidavit since the applicant has the last word in the order of things.

33. The parties have filed written submissions and the issues for determination are: -

**(i) Whether the applicants have satisfied the requirement for issuance of interim injunction pending the hearing and determination of the case.**

**(ii) What reliefs if, at all should the Court grant.**

34. It is apparent that different officials of the University Academic Staff Union (UASU) University of Nairobi (UON) Chapter, have set two different dates for chapter elections on 13.3.2021 and 18/3/2021 with the different notices issued by the secretary and assistant secretary respectively.

35. The applicants state that the assistant secretary was instructed by the Branch Executive Committee to issue the Notice for 18/3/2021 when the secretary declined to do so. That the secretary has subsequently issued the second notice for 15/3/2021 to subvert the will and authority of the Chapter Executive Committee and impose his personal arbitrary will on the membership of Universities Academic Staff Union (UASU), University of Nairobi (UON) Branch.

36. Article 4 of the Union Constitution provides:

“(a) Membership of the Union shall be open to all academic and research staff of the Universities appointed on Academic terms of service.

(b) Every eligible person shall be required to pay entrance fee of shillings five hundred (Kshs.500) on application of membership and

(c) The unknown subscription fee shall be collected from every member of the Union at the rate of two per cent (2%) of the basic wage of every member per month as decided by the National Delegates Conference.”

36. The claimants/applicants have stated under Oath that they are members of the Universities Academic Staff Union (UASU), University of Nairobi (UON) Chapter and have attached to the application pay slips for the months of December, 2020; June, 2013; July, 2016; November, 2013; July, 2017; June, 2017; and December, 2015 showing deductions referred to as “**Universities Academic Staff Union (UASU) Chapter**”.

37. In addition; the claimants/applicants have attached the list of elected officials for the chapter dated 17/3/2016 which shows the 1<sup>st</sup> respondent as the Chairman of the Chapter and 5<sup>th</sup> claimant to be Chapter representative CBPS.

38. The applicants have also attached an abstract which shows one O. James Kanya as the assistant secretary and George Omondi as the secretary.

39. Attached to the application is a list of Universities Academic Staff Union (UASU) members UON Chapter. The list is signed by the assistant secretary on 9/2/2021 as the true record of members of the chapter. The claimants are listed therein. The record on the face of it is a continuous record serialized from number 0021 to 0062. The same on the face of it contains no deletions in between and reflects a continuous clean record of members of Universities Academic Staff Union (UASU) University of Nairobi(UON) Chapter as at that date.

40. In the Replying affidavit, the 3<sup>rd</sup> respondent has attached a counter list of members titled "UASU University of Nairobi Chapter Agency Fee Payers list January, to December, 2020". The list is not serialized like the one produced by the claimants and does not bear any signature for authentication and there is no reason on the face of it which persuades the Court to have preference of it over the list of members submitted by the claimants.

41. At this stage of proceedings, the applicants only need to demonstrate a *prima facie* case with probability of success as was laid out in the case of **Gielle –vs- Cassman Brown Ltd. 1973 E.A. 358.**

"First, an applicant must show a *prima facie* case with probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not adequately be compensated by an order of damages. Thirdly, if the Court is in doubt, it will decide an application on a balance of convenience."

42. The applicants in addition to demonstrating a *prima facie* case have also satisfied the Court that they will be disenfranchised if the impugned election is allowed to take place on 15/3/2020 without involving the claimants/applicants in a manner that is not likely to be remedied by way of costs. That the conduct of the 3<sup>rd</sup> respondent if allowed to hold and the applicants are successful upon hearing of the suit would amount to unmitigated violation of the claimant's right to freedom of association guaranteed under Article 36 of the Kenya Constitution, 2010.

43. The balance of convenience and indeed the greater good is to allow everyone to participate in the elections scheduled on 18/3/2021 and if any person is aggrieved by participation of the claimants in that election, they are at liberty to seek redress in this Court.

44. Accordingly, the application has merit and is allowed. The Court issues the following orders: -

**(a) An order of interim injunction is issued restraining the Respondents, their servants, or agents or any person acting on their behalf from proceeding with the entire process of elections vide the notice dated 15/1/2021 and scheduled to take place on 15<sup>th</sup> March 2021.**

**(b) The elections of the 7<sup>th</sup> respondent is to proceed and be conducted based on the inclusive register of members issued vide letter dated 9/1/2021 and based on the notice dated 11<sup>th</sup> February, 2021, to take place on 18<sup>th</sup> March, 2021.**

**(c) Costs in the cause.**

**Dated and delivered at Nairobi this 12<sup>th</sup> Day of March, 2021**

**MATHEWS N. NDUMA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of 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, this ruling has been delivered to the parties online with their consent. 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 18 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.

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances**

Mr. Kamotho for claimants/applicants

Mr. Koceyo Titus for the 3<sup>rd</sup>, 5<sup>th</sup> and 7<sup>th</sup> respondents

Mr. Ogembo for the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 6<sup>th</sup> respondents

Mr. Ekale- Court clerk