



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
PETITION No.E046 OF 2021

JULIA MWENJE NYINKURIPETITIONER

VERSUS

KENYA COUNTY GOVERNMENT WORKERS UNION.....RESPONDENT

JUDGEMENT

Petition

The petitioner is seeking the following orders;

- a) *A declaration that the inclusion of persons employed in the water sector/water companies in the National Delegates Conference set for 30th April, 2021 is illegal and a nullity.*
- b) *An order do issue that no person employed in the water sector/water companies shall vie, vote and/or take part in the National Delegates Conference to be held on 30th April, 2021.*
- c) *A declaration that the Petitioner's members' fundamental rights and freedoms under Article 10 of the constitution have been violated by the respondent.*
- d) *An order do issue that costs of this petition be borne by the respondent.*
- e) *Any other order that the court deems fit and appropriate.*

The petitioner's case is that she is a member of the respondent union, a trade union registered under the provisions of the Labour Relations Act (LRA).

The petition is that on 15th January, 2021 the court delivered ruling in **Case CBA No.34 of 2020** the import of which was that the respondent lacks the capacity to represent employees in the water sector and the proper union for the purpose of representing employees of Nairobi Water and Sewerage Company Limited and all employees in the water sector is National Union of Water and Sewerage Employees.

The court also directed the respondent to expunge all employees of water sector from its register and delete clauses in its constitution that permits the respondent to represent employees in the water sector. The respondent was found not to be the proper union for employees of the water sector where the Nairobi Water and Sewerage Company operates and as confirmed by the Court of Appeal should expunge all employees of water and sewerage companies from its register.

The petition is also that the issue of the proper trade union to represent employees of Nairobi and Sewerage Company Limited I settled. The respondent has failed to comply with the court orders by removing from its register employees of Nairobi Water and Sewerage Company Limited/water sector employees and purporting to convene a national Delegates Conference (NDC) which has also included persons engaged in the water sector. These members have written to the secretary general of the respondent seeking to be removed from the NDC but have refused to comply. The inclusion of such person is illegal, null and void and a waste of resources.

On 19th March, 2021 the respondent proceeded and issued notice of a NDC which is not only addressed to bona fide members of the respondent but also to all branch secretaries, Water Companies Branches who are not members of the respondent.

Where the orders sought herein are not issued and water employees take part in the NDC the employees of Nairobi Water and Sewerage Company Limited in the water sector are likely to be elected as officials of the respondent. should this happen the respondent shall be left without any elected officials or a properly constituted leadership thereby thrusting it into chaos and confusion. This will infringe on the

petitioner's rights under section 33 of the LRA, article 4(e) (iv) and 6(1) of the union constitution read together with article 10 of the constitution, 2010.

The petitioner has filed the instant petition pursuant to articles 22 and 258 of the Constitution, 2010.

The petition is supported by the affidavit of the petitioner and on the grounds that as a member of the respondent section 33(a) of the LRA requires that no person shall be voting members in a trade union unless that person is employed in the sector for which the trade union is registered. The respondent despite being directed to expunge from its register all employees in the water sector has refused to comply and included such persons as part of the NDC. This is illegal, a nullity and a waste of resources.

In response, the respondent filed the **Replying Affidavit of Roba Duba** the general secretary and who avers that the petitioner has failed to particularise the constitutional violations and hence the petition is bad in law.

The employees of the Nairobi Water and Sewerage Company Limited are bona fide members of the respondent who adhere to the requirement of membership including payment of union dues. the election of Nairobi Water and Sewerage Company Limited are conducted in accordance with the union constitution and these workers have the constitutional right and freedom of association and the right to choose which union to belong to and as such not prohibited from being members of the respondent.

Mr Duba also avers that Nairobi Water and Sewerage Company Limited is part of the County Government since its shareholding is held by the Nairobi County Government and it discharges a fundamental county role hence there is no distinction between a county and sewerage company.

The registration of CBA 34 of 2020 has no impact in the elections since it was dealing with a single issue of collective bargaining and cannot be applied to bar members to participate in elections. The National Union of Water and Sewerage Employees is a sister union to the respondent and there is nothing that stops the two unions from co-existing.

The issue of elections is an internal issue to be addressed by the respondent and the registrar of trade union hence this court lacks jurisdiction to entertain the issues raised in the petition. No court order has been disregarded as alleged since the court did not stop the holding of elections.

The petitioner is guilty of laches and has come to court on the eve of elections. This court lacks power to enforce the decision in CBA 34 of 2020 and cannot force the Nairobi Water and Sewerage Company Limited employees to join another union and the petition should be dismissed with costs.

Parties attended and agreed to address the petition by way of written submissions.

The petitioner submitted the respondent lacks the capacity to include employees of Nairobi Water and Sewerage Company Limited in its national elections to be held on 30th April, 2021 and this is illegal and a nullity as in CBA 34 of 2020 the court directed the respondent to expunge all members in the employment of water sector companies from its register and the respondent has refused to comply.

Under article 10 of the Constitution the values and principles of rule of law are outlined and the respondent is in violation by disobeying court orders. Article 41 of the constitution give workers right to participate in the activities of a trade union and the respondent by including employees of water companies in the elections and who are not its members is limiting the rights of its members in participating in the activities of their trade union. By allowing water sector employee to participate in the national elections, it means that the members are denied a fair chance to participate.

The petitioner also submitted that under section 31 of the LRA officials of a trade union should be from persons who are or have been engaged or employed in the sector for which the trade union is registered. The general secretary and members of water companies who are engaged or employed in the sector which the respondent is not registered is in clear violation of the law.

Under section 34 of the LRA election of trade union officials should be conducted in accordance with the union constitution. under article 4(e) (vi) of the union constitution, only members have the right to vote or vie for any position. in breach of the union constitution, the respondent has included water sector employees in the NDC for elections on 30th April, 2021.

In **Civil Appeal No.18 of 2013 National Union of Water and Sewerage Employees and 3 others v Nairobi Water and Sewerage Company Limited** the court held that the respondent cannot represent water and sewerage members. This decision was adopted by the court in **Kenya County Government Workers Union v Nairobi Water and Sewerage Company Limited & National Union of Water and Sewerage Employees [2021] eKLR** and the rule of law decrees obedience of court orders and the orders sought in the petition should issue as prayed.

The respondent submitted that the petition has failed the threshold set in **Anarita Karimi Njeru case** and is lacking the particulars of the constitutional violations which ought to be addressed as held in **Anarita Karimi Njeru v Republic [1979] KLR** and which was reiterated in the case of **Mumo Matemu v Trusted Society of Human Rights Alliance [2014] eKLR** that a petition should set with reasonable precision in framing the issued in and rights violations. The petitioner does not plead any rights violations under the constitution.

The employees of water companies have a right and freedom of association which includes joining a trade union of choice and the court cannot stripe such persons the right to join the respondent union as their union of choice. The right to association and join trade union cannot be limited. The petition is stretching the CBA 34 of 2020 case outside of what it contains. Any rights limitation must be justified which is not the case here and as held in **Commissioner of Income Tax v Pan African Paper Mills (E.A) Limited [2018] eKLR**.

Participating in elections is a fundamental activity of a trade union and employees of water companies have exercised this right to join the respondent membership. To deny them the right to participate in elections would be an unjustified limitation of their right to vote and associate as held in **Kenya Chemical Workers Union v Dawa Limited [2014] eKLR** and freedom of association is the bedrock of workers' right under the constitution as held in **Fondo Kalama & 19 others v Anderson M Mtalaki & others [2013] eKLR**.

The respondent also submitted that the court lacks jurisdiction to deal with union elections as this is an internal issue. The employees of water sector are members of the respondent and payment membership dues for participation in the activities of the union. Disputes involving union members should be left to the internal mechanisms as held in **Zaburi Musa Hamisi & others v Ishmael Hilton & others [2015] eKLR** and the petitioner having failed to outline with precision which rights have been violated, this petition should be dismissed with costs.

Determination

The issues which emerge for determination are;

Whether the court has jurisdiction to determine the instant petition;

Whether there is a proper petition;

Whether the orders sought should issue as prayed.

As outlined above, the petitioner is seeking for declaratory orders on the grounds that the inclusion of persons employed in the water sector in the respondent's NDC set for 30th April, 2021 should be nullified and that the court should order that no person employed in the water sector should vie, vote or take part in the NDC as such violates the respondent union constitution. The petitioner has also heavily relied on the decision in **CBA 34 of 2020 – Kenya County Government Workers Union v Nairobi Water and Sewerage Company Limited [employer] & National Union of Water and Sewerage Employees [objector] and Civil Appeal No.18 of 2013 - National Union of Water and Sewerage Employees and 3 others v Nairobi Water and Sewerage Company Limited**.

On the challenge to jurisdiction, the respondent's case is that the question of elections is an internal matter and which the union should address through its internal mechanisms and not by the court. However, the petitioner defines herself as a member of the respondent, a registered trade union.

Under section 12(1) (g) of the Employment and Labour Relations Court Act, 2011 the court is given original jurisdiction to hear and determine dispute between a member and the her trade union;

(g) disputes between a trade union and a member thereof;

Where a dispute exists between the parties herein, such cannot be removed from the jurisdiction of this court. There is an inherent power to address any employment and labour relations disputes between parties as herein.

The petitioner opted to file a petition and which is challenged that it fails the test as required in **the Anarita Karimi Njeru Case**. Indeed every constitutional petition is required to meet the threshold outlined in this case that a Constitutional petition should set out with a degree of precision the petitioner's complaint, the provisions infringed and the manner in which they are alleged to be infringed. See **Mumo Matemo v Trusted Society of Human Rights Alliance & 5 others (2013) eKLR**.

a constitutional petition to be sustainable as such must at a minimum satisfy a basic threshold. See **Grays Jepkemoi Kiplagat v Zakayo Chepkoga Cheruiyot [2021] eKLR**;

It must with some reasonable degree of precision identify the constitutional provisions that are alleged to have been violated or threatened to be violated and the manner of the violation and/or threatened violation. I do not suppose it is enough to merely cite constitutional provisions. There has to be some particulars of the alleged infringements to enable the respondents to be able to respond to and/or answer to the allegations or complaints.

In this regard, the Court of Appeal in addressing an appeal arising out of a constitutional petition filed before this court in the case of **Sumayya Athmani Hassan v Paul Masinde Simidi & another [2019] eKLR** held that;

... we find that the alleged unlawful interdiction and termination of a contract of employment was not a constitutional issue and thus the petition did not disclose a cause of action anchored on the Constitution. Accordingly, the petition being incompetent, the court acted in excess of jurisdiction and erred in law in determining the petition.

In this case, the petitioner has relied on articles 22 and 258 of the Constitution, 2010 to urge the petition save, there are no particularised breaches, violations or any matter of alleged threat to the constitution outlined as such or said to have been violated. What is sought is to stop the participation of water sector/water companies employees from participating in the elections of the respondent scheduled for 30th April, 2021. Without any identified constitutional provisions being alleged to have been violated or threatened to be violated and the manner of the violation and/or threatened violation, the petitioner fails in a material way and a Memorandum of Claim should have sufficed to address the issues in dispute.

Failure to conform to the required principles of a constitutional petition is simple. The petition must be struck out.

Before conclusion, the issue at hand relates to the national elections of the respondent. trade union elections are governed under the LRA read together with the union constitution pursuant to section 34(5) of the LRA and which requires that;

(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 Registrar of Trade Unions has issued notice requiring all trade unions to conduct their elections and advised them to follow the provisions of the subject constitutions. There is no claim that the respondent in calling for the NDC on 30th April, 2021 is in violation of its constitution.

further pursuant to section 34(1) of the LRA that;

No person shall be a voting member of—

(a) a trade union unless that person is employed in the sector for which the trade union is registered;

(b) an employers’ organisation unless that person has a physical address or an office in Kenya; or

(c) a registered trade union or employer’s organisation if that person’s subscriptions are more than thirteen weeks in arrears.

A voting member thus defined. A voter is one who is employed in the sector registered for the union, and is paid up in subscriptions.

This means that, an employee who has joined the membership of a trade union cannot be disenfranchised and denied the right to vote or participate in voting and thus be voted for on the sole reason that the employee has not joined the ‘right’ union. Such would be to negate the basic right secured under the constitution and which allow the right of association, unionisation and right to vote as part of the Bill of Rights. Such rights cannot be limited without a justifiable cause.

The court reading of the Court of Appeal judgement in **Civil Appeal No.18 of 2013** is that this related to recognition and collective bargaining and in no way addressed the voting rights of union members and or restricted the right to unionise under a trade union of one’s choice. Such right remain secured under article 41 of the Constitution.

The right to belong to a trade union of choice is further secured under section 52 of the LRA which allow a given employee to join a trade union of choice and to pay directly to such trade union so an to enjoin representation and unionisation under such trade union of choice.

Nothing in this Part prevents a member of a trade union from paying any dues, levies, subscriptions or other payments authorised by the constitution of the trade union directly to the trade union.

It therefore goes without saying that, the petitioner as a member of the respondent, without defining where she works, under the County government of water sector/water companies; she is enjoying her right to unionisation under the respondent trade union. By extension, the employees who out of own volition has opted to belong and unionise under the respondent cannot be faulted and under such unionisation, elections have been called and have the right to vie, vote and take part in the NDC to be held on 30th April, 2021.

To allow the orders sought in the petition would be to invite the court to negate the rights the respondent members should enjoy under the unionisation of the trade union of their choice. The court finds no matte to justify the limitation of rights secured under the constitution and the law.

Accordingly, the petition is found without merit and is hereby dismissed. the petitioner shall meet the respondent’s costs.

DELIVERED IN OPEN COURT AT NAIROBI THIS 29TH DAY OF APRIL, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

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