



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO.E 041 OF 2021

DR.MAGARE GIKENYI J. BENJAMIN.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL COMMITTEE (IEC),

KENYA MEDICAL PRACTITIONERS, PHARMACISTS

AND DENTISTS' UNION (KMPDU).....1ST RESPONDENT

KENYA MEDICAL PRACTITIONERS, PHARMACISTS

AND DENTISTS' UNION (KMPDU).....2ND RESPONDENT

REGISTRAR OF TRADE UNIONS.....3RD RESPONDENT

DR.MOUNDE MOKAYA ISIAH.....4TH RESPONDENT

DR.OSCAR NYAMU.....5TH RESPONDENT

DR.PAULINE KIPROP.....6TH RESPONDENT

DR.DAVIS OMBUI.....7TH RESPONDENT

DR.EVELYNN CHEGE.....8TH RESPONDENT

DR.MWACHONDA CHIBANZI.....9TH RESPONDENT

DR.OROKO SAMUEL OBEGI.....10TH RESPONDENT

DR.DAISY KORIR.....11TH RESPONDENT

DR.TITUS ONDORO.....12TH RESPONDENT

DR.ALLAN OCHANJI ALDOH.....13TH RESPONDENT

DR.WESLEY OOGA.....14TH RESPONDENT

DR.DENNIS MISKELLAH.....15TH RESPONDENT

DR.MOGENI RICHARD.....16TH RESPONDENT

DR.BRIAN AYARA.....17TH RESPONDENT

DR.FRANK OKADA.....18TH RESPONDENT

DR.ALEX MUTURI.....19TH RESPONDENT

AND

DR.KAHURA MUNDIA.....	1ST INTERESTED PARTY
DR.KAUGIRIA THURANIRA.....	2ND INTERESTED PARTY
DR.DAVJI BHIMJI ATELLAH.....	3RD INTERESTED PARTY
DR.KEVIN DAN OSURI.....	4TH INTERESTED PARTY
DR.ABDAN MWACHI.....	5TH INTERESTED PARTY
DR.HARVEY MULEI.....	6TH INTERESTED PARTY
DR.MERCY NABWIRE.....	7TH INTERESTED PARTY
DR. CAREY FRANCIS).....	8TH INTERESTED PARTY
DR.TIM THEURI.....	9TH INTERESTED PARTY
DR.LOLLAH MOLLA	10TH INTERESTED PARTY
DR.GOR GOODY.....	11TH INTERESTED PARTY
DR.DANIEL JOE BIRUNDU.....	12TH INTERESTED PARTY
DR.ANBAR GANATRA	13TH INTERESTED PARTY
DR.BENJAMIN INDUSW.....	14TH INTERESTED PARTY
DR.AHMED KASAY.....	15TH INTERESTED PARTY
DR.WAKENYA NABISWA.....	16TH INTERESTED PARTY
DR.KAMONZI MULEI.....	17TH INTERESTED PARTY
DR.OUMA FREDRICK OLUGA.....	18TH INTERESTED PARTY

RULING

The Petitioner filed his application and Notice of Motion dated 24th March, 2021 under the provisions of Under Article 22(1), 23(a), 159, of the constitution and seeking for orders that;

a. Spent.

b. An order suspending elections scheduled on 29th April, 2021 or/and any other date pending determination of this application inter-parties and thereafter pending the hearing and determination of this petition or such orders this honourable court may issue.

c. A conservatory order be and is hereby issued staying the decision of the 1st Respondent given on 9th March 2021, communicated to the members by the 4th Respondent, the decision of which the 1st respondent unanimously declared physical voting as the mode of election pending determination of this application in the parties and thereafter pending the hearing and determination of this petition or/and such orders of the court may issue.

d. A conservatory order be and is hereby issued staying the decision of the 1st Respondent given on 13th March, 2021 from any further receiving, processing, prequalifying and awarding of tender Ref: IES/PQ/1/2021 for supply and delivery of election materials(meant for preparation of physical elections/voting) and/or any other tender relating the KMPDU 2021 elections for physical voting pending determination of this application in the parties and thereafter pending the hearing and determination of this petition or such orders the court may issue.

e. A conservatory order be and is hereby issued staying the decision of the 1st Respondent given on 13th March 2021 from any further receiving, processing, recruitment of applications for presiding officers, deputy presiding officers and polling clerks as contemplated in the letter/circular or/and any other recruitment of any election officials for purposes of 2021 elections (for physical elections/voting) pending determination of this application inter-parties and thereafter pending the hearing and determination of this petition or such orders this honourable court may issue.

f. An order be issued against the Respondents barring them from publishing the final register of voters for KMPDU 2021 elections pending determination of this application inter-parties and thereafter pending the hearing and determination of this petition or such orders of the court may issue.=

g. An order be issued barring the Respondents from demanding nomination fees from aspirants pending determination of this application inter-parties and thereafter pending the hearing and determination of this petition or such orders this honourable court may issue.

h. An order be issued barring the Respondents from unconstitutionally demanding that each aspirant to have at least(.....) signatures from members (branch) and 120 signatures in 6 branches for national aspirants pending determination of this application inter-parties and thereafter pending the hearing and determination of this petition or such orders this honourable court may issue.

i. An order barring the 3rd Respondent from registering any officials pending hearing and determination of the petition or/and further orders of the court.

j. An order do issue restraining the Respondents, their agents, servants, successors and or assigns from proceeding or in any way effecting the contents of the circulars by the 1st Respondent inter alia dated 9th March, 2021 (on physical election voting), 13th March 2013 (on prequalification for supply and delivery of election materials and Recruitment of Presiding officers, deputy presiding officers and polling clerks) and any other recruitment & preparation or any other circular prepared for the purpose of physical voting pending determination of this application inter-parties and thereafter pending the hearing and determination of this petition or such orders the honourable court may issue.

k. An order do issue compelling the Respondents to avail in court for all parties in this matter a list of illegally dismissed doctors from Laikipia and Kirinyaga Counties.

j. The court be pleased to extend deadline for holding 2nd Respondent's elections should this matter go beyond the month of April 2021 before being heard and be determined.

m. An order do issue to the respondents to avail in court and for all parties in this matter any other relevant materials/documents held by them for purposes of elections 2021.

n. Any other relief/modification of my prayers which this honourable court may deem fit

o. Cost in the cause.

The application is supported by the Affidavit of the Petitioner and on the grounds that on 25th September, 2020, the 3rd Respondent, Registrar of Trade Unions, herein gave notice to all registered trade unions including Kenya Medical Practitioners, Pharmacists and Dentists Union (KMPDU), the 2nd Respondent herein, to hold elections of their officials to enable Central Organizations Of Trade Unions (COTU) and Trade Union Congress of Kenya (TUC-K) to hold its elections before 30th August 2021. The current officials having served for more than 7 years and pursuant to the above directive, a 2nd Respondent special delegates conference (SDC) was held on 13th February 2021.

Pursuant to article IX of the 2nd Respondent's Constitution, a 5- member Independent Electoral Committee(IEC), the 1st Respondent herein was formed for purposes of ,inter alia, holding elections for new office bearers as per the KMPDU constitution, labour laws, other enabling provision of laws and the Kenyan Constitution(2010) and on 23rd March 2021, the 1st Respondent illegally removed over 4,000 members from the initial register on allegations of non-remittance of dues, leaving only 988 members.

Further, on 23rd March, 2021, the KMPDU published what they called the final list of registered members for purposes of voting and, from the register, the 1st to 11th Respondents and Secretariat unilaterally decided not to include some members of Laikipia and Kirinyaga counties who a competent court of law had ordered that they be reinstated to their employment after unprocedurally being dismissed. The said members from Laikipia and Kirinyaga have been discriminated against and denied a right to vote and be elected as union officials. Such action is aimed at achieving a predetermined outcome from candidates in the two counties in detriment of over 45 counties. The reason advanced of non-payment/deduction from the check-off system is just a smokescreen for their shadowy activities. It is was not the member's fault that the employer failed to remit deductions, and in any case the deductions from members to union were reinstated in March 2021 and hence there is no member with more than 13 weeks arrears(only 8weeks).

Members demanded to be given schedule of activities/timetable preceding the elections but without any stakeholders' consultation the 1st Respondent decided that the elections will be held on 29th April, 2021.

The 2nd Respondent's constitution states that elections must be held on a month of April every 5years. Further, the 1st Respondent in an undated letter declared vacant positions for both national and branch officials and at the same time illegally introduced nomination fees for aspirants. As per the said circular the nomination fees were;

A. NATIONAL OFFICIALS

i. National Chairperson Ksh.50,000

ii. National Secretary General Ksh.100,000

- iii. National Treasurer Ksh.50,000
- iv. Deputy National Chairperson Ksh.40,000
- v. Deputy National Secretary general Ksh.40,000
- vi. Deputy National Treasurer Ksh.40,000

B. BRANCH OFFICIALS

- i. National Chairperson Ksh.40,000
- ii. National Secretary general Ksh.30,000
- iii. National Treasurer Ksh.20,000
- iv. Deputy Chairperson Ksh.10,000
- v. Deputy Secretary general Ksh.10,000
- vi. Deputy Treasurer Ksh.10,000
- vii. Organizing Secretary Ksh.10,000
- viii. County Liaison Officer Ksh.5,000

The nomination fee is illegal, irregular and irrational since the same is neither within the 2nd Respondent's constitution nor any by laws. The fees are prohibitive and may deny some members the right to vie in the context of hard economic times.

The 1st Respondent further introduced a requirement that all aspirants must have nomination forms signed by at least 20 members for branch level and 120 members for national offices (in at least 20 branches). This requirement is not found anywhere in any constitution but is the making of the 1st Respondent. Further the 1st Respondent decided that the mode of elections will be physical voting (as opposed to online / virtual e-voting) despite the public health legal notices 51-54 of 2020 on curbing the spread of COVID-19 pandemic and the 14th presidential address which outlined multiple measures aimed at curbing the COVID-19 Pandemic.

On 13th March 2021 the 1st Respondent advertised for tender (Ref: REQUEST for prequalification tender IEC/PQ/1/2021: for the supply and delivery of physical election materials and related facilities, the tender which is being closed on 27th march 2021. That on the same day the 1st Respondent advertised for the positions of Presiding Officers, Deputy Presiding Officers and Polling Clerks for holding elections in 49 centres (one per county plus Moi Teaching and Referral Hospital and Kenyatta National Hospital). Even if they were to do physical voting, the one polling centre per county will disenfranchise members and deny many members their right to vote considering the vastness of areas in Kenya where members work and the worsening COVID-19 situation in the country. Majority of the members and aspirants have sent many correspondences and requested for a meeting (even virtually/ via zoom) with 1st Respondent as part of stake holder's consultative forum for, inter alia, reconsideration and change of mode of voting from physical mode to online (E-Voting) mode of voting in vain. The 1st Respondent has refused, neglected and unreasonably and irrationally blocked the use of online/virtual (E-voting) and has not responded to many correspondences for personal interests. The actions of 1st Respondent put Union members at a very high risk of contracting and dying from the COVID-19 disease.

An open and credible election can be conducted effectively and efficiently through known providers of electronic electoral devices; a majority of professional societies like KMA, KOGS, LSK, ICPAK, have successfully employed electronic electoral services in the recent past and the orders sought should issue to ensure justice.

In, the **1st, 2nd, 4th to 15th respondents filed the Replying Affidavit of Dr. Chibanzi Mwachonda** who avers that he is the Secretary General of the 2nd Respondent and is the 9th Respondent herein hence has authority to respond for the respondents.

In his reply, Dr Mwachonda avers that the allegations made by the Petitioner in support of his application are not correct and that he did not remove over 4000 members from the initial register due to non-remittances of the union dues and the petitioner is without proof with regard to such allegations. That the 2nd respondent is bound by its Constitution and the Labour Relations Act touching on membership and their eligibility to vote. The register presented to the Registrar of Trade Union, the 3rd respondent, for inspection as required under the law had eligible members and none has complained of being left out as alleged by the petitioner.

Dr Mwachonda also avers that the various allegations made by the petitioner are without proof. The setting of elections on 29th April, 2021 was done by the 2nd Respondent and the committee appointed in this regard, the 1st Respondent, and in line with directions from the 3rd Respondent.

That it is common knowledge that where an employer fails to remit union dues the members remit the same personally and if such payments fall in arrears the consequences are obvious. The requirement of nomination signatures is neither irregular nor unlawful as alleged by the

petitioner. The union and its officials are bound and cognisant of the current pandemic situation and the Ministry of Health guidelines in place and hence the preparation towards the electronic voting system for 29th April, 2021. The 1st Respondent has carried out preparations towards the set electronic exercise by sourcing for the election materials and identifying the presiding officers to oversee the elections on 29th April, 2021.

Whereas the petitioner acknowledges the financial challenges faced by the union he filed the instant proceedings to expose the union to defend a baseless petition. The members of the union are free to engage in consultations on any election matters as has been done in the past.

The 2nd Respondent is ready to conduct free and fair elections given that members are knowledgeable and their needs have been addressed. The issues relating to the updated register have been addressed under the guidance of the 3rd Respondent and nothing is pending.

The respondents appreciate the role of information and communications technology in various institutions and are ready to embrace the same and hence the proposal to change the manual voting to electronic voting system. The union updated the list of paid up members as approved by the 3rd Respondent and the same is available for scrutiny by the legible members of the union.

Dr. Mwachonda also avers that the affected members from Kirinyaga and Laikipia counties are aware of how to update their membership contributions before the elections as required under the Labour Relations Act. The union will not bend the rules in favour of some members and the allegations made on purported impropriety are without evidence and should be dismissed. There is no ulterior motive in scheduling elections as the same is in compliance with the directives of the 3rd Respondent. All members have a legitimate expectation that the 2nd Respondent will conduct its elections within the values of accountability and fairness and the court should dismiss the application and the petition with costs.

The **petitioner filed a Further Affidavit** where he avers that following the filing of the petition, the parties herein made attempts to build consensus with the aim of making all members of the union comfortable for the sake of prosperity of union and union movement and by a letter dated 30th March 2021 and addressed to the 9th Respondent, the 3rd Respondent invited the various stakeholders to a joint meeting which was to take place on 1st April 2021. It was agreed that the issues so far raised were better managed by consensus building among involved parties.

Following the consultative meeting, the 1st Respondent invited the petitioner to a tri-partite meeting on 2nd April, 2021 and all the issues were agreed/ ironed out. Further consultative processes were done and a meeting of all members conducted where only 9th respondent failed to attend.

At the meeting it was agreed that parties exchange a draft consent order where each party can read and sign once comfortable with its content. Draft consent was prepared and despite all of the parties involved having reached consensus, the respondents reneged and brought a different draft consent not capturing what was arrived at the said meeting.

The petitioner also avers that as far as he is concerned, all the issues as captured in the draft consent order have been agreed by all parties concerned, save the 9th respondent. The petitioner is hence maintains that the issues of the register, online voting, no physical voting, secret online voting, no presiding/deputy presiding offices for physical voting, auditing of e-voting systems(pre, during and after elections) have all been agreed by all parties, save for the 9th respondent. That the Elections scheduled on 29th April, 2021 be held as scheduled and should NOT be postponed.

The 3rd respondent opted to stay neutral.

Parties attended and made oral submissions.

The petitioner submitted that the matters between the parties herein have been resolved internally in a meeting held with the 3rd Respondent where all issues were addressed and a draft consent signed by all ,save for the 9th respondent who has failed to oblige the consent. That all issues have been resolved and the elections can proceed on 29th April, 2021.

The respondents, save for 3rd Respondent submitted that the 1st respondent is a non-suited party, not a legal entity to be sued and is hereby wrongly enjoined. It was just but a committee of the 2nd Respondent engaged to plan and conduct elections.

That the petition was filed is not a representative suit and the petitioner is acting for himself and cannot purport to take action for and on behalf of other union members as he lacks such capacity.

The respondents also submitted that the 2nd Respondent is a union registered with a constitution binding on all its members and no single member can dictate on how to run elections. The 2nd Respondent did set up the 1st Respondent to manage the elections on 29th April, 2021. On the averments by the petitioner that all issues have been resolved; he ought to have withdrawn his petition to allow for the elections to proceed.

Further that the 2nd Respondent, being alive to the existence of the on-going COVID-19 pandemic has organised for an online election. The union has the legal mandate to organise and conduct elections and on the issue of the members in arrears of union dues the union should conduct the elections as each member is subject to the constitution and this cannot be dictated by the petitioner. The question of eligibility as to who should vie, vote or participate is regulated under the union's Constitution and the orders sought should not issue.

That the alleged consent drafted by the petitioner cannot be forced on the respondents. The petition and application should be dismissed and

costs be paid at the highest scale.

Dr Kahura and the 1st interested party were in agreement with the petitioner in his submissions: That the 2nd respondent elections should be conducted on 29th April, 2021 as scheduled.

Dr Theuri ,the 9th interested party, also submitted that the elections scheduled for 29th April, 2021 should proceed and that the 1st Respondent is expected to provide access and audit and also allow the contestants to have an independent IT agents to verify the same.

Determination

All parties agreed that the 2nd Respondent's elections should proceed and be held as scheduled for the 29th April, 2021.

The respondents, save the 3rd respondent, raised very fundamental questions of law with regard to the petition which, despite being well addressed, the petitioner failed to take up and address.

The petitioner submitted and outlined in his Further Affidavit that there were meetings held under the auspicious of the 3rd Respondent and draft consent with regard to matters addressed in the petition agreed upon and a draft consent drawn. That all parties agreed to the draft consent, save for the 9th respondent who had declined to oblige and sign.

A draft consent or a consent dealing with a matter before court must be signed by all parties to it, filed and addressed by the court for adoption as an order of the court. Even where all parties sign consent, without the consent being adopted as an order of the court, the same remains an agreement between the parties without it affecting or having a bearing with regard to the suit.

The petition was thus compromised by the petitioner who being the right-holder, ought to have then moved with speed to either withdraw the petition or have the other parties sign consent for the withdrawal. Such would have saved all parties' time and resources. As to maintain the petition well aware that the matters at hand had been resolved and the elections scheduled for 29th April, 2021 should proceed, the petitioner only invited the payment of costs to the respondents as submitted herein.

The above put into account, the petitioner filed the instant petition pursuant to various articles of the constitution outlined in the heading of the petition. In the body of the petition the issues in dispute are addressed as *knock off of over 4,000 members from the voters register, date of elections, illegal nomination fees, nomination signatures, online election voting (e-voting/virtual), tender for supply of physical election materials, election officials, no stakeholder consultations, Kirinyaga and Laikipia counties, prudent use of union financial resources, legitimate expectation* and all without particularisation of what constitutional violations or breaches have been committed or threatened by the respondents as held by the Supreme Court in the case of **Mumo Matemu v Trusted Society of Human Rights Alliance [2014] eKLR** **where it was stated** that a petition should set with reasonable precision in framing the issues and rights violations. The petitioner does not plead any rights violations under the constitution. see also **Anarita Karimi Njeru v Republic**.

In **Harrikisson v Attorney General of Trinidad & Tobago** (1980) AC 265, the Privy Council held that;

The right to apply to the High Court underof the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court or being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.

The Court of Appeal in the case of **Sumayya Athmani Hassan v Paul Masinde Simidi & another [2019] eKLR** stated that;

It is evident that the petition was hybrid combining violations of various constitutional rights; employment rights under the Employment Act and breach the Public Officers Ethics Act. However, the underlying complaint was the alleged unlawful interdiction and subsequent dismissal of the 1st respondent by the Corporation and appellant. The specific remedies sought were general damages, terminal benefits and issuance of certificate of service. In determining the petition, the ELRC relied wholly on the provisions of Employment Act.

*The **Article 41** rights are enacted in the Employment Act and Labour Relations Act. The two Acts and the rules made thereunder provide adequate remedy and orderly enforcement mechanisms. The 1st respondent filed a petition directly relying on the provisions of the Constitution for enforcement of contractual rights governed by the Employment Act without seeking a declaration of invalidity of the provisions of the Employment Act or alleging that the remedies provided therein are inadequate. The petition did not raise any question of the interpretation or application of the Constitution.*

*We adopt and uphold the general principle in the persuasive authority in **Barbara De Klerk** (supra) that where legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the Constitution without challenging the legislation in question. That principle has been reinforced by the Supreme Court in **Communications Commission** case (supra). (underline added).*

Without particularising any constitutional violations or a threat of any constitutional violation, the petition should be struck out. This is a

pure dispute between a member of a trade union as outlined under section 12 of the Employment and Labour Relations Court Act, 2011 and Rule 7 (3) of the Employment and Labour Relations Court (Procedure) Rules, 2016 which ought to have been applied.

The Court agrees with the Respondents that the issues raised in the Petition could have been resolved without invoking the Constitutional route. The payment of costs is imperative to deter needless invocation of the constitutional petition route to approach the court on a matter which would well be addressed under a memorandum of Claim.

Under section 4(2) of the Labour Relations Act, 2007 a trade union such as the 2nd Respondent is required to conduct elections of its officials and representatives subject to its constitution. The law requires that;

- (2) *Every member of a trade union has the right, subject to the constitution of that trade union to—*
 - a) *participate in its lawful activities;*
 - b) *participate in the election of its officials and representatives;*
 - c) *stand for election and be eligible for appointment as an officer or official and, if elected or appointed, to hold office; and*
 - d) *stand for election or seek for appointment as a trade union representative and, if elected or appointed, to carry out the functions of a trade union representative in accordance with the provisions of this Act or a collective agreement.*

The 3rd Respondent has since issued notice to the 2nd Respondent to conduct its elections and make the necessary returns and further directed that such elections should comply with the Union’s constitution.

It is not in dispute that due to the current COVID-19 pandemic guidelines, the 2nd Respondent has engaged its members to ensure compliance with the protocols and safeguard its members when conducting the elections as directed by the 3rd Respondent. This does not remove the 2nd Respondent from ensuring its constitution is adhered to in terms of Article XIV of the constitution and with regard to qualifications pursuant to Article XIV(6) and as regulated by guidelines of the *Independent Electoral Committee* pursuant to Article IX. This is the gist of section 34(1) of the Labour Relations Act, 2007;

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.

The 2nd Respondent has called for elections and is at liberty to proceed as directed and make the necessary returns to the 3rd Respondent. The court finds no reason to interfere with the process of elections or the notice to hold elections on 29th April, 2021.

In the penultimate, the suit against the 1st respondent is a non-starter. No suit can be sustained against a party which has no legal persona. The 1st Respondent is added in the petition as a committee of the 2nd Respondent mandated to prepare elections. Various allegations are made against the party but the bottom line is that this is not an entity under its own legal title which can sue or be sued. This non-party is wrongly enjoined in these proceedings thereby forcing the 2nd Respondent to secure legal assistance to defend the respondents. Upon the issue being brought to the attention of the petitioner, he should have moved with haste to have such party removed from these proceedings to avoid the obvious. Payment of costs.

Accordingly, the petition and the motion therefrom are hereby dismissed. The 2nd Respondent is at liberty to hold elections as scheduled for 29th April, 2021 pursuant to the Union Constitution. Costs herein awarded to the 2nd, 4th to the 15th Respondents. The interested parties shall bear own costs.

DELIVERED IN OPEN COURT AT NAIROBI THIS 28TH DAY OF APRIL, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

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and