



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

ELRC PETITION NO. E006 OF 2021

IN THE MATTER OF SECTION 34 LABOUR RELATIONS

AND

IN THE MATTER OF SECTION 12 EMPLOYMENT AND LABOUR RELATIONS COURT ACT

AND

IN THE MATTER OF RULE 17 EMPLOYMENT AND LABOUR RELATIONS COURT PROCEDURES RULE 2016

AND

IN THE MATTER OF NAKURU KUPPET BRANCH ELECTION HELD ON 13TH FEBRUARY 2021.

ELIUD WANJOHI GWANDARU.....PETITIONER/APPLICANT

VERSUS

SAMUEL WAITA K.....1ST RESPONDENT

DANCAN GITAU MACHARIA.....2ND RESPONDENT

KIPTOO NG'ETICH.....3RD RESPONDENT

CAROLINE RONO.....4TH RESPONDENT

SAMUEL KIRUBI WANJOHL.....5TH RESPONDENT

EVALYNE CHEPCHUMBA.....6TH RESPONDENT

JOSEPH CHEBUKAKA.....7TH RESPONDENT

ANNE LANGAT.....8TH RESPONDENT

NANCY CHELANGAT.....9TH RESPONDENT

CATHERINE CHEMELI SANG.....10TH RESPONDENT

REGISTRAR OF TRADE UNIONS.....11TH RESPONDENT

KENYA UNION OF POST PRIMARY EDUCATION

TEACHERS(KUPPET).....12TH RESPONDENT

RULING

INTRODUCTION

1. The Petition herein was filed together with a Notice of Motion Application both dated 22nd February, 2021 under Certificate of urgency which court proceeded to issue interim ex parte Orders maintaining the status quo as at 25th February, 2021 with regards to the officials of KUPPET Nakuru Branch. In response to the Petition and the Application by the Petitioner, the 12th Respondent filed Grounds of Opposition, Replying Affidavit as well as the instant Notice of Preliminary Objection all dated 24 March, 2021 which was based on the following grounds;

THAT the reliefs sought herein ought to have been sought vide an Appeal against a decision of the Registrar of Trade Unions under Section 30 of the Labour Relations Act and not a Petition premised upon Section 34 of the Act. Therefore, this suit is a non-starter, a waste of this Court's precious judicial time and as such both the Application and Petition instant should be dismissed with cost.

2. The Ruling herein is therefore in respect of the said Preliminary Objection which the court found ought to be heard before the aforementioned Notice of Motion as the same touched on its jurisdiction.

3. The 12th Respondent filed its submissions on 7th May, 2021 while the Petitioner filed his on 10th May, 2021.

12th Petitioners submissions

4. The respondent herein submitted that on three main issues; Whether the orders sought herein ought to be vide an Appeal against the decision of the Registrar of Trade Unions under Section 30 of the Labour Relations Act, Whether this Preliminary Objection meets the threshold and Whether this Court has jurisdiction to hear the matter.

5. On the first issue it was submitted that the Petitioner/Applicant is guilty of material non-disclosure in this regard: as at the date of filing this suit the Registrar of Trade Unions had already registered the Notice of Change of Officers on 16th February, 2021.

6. Counsel cited the decision of Honourable Lady Justice Maureen Onyango in the case of **Beatrice Cheruto Pochora -v-Kenya County Government Workers Union & 11 Others [2019] eKLR** where the court gave a distinction of matters brought under Section 34 from an Appeal brought under Section 30 of the Labour Relations Act and submitted that this case a Preliminary Objection was raised on grounds that the orders sought should have been brought vide an Appeal to the Registrar of Trade Unions under Section 30 of the Labour Relations Act. On determining the Preliminary Objection, the Honourable Judge held that where the Registrar has already registered the Notice of Change of Officials, this constitutes a decision of the Registrar which was dependent on the outcome of the elections. In the Honourable Judge's words, "Section 34(4) of the Labour Relations Act provides that any dispute arising out of elections of officials may be referred to this Court. However, the filing under this section was misguided since the Registrar had already registered the change of officials at the time." She went on to quote Section 2 of the Employment and Labour Relations Court (Procedure) Rules 2016 which define an appeal as "an appeal made to the Court by a party against an order, decision or proceedings under any written law and includes appeals from the Cabinet Secretary, Director of the Work Injury Benefits Authority, Registrar of Trade Unions, subordinate courts and tribunals."

7. Counsel also cited the case of **Clay Odari & 2 Others -v-Kenya Petroleum Oil Workers Union & 8 Others [2018] Eklr**. Where Rika J held;

"Section 30 of the Act refers to decisions made by the Registrar under the Act as a whole, rather than under specific Sections. Such decisions are part of circumstances contemplated by Section 34 of the Act. At the heart of the dispute is the electoral process conducted by the 2nd Respondent, and change registered by the 3rd Respondent. These are matters arising from or connected to elections held by the 2nd Respondent. They involve a decision made by the Registrar. The dispute may be referred to the industrial Court, only in the form of an Appeal, under Section 30 of the Act. Section 34, must be read together with Section 30. Otherwise Section 30, which allows Persons aggrieved by decisions of the Registrar made under the Act as a whole, to prefer Appeal against such decisions within 30 days of the decisions being made, would not make sense. Notice of Change of Officials is submitted to the Registrar in form Q. under Section 35 of the Labour Relations Act. The Registrar is required to consider various issues under Subsections [3], [4] and [5], before making her decision on registration. Once a decision is made, it becomes appealable under Section 30 of the Act. it is no longer an internal electoral dispute involving the Union, its Members and aspiring Officials, which can be dealt with under Section 34, by direct engagement of the Court through a Claim; it must be brought as an Appeal against the decision of the Registrar, under Section 30.

8. It was submitted that, by reading the instant Petition & is clear outright that it discloses NO constitutional violation(s) and essentially rubbishes Rule 7 (1) of the Employment and Labour Relations Court (Procedure) Rules. To wit: '7. (1) A party who wishes to institute a petition shall do so in accordance with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution Practice and Procedure Rules, 2012.

9. Accordingly, he submitted that it follows then that the Petition has not met the threshold of a Constitutional Petition as was laid down in the cases of **Annarita Karimi Njeru** and **Mumo Matemu**.

10. Counsel therefore argued that the Petition herein is frivolously invoking the constitutional jurisdiction and ought to be discouraged and urged this Court to dismiss the same and uphold its P.O as they have met threshold contemplated in the Landmark case of **Mukisa Biscuit Company -v- West end Distributors Limited [1969] EA 696** since it is based on pure point of law.

11. Counsel in conclusion submitted that this Court does not in the instant case have jurisdiction to hear this and determine this suit and

therefore ought to down its tools and cited the case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 4** where Justice Nyarangi of the Court of Appeal held as follows:

‘I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.’

Petitioner’s submissions

12. The petitioners advocate herein submitted that, the Petitioner herein is a member of the 12th Respondent who offered himself to contest as the Executive Secretary Nakuru Branch, vide an election called by the 12th Respondent which is a Registered Trade Union. That the election herein was governed by both the 12th Respondent’s constitution and Rules and Regulations, therein the entire process is initiated by the 12th Respondent and the 11th Respondent only came into play when the results are out and forwarded by the 12th Respondent. Therefore, the decision herein was made by the 12th Respondent and not the registrar as contemplated under section 30 of the Labour relations Act.

13. Counsel submitted that even if the said provisions are applicable in the current matter, they are not mandatory as the same provides that the Aggrieved party ‘MAY’ Appeal hence does not oust the jurisdiction of this honorable court.

14. It was submitted further that for the party to invoke the provision of Section 30, the Registrar of trade Union must have actually made a decision on an issue deliberated in respect to election. your Lordship, the Petitioner herein brought the current directive Under Section 34(4) of the Labour Relations Act which provides dispute arising from or connected DIRECTLY or INDIRECTLY to elections held under this Section may be referred to the Industrial Court” as such he argues that the law has granted the petitioner power to file this Suit in this Court therefore this Court has jurisdiction to adjudicate over the issue in the petition herein as empowered in accordance with Article 162 (2) of the Constitution

15. On the cases cited by the 12th Respondent, counsel submitted that they are merely persuasive and not binding upon this honorable court since the same originate from the courts of similar Jurisdiction, further the circumstances under which the matter arose are completely different from the current Petition before this honorable court.

16. On whether the issues raise in the P.O meets the threshold set in **Mukhisa Biscuit case**, counsel submitted that the issues contested in the current Petition go squarely to the conduct of the decision by the 12th Respondent in respect of the Nakuru Branch, the issues being raised touches on non-compliance with the laid down regulations and election malpractices, are issues of facts which the court must be granted an opportunity to hear and make a determination on the legality of the entire election process. Therefore, are not base on pure point of law as contemplated in the locus classicus case of **Mukhisa Biscuit**.

17. I have considered the averments and submissions of both parties. In the main petition, the prayers sought relate to the Nakuru KUPPET election held on 13/2/2021.

18. The petitioner seeks an order nullifying or quashing the election held.

19. He also seeks orders restraining the registration of purported change of officials by the Registrar of Trade Unions, the 11th Respondent herein.

20. The respondent/applicant have submitted that the orders being sought should not be sought through a Constitutional Petition as herein sought but as an appeal under the Labour Relations Act 2007.

21. The applicants insist that these prayers should be sought under Section 30 of the Labour Relations Act (LRA 2007) and not as a Petition premised upon Section 34 of the Labour Relations Act.

22. Section 30 of the Labour Relations Act deals with appeals against decisions made by the Registrar of Trade Unions under the Act. Such appeals should be filed within 30 days of the decision being made.

23. My understanding of Section 30 is that any decision made by the Registrar of Trade Unions under the Act are appealable to this court. Such decisions are varied and range from refusal to register a Union or amalgamation thereof, refusal on change of names, of a Union or its constitution registration of change of names, cancellation or suspension of registration of a union or employer’s organization e.t.c.

24. The action of the Registrar of Trade Union refers to the duties of the Registrar of Trade Union envisaged under the entire Act.

25. Section 34 of the Labour Relations Act 2007 on the other hand deals with election of officials of the trade union. Where there are disputes in relation to the said elections the disputes may be referred to this court.

26. My understanding here is that after an election has been held any dispute and which I refer to as an election petition may be filed before this court.

27. The petition before me is in relation to election of KUPPET officials Nakuru Branch and is not in relation to decisions made by the

Registrar of Trade Union.

28. In the circumstances filing this petition under Section 34 of the Labour Relations Act was proper in the circumstances.

29. As to whether the petition meets the threshold for filing a petition, this is a matter to be determined within the petition and cannot be determined as a preliminary issue.

30. I therefore find the preliminary objection has no merit and I dismiss it and order the petition to proceed on merit.

31. Costs in the petition.

Ruling delivered virtually this 27TH day of **MAY, 2021**.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Okiro for 1st to 10th Respondents – present

Ms Akello for the 12th Respondent – present

Mukira for the Petitioner – present

Court Assistant - Fred