



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.E408 OF 2021

DR. DOMINIC MURAGE.....1ST CLAIMANT
DR. ANGELINE CHEPCHIRCHIR.....2ND CLAIMANT
DR. TERESIA MUTAVI.....3RD CLAIMANT
DR. NJAGI NJOMO.....4TH CLAIMANT
DR. KINYUA BAILASHA.....5TH CLAIMANT
DR. JOSEPHINE WAIRIMU.....6TH CLAIMANT
DR. REGINAH KITIABI.....7TH CLAIMANT
DR. PRISCA JERONO.....8TH CLAIMANT
DR. JAMES OKWAYO.....9TH CLAIMANT
DR. KANDIE KIPKOROS.....10TH CLAIMANT

VERSUS

UNIVERSITIES ACADEMIC STAFF UNION.....1ST RESPONDENT
UNIVERSITIES ACADEMIC STAFF UNION
(UNIVERSITY OF NAIROBI CHAPTER).....2ND RESPONDENT
REGISTRAR OF TRADE UNIONS.....3RD RESPONDENT

RULING

The claimants filed application dated 19th May, 2021 under the provisions of Article 41 of the Constitution, section 34 of the Labour Relations Act and section 12 of the Employment and Labour Relations Court Act and seeking for orders that;

This court be pleased to issue an order or temporary injunction restraining the respondent's either singularly or jointly, servants, agents or any person acting on their behest and instruction from proceedings with the entire process of elections vide Notice dated 17th May, 2021 or any other notice or process including nomination or any other process relating to the elections of the

National officials ending the hearing and determination of the suit herein or until further orders of the court.

The application is supported by the affidavit of the 1st claimant Dr. Dominic Murage and on the grounds that on 17th May, 2021 the 1st respondent issued a Notice for National Delegates Conference (NDC) for 23rd June, 2021 wherein 10 positions for the 1st respondent's national office shall be up for elections on the stated date. The 1st respondent has also constituted the electoral board and directed that delegates collect the nomination forms from 24th to 31st May 2021 when the nomination process will close.

Other grounds in support of the application are that under Article 9(c) of the 1st respondent constitution, every delegate has a right to attend and vote in the National Delegates Conference and run for a national office. Under Article 9(a) the constitution provides that all office bearers shall be elected every 5 years and the registered members of the chapter shall elect delegates for the purpose of electing the national officer bearers. The 1st respondent has constituted the Electoral Board and directed that delegates to collect nomination forms from 24th to 31st May, 2021 save the claimants who have been nominated to contest for the various positions in the 2nd respondent chapter and who have a right to then participate in the national elections either as delegate voters or candidates cannot benefit from the nomination process because the 2nd respondent has not concluded its elections and the claimants stand to be disenfranchised.

The 2nd respondent is the largest branch of the 1st respondent with over 1,500 members who by law cannot be disenfranchised from participating either as voters and candidates in constituting the new national office.

The claimants have been cleared to contest for the positions of officials and delegates of the 2nd respondent and they stand to be automatically disenfranchised from either presenting themselves as candidates or voters in the already scheduled National Delegates Conference.

In his Supporting Affidavit, Dr Murage avers that the court has heard a separate **matters in Cause No.E188 of 2021** and directed the 2nd respondent to conduct chapter elections based on the inclusive register of members vide letter dated 9th January, 2021 to take place on 18th March, 2021 and which elections were not conducted and now scheduled for hearing on 26th May, 2021

The claimants have a *prima facie* case with high probabilities of success and shall suffered irreparable loss and damage if denied their constitutional rights to effectively participate in the affairs of their union. The balance of convenience favours the claimants and given undertaking as to damages.

In reply, the 1st respondent filed the Replying Affidavit of Dr Constantine Wasonga the general secretary and with authority of the 2nd respondent as a chapter of the 1st

respondent and avers that trade union elections are ordered by the 3rd respondent in accordance with the Labour Relations Act (LRA) and who has since issued directions for branch and national office elections. Branch elections were to be conducted by 31st March, 2021 and national office by 3rd June, 2021 and members of the 1st respondent as set for elections on 23rd June, 2021 for which costs have been incurred for printing election materials, setting up the elections board, costs of facilitators which would go to waste should the claimants have their way.

Dr. Wasonga also avers that to grant the orders sought is an act in futility since the claimants' chapter had not conducted their chapter elections by the appointed date of 31st March, 2021 due to internal disagreements between the chapter officials but on 24th May, 2021 the 1st respondent reconciled the wrangling chapter officials of the 2nd respondent who unanimously agreed to have the chapter elections held on 9th June, 2021 and among the resolutions reached is that the chapter delegates would be eligible to participate in the national elections to be held on 23rd June, 2021.

The suit herein is an exercise in futility as the 2nd respondents will hold elections and delegates participate in the National Delegates Conference and elections and the apprehension by the claimants is misplaced. There is no *prima facie* case to warrant the grant of the orders issued and no irreparable damages will be suffered by the claimants. The balance of convenience favours the respondent and the application should be dismissed with costs.

The claimants filed Supplementary Affidavit sworn by Dr. Murage and who avers that none of the claimants are chapter officials of the 2nd respondent and have never been involved in the internal disagreements resulting in the various resolutions submitted by Dr Wasonga in his Replying Affidavit. Article 19(f) of the 1st respondent's constitution provides that the National Executive Committee of the 1st respondent controls the chapter executive committee of the 2nd respondent and the responsibility to conduct elections by the 2nd respondent is borne by the 1st respondent.

There is no dispute that the claimants have been nominated to vie for chapter elections of the 2nd respondent upon directions by the court vide ruling in **Cause No.E188 of 2021** which had been scheduled for 18th March, 2021 but did not take place on account of the chapter secretary general and the treasurer failing to release funds and which compelled the claimants to file an application for contempt of court.

Dr Murage also avers that the 3rd respondent pleaded with the 1st respondent to allow for elections of the 2nd respondent to be held and which is set for 16th June, 2021 through the court directions.

The claimants should not be blamed for the alleged internal disagreements within the 2nd respondent as this was deliberately done to ensure elections were not held as scheduled and forcing the court to set the elections for the 16th June, 2021.

Under article 9(c) of the 2nd respondent's constitution, all prospective candidates to the national office should offer themselves for elections at the National Delegates Conference must be delegates already elected at the chapter elections which means that without being a delegate, one cannot participate in the nomination process to vie for any position in the national office. In the communication of the 1st respondent dated 17th May, 2021 nomination for all the 10 positions was to commence on 24th May and ending 31st May, 2021 without an option of re-

opening.

The claimants have intention to contest for the 10 positions save the 2nd respondent's elections would be held on 16th June, 2021 making them disenfranchised as they will be locked out from nomination or campaigns for reasons not attributed to them. The holding of national elections on 23rd June, 2021 will be only 7 days after the 2nd respondent's chapter elections which would entirely lock out the claimants from contesting in any manner for any of the 10 positions and hence have a *prima facie* case and will suffer irreparable loss and damage if the orders sought are not granted.

The 3rd respondent filed the Replying Affidavit of Elizabeth Gicheha the Registrar of Trade Unions and who avers that as the regulator of trade union vide circular dated 25th September, 2020 she directed for the holding of branch and national elections from 4th January to 30th June, 2021 with branch elections being completed by 31st March, 2021.

In a court order dated 21st March, 2021 the 2nd respondent elections scheduled for 15th March, 2021 were suspended and directed to be held on 18th March, 2021 and which was brought to the attention of the 3rd respondent and elections were not held as directed on the grounds that the 2nd respondent was not financially facilitated by the 1st respondent.

Ms Gicheha also avers that upon request for an advisory by the secretary general of the 1st respondent on 10th May, 2021 on the quorum for holding the 1st respondent elections, the office advice that as long as the 2/3 quorum was met, the elections could be held. The office also advised that the 2nd respondent should be allowed to participate in the National Delegates Conference subject to the chapter conducting its elections by or within the time frame envisioned under the union constitution. Further, section 34(5) of the Labour Relations Act, 2007 allows the 3rd respondent to direct and ensure elections are conducted in accordance with the law.

All the parties attended and made extensive oral submissions.

Determination

On the application, affidavits and submissions the issues which emerge for determination are;

Whether the court should issue a temporary injunction; and

What relief should issue in this case.

The claimants' case is that they are members of the 2nd respondent, a chapter of the 1st respondent trade union and whereas the 3rd respondent the Registrar of Trade Unions has directed for holding of elections for branches/chapters and national offices from 4th January to 30th June, 2021 the 2nd respondent is yet to hold its chapter elections and from which delegates will be elected and who shall participate in the national elections as voters and or candidates save the 1st respondent has issued notice dated 17th May, 2021 relating to the elections process and calling for nominations of the national officials from 24th to 31st May, 2021 before the 2nd respondent has had a chance to hold elections.

The respondents case is that the 2nd respondent has had internal wrangles and unable to hold elections but such matters have been resolved and resolutions passed allowing for the elections and that the elected delegates shall be allowed to participate as voters and candidates and the subject of the suit is spent.

The 3rd respondent's case is that the 1st respondent has sought an advisory with regard to holding elections which the office has directed to be held before 30th June, 2021 and as long as the 2/3 quorum is met, the elections should be held in accordance with section 34 of the Labour Relations Act, 2007 and the union constitution.

In the case of **Nguruman Limited versus Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014) eKLR** where the Court of Appeal outlined the conditions to be considered for the grant of a temporary injunction as follows;

in an interlocutory injunction application the applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially.

And in the in the case of **Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others [2015] eKLR** the court held that;

In summary, the principles are that the Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the Court should decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered

nugatory. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether to grant or deny a conservatory order.

In this case, it is not disputed that the 2nd respondent chapter under which the claimants are members has not held its elections following the notice issued by the 3rd respondent dated 25th September, 2020 due to internal wrangles and leading to five (5) members filing **Dominic Murage & 4 others v Richard M Bosire & 6 others [2021] eKLR** which related to call for elections for 18th March, 2021 and 15th March, 2021 by different officials of the 2nd respondent.

Following various motions, the court stopped the 2nd respondent elections and which were directed to be held on 16th May, 2021.

In this regard, the 1st respondent vide Notice dated 17th May, 2021 notified all chapters that;

NOTICE OF THE 2021 NATIONAL ELECTIONS FOR THE UNIVERSITIES'

ACADEMIC STAFF UNION (UASU)

You are hereby notified that the National Delegates' Conference (NDC) will convene on Wednesday June 23, 2021 at ... to elect 10 (10) National Officials.

...

Nomination Forms shall be issued free of charge from the national Secretariat

... Nairobi, from 24th May, 2021 to 31st May, 2021. ... duly completed nomination forms should be returned to the National Secretariat, Unafri House by 31st May, 2021 by 4.00P.M.

Dr Wasonga, the 1st respondent general secretary avers that election materials have been prepared for the 23rd June, 2021 and ballot papers will go to waste. He has made his affidavit for and on behalf of the 1st and 2nd respondents as the general secretary of the 1st respondent. At his paragraph 8 of the Replying Affidavit dated 26th May, 2021 he avers that;

On 24th May 2021 the National office reconciled the wrangling Chapter officials of the 2nd respondent who unanimously agreed to have the Chapter elections held on 9th June 2021 (Attached is the resolutions of the meeting held on 24th May 2021...)

The 2nd respondent's elections are scheduled for 16th June, 2021.

This required the intervention of the court as cited above in **Dominic Murage & 4 others v Richard M Bosire & 6 others [2021] eKLR**.

The claimants are ordinary members of the 2nd respondent chapter. They are not part of the internal wrangles resolved by Dr Wasonga on 24th May, 2021 and therefore not party to the alleged resolutions thereof.

In the Memorandum of Claim, the claimants define themselves as members of the 2nd respondent and who have received nominations to participate as candidates in the chapter elections which are due.

On the instant application dated 19th May, 2021 the claimants as members of the 2nd respondent who have been cleared to contest for the positions of officials of the 2nd respondent and then become eligible to attend at the 1st respondent National Delegates Conference following notice dated 17th May, 2021 stand to suffer damage, injury and prejudice as the Notice dated 17th May, 2021 requires those eligible to attend the National Delegates Conference and seeking nomination for any of the 10 positions to complete the nomination forms and submit with the 1st respondent on dates prior to the holding of the 2nd respondent chapter elections scheduled for 16th June, 2021 way after submissions has closed as of 31st May, 2021 by 4PM.

The court finds a clear case set out by the claimants with regard to their right secured under Article 41 of the Constitution, 2010 read together with the Labour Relations Act, 2007 and which requires them to participate in the affairs of their trade union, participate in its activities and by being locked out of attending at the elections both national and chapter level, such violate their constitutional and legal rights.

The 3rd respondent has issued notice pursuant to section 34 of the Labour Relations Act, 2007 which requires the call for elections and change of officials upon elections every 5 years.

Under Article 9(c) of the 1st respondent constitution, every delegate has a right to attend and vote in a National Delegates Conference and run for a national office. Such delegates are secured from chapter elections.

Under Article 9(a) the constitution provides that all office bearers shall be elected every 5 years and the registered members of the chapter

shall elect delegates for the purpose of electing the national office bearers.

The claimants stand to lose and be disenfranchised for the next 5 years where their participation as voters or candidates is not secured at this stage and hence have made a clear case of the injury to be suffered.

With regard to balance of convenience, Dr Wasonga in his Replying Affidavit, save to urge the court that ballot materials have been secured and the National Delegates Conference and elections are set for 23rd June, 2021 nothing is particularized as to the nature of incontinence which shall be caused upon the 1st respondent by allowing the claimant's time to put in their nomination forms or any other process relating to the elections of the national officials.

Unionisation as regulated under the Labour Relations Act, 2007 with the core purpose of promoting to democratisation, protection and promotion of freedom of association. Under the Labour Relations Act, 2007 preamble, it provides that;

... the law relating to trade unions and trade disputes, to provide for the registration, regulation, management and democratisation of trade unions and employers organisations or federations, to promote sound labour relations through the protection and promotion of freedom of association, the encouragement of effective collective bargaining and promotion of orderly and expeditious dispute settlement, conducive to social justice and economic development and for connected purposes

It would therefore defeat the very purpose of unionisation to lock out potential voters and candidates at any level of the 1st respondent trade union.

Under Article 6(d) of the 1st respondent constitution it requires that;

Every chapter of the union shall have the right to send one delegate for every 100 (one hundred) members of part thereof of duly registered in the membership register at such chapter provided that nothing herein contained shall authorise a chapter to send more than 7 (seven) such delegates to the National Delegates Conference. The registered members of the chapter concerned shall elect such delegates for that purpose.

Dr Murage in his Supporting Affidavit averred that the 2nd respondent is the largest branch of the 1st respondent with over 1,500 members. Such is a large constituency and where article 6(d) of the Union constitution were to be strictly followed, the maximum number of delegates to attend the National Delegates Conference is imperative.

To lock out such a branch, which is due to hold its elections after the 31st May, 2021 at 4PM when the 1st respondent's nomination list for the National Delegates Conference delegates is closing is to disenfranchise such membership from participating either as voters and candidates in constituting the new national office.

The court finds the reliefs sought will enhance the constitutional values and objects of Article 41 of the Constitution, 2010 being a right protected under the Bill of Rights, and if the order is not granted, the substratum of the claim filed together with the application will be spent.

On the advisory of the 3rd respondent dated 17th May, 2021 that 2/3 quorum is sufficient to hold elections and submissions in terms of section 34 of the Labour Relations Act, 2007 and notice dated 25th September, 2020 requiring elections be held on or before 30th June, 2021; being cognisant of the ruling in **Cause No.E188 of 2021 - Dominic Murage & 4 others v Richard M Bosire & 6 others [2021] eKLR** and the directions that 2nd respondent elections be held on 16th June, 2021 Dr

Murage in his Supplementary Affidavit dated 28th May, 2021 at paragraph 12 avers that;

Claimants have been categorical that they intend to contest for the 10 positions as per their established constitutional rights but by the time the 2nd respondent's elections would be held on 16th June, 2021 they stand entirely disenfranchised as they would have been blocked from nominations or campaigns for reasons not attributed to themselves.

When parties attended court for oral submissions on 31st May, 2021 it became apparent to the court that the instant application will have ripple effect with regard to the outcome of the 2nd respondent's elections on 16th June, 2021 and thus prioritised the ruling for 21st June, 2021.

Such leaves any members eligible for attending at National Delegates Conference with barely one (1) clear day to do anything with regard to submissions of nomination forms or campaigns. The failure by the respondents to hold elections in good time cannot be attributed to the claimants.

Accordingly, the court finds merit in the application dated 19th May, 2021 and directs as follows;

(a) Aware of the Ruling delivered in Cause No.E188 of 2021 - Dominic Murage & 4 others v Richard M Bosire & 6 others [2021] eKLR and the directions that 2nd respondent elections be held on 16th June, 2021;

(b) Notice dated 17th May, 2021 or any other notice or process including nominations or any other process relating to the elections of the national officials of the 1st respondent shall open for the next five (5) calendar days;

(c) Notices for national elections for the 1st respondent shall simultaneously issue to be held on the 14th day after this date/today; and

(d) Cost awarded to the claimants.

DELIVERED IN COURT AT NAIROBI THIS 21ST DAY OF JUNE, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

..... and