



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E004 OF 2021

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: ARTICLE 41(4) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE LABOUR RELATIONS ACT NO. 14 OF 2007

AND

IN THE MATTER OF: THE KENYA UNION OF CLINICAL OFFICERS (ELECTION OF OFFICERS)

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT

BETWEEN

KENYA UNION OF CLINICAL OFFICERS.....APPLICANT

VERSUS

REGISTRAR OF TRADE UNIONS,

MINISTRY OF LABOUR AND SOCIAL PROTECTION.....RESPONDENT

AND

THE HON. ATTORNEY GENERAL.....INTERESTED PARTY

JUDGMENT

1. The Ex parte Applicant, (herein after referred to as Applicant) is a trade union registered under the Labour Relations Act vide registration certificated dated 5th July 2017 to represent Clinical Officers.
2. The Respondent is The Registrar of Trade Unions in the Ministry of Labour and Social Protection, in Kenya.
3. The Interested Party, The Hon. Attorney General, is the Attorney General of the Republic of Kenya whose duty is to advice all government agencies on legal issues and to represent government in legal suits.

4. The Applicant seeks the following orders: -

(i) That an order of CERTIORARI do issue to remove into the High Court and quash the directive of the Respondent in ordering for elections as contained in the Respondent's Circular Ref No. ML&SP/TU/ELECTIONS/2021 dated 25th September 2020 to the extent that the circular relates to the KENYA UNION OF CLINICAL OFFICERS.

(ii) That an order of PROHIBITION do issue directed to the Respondent to prohibit the Respondent from taking any such steps against the Applicant, pursuant to its Circular Ref No. ML&SP/TU/ELECTIONS/2021 dated 25th September 2020 to the extent that the circular relates to the KENYA UNION OF CLINICAL OFFICERS.

(iii) That an order of MANDAMUS do issue directed to compel the Respondent to execute its statutory obligations and perform its regulatory role in line with the Constitution of Kenya and the Labour Relations Act and to exempt the Applicant Union from conducting elections until July 2022 as contained in its registered Constitution.

(iv) That costs of this application be provided for.

5. The grounds in support of the motion as set out in the statutory statement are that: -

a. By a Circular Ref No. ML&SP/TU/ELECTIONS/2021 dated 25th September 2020 the Respondent ordered for Elections in all Trade Unions, including the Applicants. The Respondent actions are highly prejudicial and in total disregard of the-Constitution of Kenya, Article 41(4)(a) and (b) as well as the Applicants Constitution, registered on 5th July 2017.

b. That Article XVIII of the Applicant's Constitution establishes a National Election Board by the National Executive Council one year to the expiry of the five- year term to conduct elections both St. Branch and National levels and as such there is no lacuna as to when the Applicant should conduct her elections

c. That pursuant to the Applicants Constitution, and in line with its five-year election cycle; it is clear that the Applicant's next available term for an election exercise shall be in July, 2022 and as such, the Respondent cannot compel the Applicant to conduct elections against the Constitution of Kenya, 2010, the Labour Relations Act, as well as its registered Constitution.

d. The decision is extremely prejudicial to the Applicant, her members and its administrative operations as it will incapacitate the Applicant and make it impossible for the Applicant to protect its members from the Respondent unfair labour practices.

e. That pursuant to the provisions of Section 34 of the Labour Relations Act No. 14 of 2007, the Respondent is obviously misrepresenting the mandatory provisions of this statute.

f. The decision of the Respondent contained in the Circular Ref No. ML&SP/TU/ELECTIONS/2021 dated 25th September, 2020 ordering for Elections of Trade Unions including the Applicant is in violation of Labour Relations Act (No. 14 of 2007) Sec 34 (1) and (5) and the Kenya Union of Clinical Officers Constitution registered on 5th July, 2017 thus:-

34. Election of officials

(1) The election of officials of a trade union, employers' organization or Federation shall be conducted in accordance with their registered constitutions.

(5) The Registrar may issue directions to a trade union, employers' organization or federation to ensure that elections are conducted in accordance with this section and their respective constitutions.

g. The Respondent will breach Article 41(4)(a) & (b) of the Constitution of Kenya, 2010; which actions will weaken the Applicant and expose the Applicant's members to the Respondent's injustices thus:-

(4) Every trade union and every employers' organization has the right—

(a) to determine its own administration, programmes and activities;

(b) to organise; and

h. The Applicant has since on two instances - that is by way of letter Ref. KUCO/AG/11/2020(132) dated 4th November 2020 and another one of Ref. KUCO/AG/2/12 2020 (154) dated 10th December 2020 sort for a legal opinion and advisory from the Interested Party herein with no response.

i. The decision by the Respondent to compel the Applicant to conduct elections pursuant to the Circular Ref No. ML&SP/TU/ELECTIONS/2021 dated 25th September 2020 is not only illegal, but also unprocedural and unfair and as such, should be pronounced as not applicable in respect to the

Applicant herein.

j. Unless the application filed herewith is urgently heard and determined, the Respondent will breach Article 41(4)(a) & (b) of the Constitution of Kenya, 2010, Sec 34(1) & (5) of the Labour Relations Act No. 14 of 2007 Laws of Kenya as well as the Registered Constitution of the Applicant Union; which actions will weaken the Applicant and expose the Applicant's members to the Respondent's injustices.

6. The motion is further supported by the verifying affidavit of GEORGE MAROAH GIBORE sworn on 16th February 2021.

7. The Respondent opposes the application vide a replying affidavit of ELIZABETH N. GICHEHA sworn on 5th May 2021 in which it is deponed that the Applicant's Constitution is unlawful and unfair as it discriminates against other members of the Union who would wish to vie for the elections vis a vis the current interim officials. Further that there is no general meeting where a resolution was passed that the Union be exempted from conducting elections. That the Ex Parte Applicant has never held elections and the application is made out of fear of losing their positions by the interim officials who became national officials and have never been elected.

8. The application was disposed of by way of written submissions.

Applicant's Submissions

9. The Applicant contends that the replying affidavit is not supported by any evidence and the averments therein are mere allegations. That the same ought to be struck out for lack of merit. It submits that it is not aware of any of its members who feels discriminated as alleged by the Respondent as there is no complaint that has been made against it.

10. The Applicant submits that the directions contained in the Respondent's circular Ref No. ML&SP/TU/ELECTIONS/2021 dated 25th September 2020 is in violation of Article 41(4)(a) and (b) of the Constitution of Kenya, Section 34 of the Labour Relations Act as well as Article XVIII read alongside Article XX of the Applicant's Registered Constitution.

11. The Applicant relies on the decision in **Kenya National Union of Nurses v Registrar of Trade Unions & 8 Others [2016] eKLR** in which the Court held that –

61. In this regard, the only provision in law is that trade unions should give a notice of the election of officials to the registrar of trade unions within 14 days of completion of the election and should issue direction or conduct of elections in accordance with the Unions' respective Constitutions.

62. Under Section 5(5) above, it is good practice but not mandatory that the Registrar of Trade Unions issues directions to ensure that elections are conducted in accordance with the law and respective Constitutions. To expect a Trade Union to therefore conduct elections in a particular way other than as per their Constitution and as per the members agreed norm is to interfere in the running of the affairs of the Union and is therefore against ILO Convention 98 on Freedom of Association and of the right to organize.

63. It is the finding of this Court therefore that the circular by the Registrar of Trade Unions of 25/11/2015 was unconstitutional and null and void to the extent of waiting to micro manage the affairs of the Appellant and insisting on who should supervise the elections without consideration of the Unions Constitution and provisions of the law and I declare it so.

12. The Applicant further relied on the decision in **Noah Rotich & 6 Others v Union of Kenya Civil Servants & Another**

[2018] eKLR, where Rika J. stated:-

"80. Section 34 of the Labour Relations Act 2007, as observed

*by this Court in **Petition Number 7 of 2016, Michael Ochieng Magugu v The Registrar of Trade Unions & 2 Others** requires Trade Union elections are conducted in accordance with their registered Constitutions. Trade Union Constitutions under subsection 2[a] of Section 34, shall not contain a provision which discriminates unfairly between Incumbents and other Candidates in elections. The elections of 27th October 2016 were conducted in accordance with the registered Constitution of the 1st Respondent. There is nothing in the Union Constitution shown to have discriminated unfairly between Incumbents and other Candidates. The 1st Petitioner was indeed an Incumbent Chairman, who was defeated by a new Candidate. The power of incumbency does not appear to have been determinative in the elections.*

82. There is no basis to restrain the 1st Respondent from implementing its new Constitution. Even had the Petitioners established that elections were conducted very badly, what has this to do with implementation of the new Union Constitution "How will the Union function without its duly registered Constitution" The Constitution regulates other affairs of the Union, not just the conduct of elections.

*85. The 2nd Respondent, Registrar of Trade Unions likewise, does not conduct trade union elections. As observed by the Court in **Aloise A. Otiende v Boniface Munvao**, Public Authorities do not exercise control over trade union electoral processes. The role of the Registrar under Section 34 of the Labour Relations Act, is to register elected Officials, and may also issue directions to ensure elections are conducted in accordance with Section 34 of the Act, and in accordance with trade union Constitutions. Trade Unions retain the right to self- regulate. The Court cannot order the 2nd Respondent to oversee elections. The law does not allow her to do so."*

13. The Applicant submits that the Respondent has no right whatsoever to challenge the manner in which the Applicant conducts its affairs

with regard to its registered constitution. That unless proof is exhibited by the Respondent that the Applicant's constitution is unlawful, this Court ought to grant it prayers as prayed in the Applicant's application and statutory statement herein.

Respondent's Submissions

14. The Respondent's submits that in issuing the impugned directive, it acted in accordance with its statutory mandate under Section 34(2) and 34(5) of the Labour Relations Act which provides –

(2) The constitution of a trade union, employers' organisation or federation shall—

(a) not contain a provision that discriminates unfairly between incumbents and other candidates in elections; and

(b) provide for the election, by secret ballot, of all officials of a trade union at least once every five years.

(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.

15. It is submitted that although Article 41(4) of the Constitution of Kenya 2010 protects the right of every trade union to determine its own administration, programs and activities, Section 24(1) of the Constitution provides that such right may be limited by law to the extent that such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including the need to ensure that the enjoyment of the rights and fundamental freedoms by any individuals does not prejudice the rights and fundamental freedoms of others. That freedom from discrimination is protected under Section 34(2) of the Labour Relations Act and Article 27 of the Constitution.

16. It is submitted by the Respondent that the Applicant Union was formed on 9th August 2014 when most of its current officials were elected. That it is these officials who were adopted as interim officials as no elections as envisaged under Section 34 of the Labour Relations Act have ever been held by the Applicant. The Respondent relies on the decision in **Noah Rotich and Others (supra)** where the Court observed –

*"80. Section 34 of the Labour Relations Act 2007, as observed by this Court in **Petition Number 7 of 2016, Michael Ochieng Magugu v The Registrar of Trade Unions & 2 Others** requires Trade Union elections are conducted in accordance with their registered Constitutions. Trade Union Constitutions under subsection 2[a] of Section 34, shall not contain a provision which discriminates unfairly between Incumbents and other Candidates in elections. The elections of 27th October 2016 were conducted in accordance with the registered Constitution of the 1st Respondent. ..."*

17. It is submitted that the constitution of the Applicant discriminates unfairly between the incumbents and other candidates as it locks out other members who may wish to vie for national office positions.

18. It is further submitted that officials of the Applicant were appointed on an interim basis and by virtue of Article XX of the Applicant's constitution, automatically became office bearers for the first term and are eligible for re-election according to Article XVII thereof.

19. The Respondent submits that under Section 3 of the Judicature Act which provides for the hierarchy of laws in Kenya, the National Constitution is the Grundnorm followed by the Acts of Parliament and thereafter all other laws and regulations are subsidiary. It therefore follows that the constitution of a trade union, being an agreement among the members of the union, does not take precedence over an Act of Parliament.

20. It submits that the directive that was issued is well within the Respondent's statutory mandate and cannot be declared unconstitutional simply because it goes against an Article of the Petitioner's constitution which is discriminatory and contrary to Section 34 of the Labour Relations Act and Article 27 of the Constitution of Kenya 2010.

Determination

21. I have considered the pleadings and submissions by the parties. I have further considered the authorities cited by the parties.

22. The issue for determination is whether the Ex Parte Applicant has met the threshold for grant of the orders of certiorari, prohibition and mandamus as sought in the application dated 24th May 2021.

23. The circumstances under which orders of judicial review may be granted were set out by **Justice Kasule** in the Uganda case of **Pastoli v Kabale District Local Government Canal & Others (2008) 2EA 300 at pages 300-304.**

"In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.

Illegality, is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of a law or its principles are instances of illegality ---.

Irrationality, is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.

24. Further the Fair Administrative Actions Act provides for institution of judicial review proceedings against administrative action or decision as follows in Section 7(2) –

(2) A court or tribunal under subsection (1) may review an administrative action or decision, if—

(a) the person who made the decision—

- (i) was not authorized to do so by the empowering provision;**
- (ii) acted in excess of jurisdiction or power conferred under any written law;**
- (iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;**
- (iv) was biased or may reasonably be suspected of bias; or**
- (v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;**

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action or decision was procedurally unfair;

(d) the action or decision was materially influenced by an error of law;

(e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;

(f) the administrator failed to take into account relevant considerations;

(g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;

(h) the administrative action or decision was made in bad faith;

(i) the administrative action or decision is not rationally connected to—

- (i) the purpose for which it was taken;**
- (i) the purpose of the empowering provision;**
- (ii) the information before the administrator; or**
- (iii) the reasons given for it by the administrator;**

(j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;

(k) the administrative action or decision is unreasonable;

(l) the administrative action or decision is not proportionate to the interests or rights affected;

(m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;

(n) the administrative action or decision is unfair; or

(o) the administrative action or decision is taken or made in abuse of power.

25. According to the Ex Parte Applicant the directions given in the Respondent's circular Reference No. ML&SP/TU/ELECTIONS/2021 dated 25th September 2020 is a violation of Article 41(a) and (b) as read with Section 34 of the Labour Relations Act. Article 41(4)(a) and (b) provide as follows:

(4) Every trade union and every employers' organisation has the right—

(a) to determine its own administration, programmes and activities;

(b) to organise; and

26. Further Section 34 of the Labour Relations Act provides as follows: -

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.

(2) The constitution of a trade union, employers' organisation or federation shall—

(a) not contain a provision that discriminates unfairly between incumbents and other candidates in elections; and

(b) provide for the election, by secret ballot, of all officials of a trade union at least once every five years.

(3) Notice of the election of officials under this section shall be given to the Registrar in the prescribed form within fourteen days of the completion of the election.

(4) Disputes arising from, or connected directly or indirectly to, elections held under this section may be referred to the Industrial Court.

(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.

27. The Ex Parte Applicant has not shown that the Respondent acted outside the provisions set out in Section 34 of the Labour Relations Act. The Applicant has further not demonstrated how the circular by the Respondent which was issued to all trade unions, employers' organizations and federations is in violation of Article 41(4) of the Constitution.

28. The Ex Parte Applicant has further not addressed the averments of the Respondent that its Constitution contravenes Section 34(2) of the Labour Relations Act as it discriminates unfairly between incumbents and other candidates who may wish to vie for elective positions.

29. Articles XVIII and XX of the Exparte Applicant's Constitution provides for establishment and functions of the Elections Board as follows: -

ARTICLE XVIII: ELECTION BOARD

- For the purposes of conducting elections, there shall be established an Election Board composed of 3 members of whom will elect a chairperson from among them one year before elections by National Executive Council.

- The National Executive Council shall provide the necessary facilitation to the board.

- A person to be nominated shall apply to the NEC upon notification by the General Secretary on the union website.

- He or She shall not be an official, candidate or an agent of any candidate either by inference or affiliation and shall be impartial

FUNCTIONS

- Receive applications from all aspirants at national and branch level.

- They shall vet and shortlist all successful candidates who meet qualifications stipulated in this constitution, chapter 6 of the Kenya constitution or any other applicable law.

- Prepare the delegates list as provided by the election guideline.

- The term of the National Elections Board will end upon inauguration of all the National officers of the union.

- Conduct Branch and National elections in line with this constitution.

- They will receive, consider, arbitrate and resolve all complaints arising from the elections within 2 weeks from the date of election.

30. Article XX provides for interim officials as follows –

ARTICLE XX - INTERIM OFFICIALS

1. Names of Interim officials of the Union shall be forwarded to the National Labour Board together with the application for the registration of the Union.
2. The officials shall constitute the interim National Executive Council and their role shall be as stipulated under Article IX.
3. The interim officials will automatically become national office bearers in their respective offices for the first term and will afterwards be eligible for re-election according to Article XVIII above.
4. The interim officials automatically become registered members of the union.

31. Article XX does not state the term of office of the interim officials who converted to National officials. It also does not address the fate of branch officials who have never been subjected to elections. Further Article XVIII does not empower the Elections Board to set a calendar of Elections, which is a preserve of the Respondent under **Section 34(3) of the Labour Relations Act**.

32. Article XX of the Ex Parte Applicant's Constitution must hence be read in context with Section 34(3) of the Labour Relations Act to mean that the first term is in relation to the notice of elections issued by the Respondent under that Section. This would mean that the term of the interim national officials comes to an end when the immediate next elections are called by the Registrar of Trade Unions, the Respondent herein.

33. I find that the Ex Parte Applicant has not demonstrated that the circular by the Respondent dated 25th September 2020 is illegal, unprocedural or unfair or unfair as alleged by the Ex Parte Applicant.

34. From the foregoing, I find that the Ex Parte Applicant has not met the threshold for grant of the orders sought with the result that the notice of motion dated 25th May 2021 is accordingly dismissed. There shall be no orders for costs.

35. In view of the fact that the timelines set out in the Respondent's circular for union elections dated 25th September 2020 expires on 30th June 2021 which is less than 14 days from today, the Ex Parte Applicant is given up to 30th August 2021 to carry out both its branch and national elections. The Respondent will issue modified directions to the Ex Parte Applicant to that effect.

36. The Respondent is further at liberty to take administrative action to ensure that the Ex Parte Applicant's constitution meets the requirements of the Labour Relations Act including Section 34(2) thereof. **Further, Article XX of the Ex Parte Applicant's constitution will lapse upon the elections being held on or before 30th August 2021 and this fact should be reflected in its constitution.**

37. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF JUNE 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. 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 1B 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.

MAUREEN ONYANGO

JUDGE