



Benjamin & 3 others v Kenya Medical Practitioners Pharmacists and Dentists Union & another; Registrar of Trade Unions & 17 others (Interested Parties) (Petition E080 of 2021) [2021] KEELRC 1135 (KLR) (29 July 2021) (Ruling)

Magare Gikenyi J. Benjamin & 3 others v Kenya Medical Practitioners Pharmacists and Dentists Union & Commissioner of Labour; Registrar of Trade Unions & 17 others (Interested Parties) [2021] eKLR

Neutral citation: [2021] KEELRC 1135 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E080 OF 2021
NZIOKI WA MAKAU, J
JULY 29, 2021**

BETWEEN

DR. MAGARE GIKENYI J. BENJAMIN & 3 OTHERS PETITIONER

AND

KENYA MEDICAL PRACTITIONERS PHARMACISTS AND DENTISTS UNION 1ST RESPONDENT

COMMISSIONER OF LABOUR 2ND RESPONDENT

AND

REGISTRAR OF TRADE UNIONS & 17 OTHERS INTERESTED PARTY

RULING

1. The 1st Respondent's Preliminary Objection dated 22nd June 2021 in opposition to the Petitioners' Notice of Motion Application is to the effect that:
 - i. That the Petition and Application are frivolous, vexatious and otherwise an abuse of the court process as the same is an Election Petition under the Trade Unions Elections (Election Petition) Rules, 2014 filed as a Constitutional Petition.
 - ii. That the entire Petition and Application are frivolous, vexatious and otherwise an abuse of the court process as the same is filed outside time allowed under Rule 3 of the Trade Unions Elections (Election Petition) Rules, 2014 which requires that a petition to question the validity of an election under the Act shall be filed within seven (7) days after the date of the declaration of the results of the election.



- iii. That the declaration of the results of the election in dispute herein was made on 6th May 2021 and this Petition was filed on 27th May 2021.
 - iv. That due to the foregoing grounds, the suit cannot be sustained and ought to be struck out with costs in favour of the 1st Respondent.
2. Counsel for the 1st Respondent submitted that the petition should have been lodged within the time prescribed in Rule 3 of the Trade Unions Election Petition Rules and whereas the results were declared on 6th May, the Petition is dated 27th May 2021. The 1st Respondent relies on the case of *Mukisa Biscuit v West End* that a preliminary objection is on a pure point of law.
 3. The Petitioners are opposed and Counsel for the Petitioners submitted that they oppose the preliminary objection because there is no substantive Statute but the Labour Relations Act under Section 34(1) provides that the elections be conducted in accordance with the Constitution of the Trade Union. That in line with the provision of appeals once declaration of results is made, Part 10 of the constitution of the Union spells out at para 7 that election disputes are to be settled by the Independent Electoral Committee (hereinafter ‘the Committee’). He argued that instead of the Committee hearing the appeal, it proceeded to validate the results and it was his submission that the declaration of results becomes final after the exhaustion of the Appeals process. Counsel argued that such a determination has never been made to date and time has not started running as the process has been challenged. He further argued that had they come before the process of appeal was finalised an issue would arise that they came to Court prematurely. He submitted that the time in Rule 3 of the Trade Union Election Rules has not lapsed and that the Court has the jurisdiction to hear and determine the Petition with one of the issues to be determined being the failure to make a final determination of the appeals that were lodged. The Petitioners’ advocate prays the preliminary objection be dismissed with costs.
 4. In a brief rejoinder, Counsel for the 1st Respondent submitted that he agrees the Labour Relations Act is the guiding Act and that the Minister made the rules pursuant to Section 83. He argued that the Petitioners admits the declaration was made on 6th May while the Rules require the Petition to be made in 7 days and that they cannot hypothesize on what would have happened had the Union internal organs moved. He submitted that the prayers seek redress on the declaration of the result and that the 1st Respondent thus prays the preliminary objection be granted and the Court proceeds to strike out the suit for being out of time.
 5. The preliminary objection taken is well founded as it relates to the law. It is asserted by the 1st Respondent that the suit was filed out of time. Section 83 of the Labour Relations Act, 2007 provides that the Minister may, after consultations with the Board, make regulations on any matter for the better carrying out of the provisions of the Labour Relations Act. Pursuant to this delegated authority to make law, the Minister prescribed the Trade Unions Elections (Election Petition) Rules, 2014. Rule 3 thereof provides that a petition to question the validity of an election under the Act shall be filed within seven days after the date of the declaration of the results of the election. Additionally, Section 34 (4) of the Labour Relations Act provides that disputes arising from, or connected directly or indirectly to, elections held under Section 34 may be referred to the Industrial Court, read Employment & Labour Relations Court.
 6. It is the 1st Respondent’s case that the Petitioners failed to lodge their petition against the Union’s elections within the time prescribed by the Trade Unions Election Petition Rules while the Petitioners’ case is that the Electoral Committee has failed to make a final determination on their appeal and thus the Petition before this Court. The Court takes note of the averments in the Replying Affidavit to the



Petitioners' Notice of Motion dated 27th May 2021 made by the 1st Interested Party who is the Registrar of Trade Unions. She depones that she received a report of the elections on 7th May 2021 and went ahead to register the names of the officers and that she then received a letter of objection to the elections through email, which she responded indicating the objection was out of time. Her reasons were that by the time she received the objection on 11th May 2021, the election results had already been registered and no objection had been raised when the said results were presented to their office as indicated in the constitution of the union. It is noteworthy that whereas the elections were held on 6th May 2021, the Petitioners filed their objection on the same with the Registrar in 4 to 5 days as confirmed by the 1st Respondent and also filed their appeals within the required 7 days as exhibited in their supporting affidavits to the Motion and Petition.

7. Under Section 3 of the *Judicature Act*, the hierarchy of laws in Kenya include the Constitution of Kenya as the grund norm followed by Acts of Parliament and all other laws and regulations follow thereafter as subsidiary. Consequently, the constitution of a trade union being an agreement among the members of the union does not take precedence over an Act of Parliament. As to whether the Petition as filed by the Petitioners is competent, this Court is persuaded by the holding of the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2015]* eKLR at para 39 and 40 that:

“...Any question as to the competence of the cause, therefore, falls under “form”, as opposed to “jurisdiction”. Was the filing of this appeal irregular? As submitted on behalf of the 1st and 3rd to 8th respondents, the appellant had filed a petition akin to an originating petition contemplated by Section 12 of the Supreme Court Act, 2011 and Rule 9 of the Supreme Court Rules, 2012 – instead of a petition of appeal pursuant to Rule 33 of the Supreme Court Rules, 2012. The argument by counsel for the 1st, 3rd to 8th respondents was that, the originating petition which bore a statement of facts, grounds of argument, and reliefs sought – accompanied by an affidavit – contained elements reserved for this Court’s original jurisdiction, and therefore, exceeded the ambit of Article 163(4)(a) of the Constitution. The appellant in response, submitted that the issues in the appeal were confined to questions raised in the election petition, and to those determined by the superior Courts; and as such, the appeal fell squarely to this Court’s appellate dispensation.

We are clear that an appeal of this kind should not be held to fail on mere account of form. Although the Rules of this Court give guidance on the form which an appeal should take, we are cognizant of the fact that Article 159(2)(d) of the Constitution accords precedence to substance, over form. Rule 3(5) of the Supreme Court Rules, 2012 empowers us to invoke our inherent power to make such Orders and directions as are necessary for the attainment of ends of justice, and to prevent abuse of Court process. In this regard, and in order to serve the sanctified task of interpreting the Constitution, and for the purpose of resolving this protracted electoral dispute, we are guided by Article 159(2)(d) – towards saving this appeal for determination on merits. The presentation form in this appeal, by no means violates the mandatory tenets of the Constitution, or the law, so as to compel the striking out of the appeal in limine. Though the petition is presented in its current form, our determination of the appeal will focus only on the issues canvassed....”

8. The appeal having been lodged in time, the Petitioners approached the Court in line with the law as an appeal was presented within the 7 days window provided for in the law as the challenge was made on 11th May 2021 within 5 days of the declaration of the results. The preliminary objection is dismissed with no order as to costs.



So ordered.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JULY 2021.

NZIOKI WA MAKAU

JUDGE

