



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NYERI**

**CAUSE NO.E005 OF 2021**

***(Before D.K.N.Marete)***

**PATRICK MWANGI MAINA.....1ST CLAIMANT**

**AARON MWANGI MUHAMI.....2ND CLAIMANT**

**BEATRICE NYANGAU NDUNGU.....3RD CLAIMANT**

**VERSUS**

**KENYA UNION OF POST PRIMARY EDUCATION**

**TEACHERS (KUPPET).....1ST RESPONDENT**

**REGISTRAR OF TRADE UNIONS.....2ND RESPONDENT**

**LABOUR OFFICER NYERI COUNTY.....3RD RESPONDENT**

**JUDGMENT**

This matter was originated by way of a Memorandum of Claim dated 8th February, 2021. The issues in dispute are therein cited as;

- a) *Whether there was a credible free and fair election held on 30.01.2021 at 1<sup>st</sup> Respondent's Nyeri Branch.*
- b) *Whether the orders sought of nullification of the purported elections should be granted.*

The 1st Respondent in a Replying Affidavit sworn on 16th February, 2021 denies the claim and prays that it be dismissed with costs.

The 2nd and 3rd Respondents Grounds of Opposition dated 26th February, 2021 comes out thus;

1. *That the Application is not supported by factual evidence and/or the Law.*
2. *That the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' participation in the impugned elections was limited to the performance of their statutory duties under the Labour Relations Act, 2007.*
3. *That the burden of proof in election disputes lies on the party challenging the elections and the same has not been discharged by the Applicants herein.*
4. *That the orders sought cannot issue at this interim stage as the same is tantamount to allowing the 1<sup>st</sup> Respondent's branch to operate in a vacuum without officials contrary to the relevant legal provisions.*
5. *That the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are innocent third parties being dragged into the internal wrangles between the 1<sup>st</sup> Respondent and its officials.*
6. *That the Applicants have failed to demonstrate how the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were involved in any election malpractices*

*either as alleged or at all.*

*7. That the Applicants have not come to equity with clean hands and are seeking to enjoy the benefits of a court of equity.*

The Claimant's case is that the 1st Respondents Nyeri Branch conducted an election of office bearers on 30th January, 2021 where the claimants were contesting various positions.

The Claimant's further case is that the said elections presided over by the 3rd Respondent were not credible, free or fair as it was marred with election malpractices in total disregard of Kuppet constitution and rules and also the Labour Relations Act, 2007.

It is their other case that following the discontentment that arose during the voting exercise and an announcement of illegal results they wrote to the 3rd Respondent on 2nd February, 2021 seeking an opportunity to inspect the voters register. This was however, denied.

The 1st Claimant avers that following an admission of strangers to the membership of the 1st Respondent to participate in the impugned elections of 30th January, 2021 and the conduct of the 1st Respondent, the claimant wrote to the 2nd Respondent seeking suspension of registration of the elected officials.

The Claimants further case is that the elections of 30th January, 2021 for the 1st Respondent Nyeri Branch were riddled with the following malpractices;

- a) Allowing persons who are not members of the 1<sup>st</sup> Respondent to participate in the elections by voting.*
- b) Failure to cross names off the register of voters during entry by voters into the voting hall.*
- c) Failure to observe identification procedure where persons were allowed to vote without presenting their original identity cards and pay slips.*
- d) Voter bribery.*
- e) Crossing names off the voters register for persons who did not participate in the election on 30.01.2021.*
- f) Failure to seal the ballot boxes.*
- g) Counting cast ballots that were not stamped.*
- h) Failure to use indelible ink when marking members who had voted.*

These faulted Article 13 of the Kuppet constitution and rules and section 34 of the Labour Relations Act, 2007

They pray as follows;

- a) A declaration that the Respondents' elections held on 30.01.2021 were null and void for flouting the union's constitution and the Labour Relations Act on conduct of branch elections.
- b) An order for the Respondents to pay the Claimants' costs of the claim plus interest thereon.

The Respondents did not file a response to the claim. Instead they opted to rely on their Replying Affidavit and grounds of opposition filed in opposition to the claim. These oppose the claim and lay their respective positions on it.

The issues for determination therefore are;

1. If the claimant fail to adhere to the doctrine of exhaustion of remedies under the constitution of the 1st Respondent.
2. Whether there was a credible, free and fair elections held on 30th January, 2021 by the 1st Respondents Nyeri branch?
3. Whether the claimant is entitled to the relief sought?
4. Who bears the costs of this cause?

The 1st issue for determination is whether the claimant failed to adhere to the doctrine of exhaustion of remedies under the constitution of the 1st Respondent. The Claimants in answer to paragraph 5 of the Replying affidavit sworn on 16th February, 2021 which employs Article 22.0 (c) and Article 8.12.0 (d) of the Kuppet constitution which dictates on matters of committing a branch or the union to court without the authority of the secretary general. Article 8.12.0 (d) provides for the functions of the branch executive committee as out of keeping the union records on membership and reports to the secretary general.

It is their submission that the application of these articles of the constitution is misplaced as it relates to the functions of the Branch

Executive Committee and not the office of the Branch Executive Secretary that the 1st Claimant held. It is not relevant on elections irregularities and this is the province of section 34 (4) of the Labour Relations Act, 2007.

I agree. These cumulative provisions of the 1st Respondents constitution are not a bar to the claimants from seeking redress to court. They do not even address the subject matter, or at all. This answers the 1st issue for determination

The 2nd issue for determination whether there was a credible, free and fair elections held on 30th January, 2021 by the 1st Respondents Nyeri branch.

The Petitioner's in their submissions also reiterates their case and faults the conduct to the elections for not being credible free and fair. They were riddled with the following malpractices;

- a) *Allowing persons who are not members of the 1<sup>st</sup> Respondent to participate in the elections by voting.*
- b) *Failure to cross names off the register of voters during entry by voters into the voting hall.*
- c) *Failure to observe identification procedure where persons were allowed to vote without presenting their original identity cards and pay slips.*
- d) *Voter bribery.*
- e) *Crossing names off the voters register for persons who did not participate in the election on 30.01.2021.*
- f) *Failure to seal the ballot boxes.*
- g) *Counting cast ballots that were not stamped.*
- h) *Failure to use indelible ink when marking members who had voted.*

The 2nd and 3rd Respondents in their written submissions dated 10th March, 2021 submit that their role in the impugned elections was limited to the exercise and performance of statutory duties under the Labour Relations Act, 2007 for which they cannot be held liable.

Again, the 3rd Respondent, who was a presiding officer at the elections acted pursuant to the 1st Respondent constitution and section 33 and 34 of the Labour Relations Act. She was therefore an independent arbiter and third party who had no interest in the outcome of the elections. Any irregularities, if at all, cannot be attributed to her.

The 3rd Respondent was therefore not in charge of the voting exercise whose charge was the election official and the parties candidates and cannot be held responsible for malpractices, if at all, at the election.

The Claimants bring out a case of election malpractices and upheaval. They however failed to demonstrate this in evidence. Their cry of lack of credibility and unfairness cannot be pinned on any of the respondents. At least not in evidential prowess and provision.

The claim is therefore unsubstantiated and remains hollow. It lacks supporting evidence. It is not merited and should fail. This answers the 2nd issue for determination.

I am therefore inclined to disallow the claim with orders that each party bears the costs of the same.

**Dated and delivered at Nyeri this 26th day of July, 2021.**

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Mr.Mshila holding brief for J.Wangechi instructed by J.Wangechi & Company Advocates for the Claimants.
2. Miss. Akello instructed by Triple A.Advocates for the 1st Respondent.
3. Mr.Nderitu instructed by State Law Office for the 2nd and 3rd Respondents