



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CONSTITUTIONAL PETITION NO 8 OF 2020

IN THE MATTER OF A PETITION BY ROMAN WAEMA, LUCY KANYI AND

AHMED OMAR

AND

IN THE MATTER OF ARTICLES 22 AND 23 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ARTICLES 10,19,20,27,36,41,47,50 AND 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTIONS 4(2),4(3),25(3),25(4),28,29,34,35,36,42,43,44 AND 45, LABOUR RELATIONS ACT NO 14 OF 2007

AND

IN THE MATTER OF SECTION 12 OF THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT, 2011

AND

IN THE MATTER OF SECTION 4 AND 7 OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015

AND

IN THE MATTER OF TRADE UNIONS REGULATIONS, 2012

AND

IN THE MATTER OF TRADE UNIONS (ACCOUNTS) REGULATIONS, 2012

BETWEEN

ROMAN WAEMA.....1ST PETITIONER

LUCY KANYI.....2ND PETITIONER

AHMED OMAR.....3RD PETITIONER

AND

NICHOLAS MBUGUA.....1ST RESPONDENT

PETER NJUNG'E.....2ND RESPONDENT

GRACE NYAMBURA.....3RD RESPONDENT

KENYA LONG DISTANCE TRUCK DRIVERS

AND ALLIED WORKERS UNION.....4TH RESPONDENT

REGISTRAR OF TRADE UNIONS.....5TH RESPONDENT

RULING

1. This ruling relates to the Petitioners' Notice of Motion dated and filed in court on 17th March 2021 by which the Petitioners seek the following orders:

a) An order staying the assumption of office and/or upon assumption of office, the exercise of any and all duties, roles and functions, responsibilities and/or obligations of any and all offices and/or office bearers of the 4th Respondent Union elected vide the undisclosed election exercise conducted on 16th March 2021;

b) An order restraining the officers and/or office bearers of the 4th Respondent Union elected vide the undisclosed election exercise conducted between 1st February 2021 and 16th March 2021, whether by themselves, their agents, servants, employees, representatives and/or assigns from any and all acts and/or omissions amounting to and/or capable of construction to amount to the assumption of office and/or exercise and/or performance of any and all acts and/or omissions amounting to and/or capable of construction to amount to the duties, roles, functions, responsibilities and/or obligations of the respective offices;

c) That the orders subject to prayer (b) above be served upon the 5th Respondent, the entire membership of the 4th Respondent Union and COTU for purposes of ensuring compliance therewith, while safeguarding the interests of the 4th Respondent's members;

d) An order compelling any and all office bearers of the 4th Respondent elected vide the undisclosed election exercise conducted between 1st February 2021 and 16th March 2021 to unconditionally vacate the respective offices.

2. The Motion is supported by the Petitioners' joint affidavit and is based on the following grounds:

a) That vide ruling delivered on 5th November 2020, the Court directed as hereunder:

i) The parties are directed to take steps towards setting down the main Petition for hearing by *viva voce* evidence on priority basis;

ii) In the intervening period, the parties are restrained from taking any action that may be construed as interference with the subject matter of this dispute or intimidation of any party to the dispute.

b) That vide letter dated 21st January 2021, copied to all the Respondents, the Petitioners indicated *inter alia*, that:

i) The unprocedural, unfair, irregular, wrongful and/or corrupt practices by both Nicholas Mbugua and E.N Gicheha (Mrs) are deep-rooted, with both individuals colluding to *inter alia*:

· Surreptitiously, facilitate unprocedural, unfair, irregular, wrongful and/or corrupt elections through discrete issuance of a circular for elections to Nicholas Mbugua and non-dissemination of information as regards any elections to union membership, National Executive Committee and National Delegates Conference;

· Attempts to facilitate discrete, unprocedural, unfair, irregular, wrongful and/or corrupt elections.

ii) The 1st Respondent has unprocedurally and unlawfully proceeded to conduct discrete, unprocedural, unfair, irregular, wrongful and/or corrupt elections without involving and/or informing the Court, the Petitioners and the membership of the 4th Respondent;

iii) The 5th Respondent has similarly unprocedurally and/or unlawfully facilitated and/or aided and/or abetted the 1st Respondent's conduct of the discrete, unprocedural, unfair, irregular, wrongful and/or corrupt elections.

c) That the Petition that, *inter alia*, challenges the viability of the 1st, 2nd and 3rd Respondents as office bearers of the 4th Respondent and the 5th Respondent as a State Officer is pending hearing and determination before this Court;

d) That it is therefore only proper that the Court grants the orders sought in this Motion.

3. The 1st, 2nd, 3rd and 4th Respondents field Grounds of Opposition on 19th April 2021 stating:

a) That the Petitioners' application is frivolous, vexatious and an abuse of the court process;

b) That the application is intended to frustrate and delay hearing and determination of the Petition, which had been listed for directions on 18th March 2021;

c) That in filing this application, the Petitioners purport to represent and seek orders in respect of the membership of the 4th Respondent;

d) That the 1st to 4th Respondents have not contravened the letter and spirit of the ruling delivered by the Court on 5th November 2020.

4. The 1st, 2nd, 3rd and 4th Respondents also filed a replying affidavit sworn by the 1st Respondent, Nicholas Mbugua on 1st April 2021.

5. Mbugua reiterates the Grounds of Opposition and further accuses the Petitioners of contravening the letter and spirit of the ruling delivered by the Court on 5th November 2020.

6. Mbugua states that in a letter dated 21st January 2021, issued by the Petitioners' Advocates, the Petitioners reported the 1st Respondent to the Ethics and Anti-Corruption Commission and the Directorate of Criminal Investigations, alleging embezzlement of public funds and corrupt practices.

7. Mbugua adds that in the aforesaid letter, the Petitioners reproduce their claim in the Petition and as it were argue their case against the 1st Respondent and involve over ten other public offices and institutions copied in the letter dated 21st January 2021.

8. Mbugua goes on to state that the aforesaid letter raises with third parties, matters of the Petition that are still pending in court.

9. I have looked at the pleadings filed by the parties in this application, which raise many matters of fact that are highly contested. It seems to me that the Petitioners, rather than proceeding to prosecute their Petition, in the manner directed by the Court in its ruling dated 5th November 2020, have chosen to pursue their case by way of affidavit evidence.

10. I have said before and I will say it again, that the issues raised in this Petition can only be efficaciously determined by way of *viva voce* evidence in a full trial.

11. In the result, the Petitioners' Notice of Motion dated 17th March 2021 is disallowed with costs to the Respondents.

12. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 8TH DAY OF JULY 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Ngonze for the Petitioners

Miss Wambui h/b for Mr. Waweru for the 1st – 4th Respondents

No appearance for the 5th Respondent