



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO E001 OF 2021

STANLEY KIPKURUI MUTA.....1ST CLAIMANT

CAXTON M. MIUNGI.....2ND CLAIMANT

TOM KITTU GWENGWELE.....3RD CLAIMANT

-VERSUS-

KENYA NATIONAL UNION OF TEACHERS.....RESPONDENT

RULING

1. Before this Court is the Claimants Application dated 9th April, 2021 filed through the firm of Rakoro and Company Advocates seeking the following Orders;-

a) That this Application be certified as urgent, service be dispensed with and the application be heard ex parte in the first instance.

b) This Honourable Court do enlarge time within which the form Q can be prepared and filled by the Kenya National Union of Teachers –KNUT through the secretary general Hon. Wilson Sossion- pursuant to the changes of officials-KNUT-Kericho branch after the election held on 13.3.2021 as the statutory period of 14 days within which form Q must be prepared, signed and sent to the registrar lapsed on 28.3.2021.

c) The respondent through the secretary general Hon. Wilson Sossion be compelled to prepare, fill and or sign and send to the registrar of trade Unions, the Form Q of the change of officials pursuant to the KNUT Kericho branch elections held on 13.3.2021, within 24 hours of service of this Order, or such other time as the Court may direct, pending the hearing and determination of this Application.

d) The registrar of trade unions be directed to receive and or act on the said form Q prepared, filled and or signed by the Hon. Wilson Sossion, or register the changes of the officials pursuant to the KNUT- Kericho branch elections held on 13.3.2021 with or without the form Q, within such time as the court may direct.

e) The costs of this Application be borne by Respondent and or Hon Wilson Sossion personally.

2. The Claimants Application is supported by the grounds on the face of the application and the supporting affidavit of the 1st Claimant, Stanley Kipkurui Mutai sworn on 9th April, 2021 on the following grounds;

a) That, the registrar of Trade Unions announced the elections of all trade unions for 2021 vide their letter of 25th September 2020. Consequently, KNUT issued circulars and notices for KNUT General elections on 10.11.202 and 6.1.2021 and KNUT –Kericho branch election were scheduled for 13.3.2021.

b) That the said election was carried out as scheduled and supervised by the County Labour Officer who submitted a report on 16.3.2021 that the said branch elections met the requirement of the Union constitution.

c) That the 1st Claimant herein was elected as the executive secretary garnering 312 votes while his challenger Ann Cheruiyot garnered 294 Votes.

d) It was stated that after elections the respondent through its secretary General, was to prepare, fill and forward Form Q, on the change of officials of the branch within the statutory 14 days from the date of elections.

e) That the Hon. Wilson Sossion has refused to fill the said form Q on claims that there is a complaint dated 15.3.2021 addressed to the registrar and copied to them, when the said complaints are within the purview of the registrar of trade unions not KNUT or the secretary general.

f) That the complainant's allegations that retired and transferred teachers voted during the said elections was not raised during voting but was only raised after the said complainant lost the said election as such the complaint was an afterthought.

3. The Respondent opposed this application and filed a replying affidavit sworn by Hon. Wilson Sossion, the Respondent's Secretary General, on the 28th April, 2021 and on the following grounds;

a) He stated that the election for KNUT-Kericho branch was scheduled for 13.3.2021 in contravention of the 14th presidential address on the prevention and containment of covid-19 pandemic which had banned any political gathering for 30 days leading to low turnout of voters.

b) That after the said branch elections, the respondent received a complainant addressed to the Registrar of Trade Unions and copied to it that complained inter alia of; 3 retired teachers voting, campaigns carried out till the day of elections, nominations carried out on the date of elections and a teacher transferred to another branch voting. This culminated to auditing of the voters register to ascertain the complaint therein.

c) That the complainant of the election malpractices filed a petition in Kericho Employment and Labour relations Court dated 6th April, 2021 and filed on 7th April, 2021 being Kericho ELRC Petition No. E005 of 2021; Ann Cheruiyot and 2 others –v- Stanley Mutai and 4 others. Which petition was filed prior to this Application.

d) He therefore stated that the reason for declining to fill Form Q was that the said elections are contested and subject to this Court's case mentioned above.

e) The respondent contends that this Court is barred by the doctrine of Sub-judice from hearing and determining this Application when the same is substantially and directly in dispute in ELRC Cause No. E005 OF 2021 which was filed prior to this Application.

f) The respondent contends that this Court lacks Jurisdiction to grant the Orders sought at this Interlocutory stage as the said orders are not part of the orders sought in the memorandum of claim.

4. The parties herein disposed of the application by way of written submissions with the Claimants filing theirs on the 11th May, 2021 and the Respondent filing on 2nd June, 2021.

Claimants' Submissions

5. The claimants/Applicant submitted that the County Labour officer who supervised the election affirmed that the same met the legal requirement as such the Secretary General to the union was to prepare and forward Form Q within 14 days in accordance with section 35(2) of the Labour Relations Act. He argued that the complaint raised by the complainant and the basis upon which the Respondent refused to fill form Q has no basis in law as the respondent is not barred from filling form Q for whatever reason. Further that if the respondent had any misgiving on the said election he ought to have raised the same within 14 days.

6. It was argued that the legal obligation of making enquiries as to the validity of any changes of officials rest with the registrar of Trade Union as provided for under Section 35(3) and (4) of the Labour Relations Act and not the Respondent.

7. Counsel buttressed his argument by citing the case of **Wilson Onduto (Suing as the secretary Elect, Kenya Scientific Research international technical institute workers union (Nairobi branch) & 2 others –v- Martin J. Oduor (sued as the secretary general, Kenya scientific research international technical institutions workers Union and another[2016] eklr** which Justice Ndolo Held that;

“It seems to me therefore that the 1st Respondent is abusing his statutory office as the secretary general of the 2nd Respondent by declining to sign form Q on account of Nairobi branch elections in which he lost. Consequently, the court compelled the secretary general to fill form Q and the registrar directed to register the same out of the statutory 14 days.”

8. On the allegation that the applicant filed this application belatedly as an attempt to steal a march from the petitioner in Kericho ELRC Cause No. E005 of 2021. Counsel submitted that the Respondent herein has failed to indicate to this Court when the said pleadings were served to then or the Union therefore he submitted that the application herein is not Sub-judice as alleged. Further that the election petition Number E005 OF 2021 Kericho is on legality of Election while this Application simply seeks to compel the secretary General to fill form Q as mandated by Law, therefore are not similar in substance as alleged.

9. Counsel submitted that the 1st Claimant intends to vie for the office of National Secretary General an office that Hon. Wilson Sossion is currently holding, therefore the Applicant alleges that Hon. Sossion actions are an attempt to block all his competitors from vying for the said office.

10. That the actions and inaction of the respondent and more so Hon. Sossion are illegal as they are an attempt to deny the members their right to be served by official of their choice against the expressed provision of the law and the Union Constitution which action this Court ought to frown upon.

Respondent's Submission

11. The respondent submitted that the Applicant's application is sub-judice in that the application seeks to enforce the results of an election whose legitimacy is the subject of the pending proceedings in Kericho ELRC Petition number E005 of 2021. He argues that the matter herein is directly and substantially in issue in the Petition which was filed prior to this Application. He further argues that the application herein is an abuse of court process whose end result is to flood the judicial system with multiple proceedings between the same parties litigating over similar subject matter thus exposing court of concurrent jurisdiction to the risk of issuing contradictory decisions. He buttressed his argument by citing the case of **Republic –v- Paul Kihara Kariuki, Attorney General & 2 others Ex-parte Law Society of Kenya [2020] eKLR** where the court held that;

“In several decisions of this court, I have stated that litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks. Pursuing two processes at the same time constitutes and amounts to abuse of court/legal process.[26] It matters not that the earlier suit was filed by the Branch of the LSK while the instant suit is filed by the main body.

40. Thus, the multiplicity of actions on the same matter the same parties even where there exists a right to bring action is regarded as an abuse.[27] The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right per se. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interface with the administration of justice.”

12. It was submitted that the applicant herein seeks to legitimize an election that was marred by irregularities contrary to the legal doctrine *ex turpi causa non oritur action*, which stipulates that out of an illegal act there can be no flow of a legal remedy and cited the case of **kenya Ports authority –v- Fadhil Juma Kisuwa[2017] eKLR**. Further that the elections were in violation of the president's directive issued on 12th March, 2021 banning any political gathering for 30 days in line with covi-19 containment measures. Therefore, he argues that the elections were a result of an irregularity.

13. The respondent submitted that six hundred members of the union participated in the impugned elections out of over Three Thousand members which was low and against Article XX(A)(1) as read with Article XI(3) of the union Constitution that provides for a voter turn-out for a valid branch election to be one-sixth of all members of the branch. He thus argued that the turnout of members did not meet the threshold as such the entire election were illegal null and void.

14. He further submitted that since the election were marred with irregularities there can be no valid, recognizable or registrable elections that will require the secretary general to fill form Q.

15. On whether the resolution of election dispute is a preserve of the office of the registrar of trade Union, it was submitted that since the formulation of regulations and determination of administrative programs fall within the ambit of the Union, then it follows that the union ought to determine any matter pertaining to the conduct of its activities and how the same are carried out. Accordingly, he argues that when the union was copied on the complaint of the elections carried out in the branch, they rightfully withheld the names of the official to allow the relevant authority interrogate the correctness of the process as such acted within its mandate.

16. The respondent thus urged this Court to dismiss the application as lacking merit.

17. I have examined the averments of the parties herein. Vide this court's Ruling on 4/3/21, elections were ordered to proceed without embodiments that had been placed by the respondents. The parties later agreed to proceed with elections for both branch and national level. The applicant's election proceeded on 13/3/2021.

18. The respondents aver that the elections were held in contention of the presidential direction on COVID where directives have not been submitted before this court.

19. It is however my finding that if indeed elections were held without following the proper regulations this is a matter for an election petition which petition has already been filed and is pending before this court.

20. It would be a duplication of my efforts to determine the legality or otherwise of the election in this application.

21. The election having proceeded whether legally or not, the prudent thing is to register the elected officials and deal with any after math during the petition.

22. In the circumstances I find this application is merited and allow it in the following terms;-

a) This Honourable Court do enlarge time within which the form Q can be prepared and filled by the Kenya National Union of Teachers –KNUT through the secretary general Hon. Wilson Sossion- pursuant to the changes of officials-KNUT-Kericho branch after the election held on 13.3.2021 as the statutory period of 14 days within which form Q must be prepared, signed and sent to the registrar lapsed on 28.3.2021.

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d) The respondents to bear cost of this application.

RULING DELIVERED VIRTUALLY THIS 7TH DAY OF JULY, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Okoth for Respondent – present

Rakoro for Claimant/Applicant – present

Court Assistant - Fred