



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NUMBER EO43 OF 2021 [CONSOLIDATED WITH PETITION NO. E093 OF 2021,

PETER L. LEMOOSA & 14 OTHERS v. REGISTRAR OF TRADE UNIONS & ANOTHER]

BETWEEN

- 1. FRANKLINE KABURU KINOTI**
- 2. CRISPUS KOINANGE WAWIRE**
- 3. ATHONY WANYONYI WASENA**
- 4. MOSES ONYANGO OPIYO.....PETITIONERS**

VERSUS

- 1. UNIVERSITY ACADEMIC STAFF UNION [UASU] EXECUTIVE,
KENYATTA UNIVERSITY CHAPTER.**
- 2. UNIVERSITY ACADEMIC STAFF UNION [UASU] SECRETARY,
KENYATTA UNIVERSITY CHAPTER.**
- 3. UNIVERSITY ACADEMIC STAFF UNION [UASU] CHAIRMAN,
KENYATTA UNIVERSITY CHAPTER ELECTIONS BOARD.**
- 4. REGISTRAR OF TRADE UNIONS.....RESPONDENTS**

AND

KENYATTA UNIVERSITY.....INTERESTED PARTY

Rika J

Court Assistant: Emmanuel Kiprono

Musyoki Mogaka & Company Advocates for the Petitioners [Petition E043/ 2021]

Guserwa & Company Advocates for the 1st and 2nd Respondents [Petition EO43/2021]

Mwae & Associates, Advocates for the 3rd Respondent [Petition E043/2021]

Attorney-General for the 4th Respondent [Petition E043/2021]

JUDGMENT

1. Petition No. O43/2021 was initiated on 28th March 2021. The Petitioners seek the orders below: -

- a. Declaration that the act of the Respondents disenfranchising the 3rd and 4th Petitioners and their 145 other colleagues, by excluding them from the voters' register of the 12th February 2021, and their further neglect of the advice of the Registrar of Trade Unions, violates the Petitioners' right to participate in the lawful elections of the Union as guaranteed under Article 41[2][c] of the Constitution, as read with Section 4[2] of the Labour Relations Act No. 14 of 2007.
- b. A permanent order restraining and/or prohibiting the 4th Respondent from registering the winners of the UASU Kenyatta University Chapter elections, held on 25th March 2021.
- c. An order of mandamus to compel the Respondents to nullify the elections of 25th March 2021 and order for fresh elections.
- d. An order of mandamus compelling the Respondents to forthwith update its voters' register issued on the 12th February 2021, by including the 147 disenfranchised members of the Union, within reasonable time, to ensure the legitimate voters participate fully in fresh elections.
- e. Costs of this Petition.
- f. Any other suitable order.

2. Filed simultaneously with the Petition is an Application for conservatory orders. The same was placed before the Court under Certificate of Urgency, on 29th March 2021. The Court granted an order directing the 4th Respondent to hold back registration of the winners in the elections of 25th March 2021.

3. **Petition No. EO93/2021** was presented on 26th July 2021 by the incumbents. They are: Peter L. Lemoosa, Dr. Wilfridah Itolondo, Dr. George L. Makokha, Dr. Calvin Kayi, Dr. Kisa Amateshe, Dr. Eliud Obere, Dr. Stephen Nzoka, Dr. Mark Obonyo, Dr. Daniel Akunga, Mohammed Dekow, Dr. Joseph Mahiri, Dr. Magero Bunyasi Fedulius, Ms. Florence Akinyi, Professor Fuchaka Waswa and Dr. Elizabeth Katam. They state in their Petition that they have sued in their own capacities, and as delegates and officials of UASU, Kenyatta University Chapter.

4. The latter Petition was prompted by the National Delegates Conference of the National Union, UASU, which was scheduled to take place on 23rd June 2021. National elections were to be held at the NDC, and the Petitioners sought to participate in that exercise, representing the Kenyatta University Chapter.

5. They sought conservatory orders in an Application dated 17th June 2021, staying implementation of a letter issued by the Registrar of Trade Unions, dated 11th May 2021. The Registrar had advised UASU that the Chapters whose election results had not been registered by the Registrar, could not participate in the NDC. The Kenyatta University Chapter fell in this category.

6. It is noted that in Petition No. 043/2021, there was already an order from this Court, staying registration of the Kenyatta University Chapter election results, pending hearing of the Application presented by the Petitioners herein.

7. The Court, on 1st July 2021 considered the Application dated 17th June 2021, issuing the following orders: -

- a. Petition EO43/2021 and Petition E093/2021 are consolidated.
- b. The status of officials of Kenyatta University Chapter is disputed, and none can at this time represent the Chapter at the NDC.
- c. The Court would be validating the position of officials whose status is disputed, by allowing the Application.
- d. Let the NDC go on, without Kenyatta University Chapter.
- e. The Consolidated Petitions shall be heard on a priority basis.

8. The substantive prayers in Petition No. 093/2021 are: -

- a. A permanent order be issued, staying implementation of the Respondent [Registrar's] letter dated 11th May 2021, locking out the Petitioners from participating in the Interested Party's [UASU] National Delegates Conference, scheduled for 23rd June 2021 or any other date, without the participation of the Petitioners.

b. The Interested Party [UASU] is directed to include the names of the Petitioners in the UASU National Delegates Conference, on 23rd June 2021, or any other future date.

9. On 15th July 2021, the Court directed that the Petitions are considered and determined on the strength of the respective records. Judgment was reserved for 7th October 2021. It has however been completed, earlier than the date given. It is noted that the Parties, at the last virtual mention before the Court, impressed upon the Court on the need to have an expeditious determination of the substantive dispute. The Court has no reason to wait until 7th October 2021, and has directed its Registry, that Parties are notified of delivery of Judgment, on the date indicated at the end of this Judgment.

10. The Court is disinclined to allow the substantive prayers in Petition O93/2021. The inclusion of the Petitioners as representatives of Kenyatta University Chapter, at the NDC or any other participative platform, depends on the outcome of Petition 043/2021. The Petitioners' mandate as officials of the Kenyatta University Chapter expired. They were not registered as new officials by the Registrar. There is an order staying registration. It was correctly pointed out to the Petitioners, by the Registrar in her Replying Affidavit in Petition No. 093/2021, that Section 35[6] of the Labour Relations Act, bars a person who is not registered by the Registrar in accordance with the Act, from acting or purporting to act, as an official of a Trade Union.

11. To allow Petition No. 093/2021 would result in disregarding, what the law cited above, prohibits.

12. It is observed also, that the date of the NDC given in the Petition, is past. The inclusion of the Petitioners' names in future National Delegates Conferences would, as suggested elsewhere in this Judgment, depend on their official status at those future dates, in the Register of Trade Unions.

13. Ultimately the Court must reject Petition No. 093/2021. Ideally, this Petition should have been presented as an Application is Petition No. 043 / 2021. The Petitioners were aware of the subsistence of Petition No. 043/2021. It is not clear why, they opened another front in the same electoral dispute. Filing of multiple Claims, over the same, or similar disputes, interferes with the capacity of the Courts, to issue consistent pronouncements. It leads to judicial conflict and lawlessness. It is deprecated.

14. It is ordered that Petition 093/2021 is declined, with costs to the Respondents.

15. The Court turns to **Petition No. 043/2021**.

16. The Registrar issued a Notice to all Registered Trade Unions, Employers' Organizations and Federations, to hold their elections in 2021, under the 5-year cycle law, contained in Section 34 of the Labour Relations Act.

17. Union Branches were directed to conduct their elections from 4th January 2021 to 31st March 2021, while National Offices were to conduct theirs, from 1st April 2021 to 31st June 2021.

18. The Notice usually triggers a flurry of activities, subterfuge, intrigues and scheming in the Trade Union Movement. The Notice of 25th September 2020 was no different.

19. The Candidates in Kenyatta University Chapter rightly focussed on the voters' register, in preparation for the elections. The Petitioners sought from their Employer, list of Staff who pay agency fees. The Petitioners demanded and were allowed by the incumbent General-Secretary to scrutinize the membership register. It was alleged by the General-Secretary that the Petitioners ran away with the register after scrutiny! Scrutiny did however, unearth issues which are central to this Petition.

20. Complaints were lodged with the Registrar, by the Petitioners, that the incumbents closed the office in December 2020, which disenfranchised members who wished to update their subscription and thus be eligible to participate in the Chapter elections.

21. The Registrar wrote to the incumbent General- Secretary on 8th March 2021, indicating that a list of 80 legitimate members, who had been excluded from the register, had been submitted to her and the Chapter's Election Board. The Registrar advised that recruitment of members was an ongoing process, and that the incumbents should ensure that there was level playing ground. The Registrar advised that Section 33 [c] of the Labour Relations Act, provides that only members whose subscriptions were more than 13 months in arrears, should be ineligible to participate in the elections.

22. The Chapter's own Election Board through its Chair Sheikh Abdallah Bundid, confirmed that there were flaws in the process leading to the elections. In a letter dated 15th March 2021, he confirms that the Chapter's offices were closed from 17th December 2020 to 6th January 2021. There were members therefore, who were prevented from submitting their application forms. No alternative means of submitting the forms were provided. Staff who paid registration fee of Kshs. 500 through the Union's Bank Account were not included in the voters' register. The Election Board confirmed visiting the Chapter's offices, and finding them locked on the material dates. The Board also stated that it was not true, as held by the incumbent General-Secretary, that the voters' register had been updated. These anomalies are elucidated in an Affidavit sworn by Sheikh Abdallah Bundid on 7th May 2021. He states that he did his best in conduct of the elections, having raised all the concerns by the Parties. He concedes, the concerns were not rectified.

23. The concerns raised by the Petitioners, the Registrar of Trade Unions and the Chapter's Election Board were shrugged off by the incumbent General- Secretary. Notice that elections would be held on 25th March 2021, issued on 17th March 2021, barely 2 days, after the Election Board raised the concerns recorded at paragraph 21 above.

24. The rest is history. Elections took place on 25th March 2021, the elected candidates were not registered, and these Petitions ensued.

25. It is obvious that the process and outcome, did not conform to the Chapter's own constitution, The Constitution of Kenya and The Labour Relations Act. The incumbents rejected the counsel of its own Election Board and the Registrar, resulting in disenfranchising of legitimate members.

26. To borrow from the Supreme Court of Kenya in *Raila Amolo Odinga & Another v. Independent Electoral Boundaries & 2 Others [2017] e-KLR*, UASU elections of 25th March 2021, were full of illegalities and irregularities. The electoral principles coming out of this decision, ought to guide Trade Unions in conduct of transparent, fair and accountable elections. Processes that do not meet the high standards of democracy set in the decision, risk being reversed, irrespective of the outcomes. No candidate claiming success under such a flawed process, merits being placed in office. The process leading to elections, is as important as the actual voting on the election date. The Chapter's leadership bungled the entire electoral process.

27. The Court is satisfied that Petitioners' specified rights and freedoms under the Constitution and the Labour Relations Act, were violated. They, and others, were denied the basic right of participating in their Chapter's elections.

28. Trade Unions must embrace democratic culture and move with the rest of the country, under the Constitution. When Trade Unions embrace democratic culture, they merit greater institutional freedom of association, with less legislative intrusion. Trade Unions are voluntary organizations, entitled to self-government. Courts or other Public Authorities, would not interfere with their internal decisions, where democratic culture is ingrained. *In Industrial Court Cause No. 1650 of 2011, Aloise A. Otiende v. Boniface M. Munyao*, the Court emphasized that Trade Unions are voluntary organizations, which must be allowed to self-govern.

29. Self-government requires that there is internal democracy. It would not have been necessary for the Respondents to keep inviting the Registrar in, to assist in the electoral process, had the Union embraced internal democracy and demonstrated capacity to run a transparent, fair and accountable process. The role of the Registrar is to register Trade Unions and regulate them in accordance with the Act, not to conduct Trade Unions' internal processes. The Chapter had an Election Board, signifying its desire to self-government. The incumbents did not make it possible for the Election Board, to deliver a fair process and outcome. Failure by the incumbents, and apparent proclivity to tilting the playing ground in their favour, necessitated the constant intrusion of the Registrar of Trade Unions. The Registrar is a Public Officer, whose role is to register and regulate Trade Unions; this role does not include the running of Trade Union internal affairs.

30. The Court has come to the conclusion that the Petition is merited. *It is allowed*. The Petitioners' rights and freedoms under Section 4 of the Labour Relations Act, and Articles 36 and 41 of the Constitution in particular, were ravaged. It is not the mandate of any of the Respondents to nullify the elections, as suggested by the Petitioners, in their prayers; this role is exercised by the Court.

IT IS ORDERED: -

a. Petition No. 093/2021 is declined with costs to the Respondents therein.

b. It is declared that the 1st and 2nd Respondents in Petition 043/2021, violated the 3rd and 4th Petitioners' fundamental rights and freedoms under the Constitution of Kenya and the Labour Relations Act, by excluding them from the voters' register.

c. No registration shall be effected by the 4th Respondent, with regard to results from the elections of 25th March 2021.

d. The election results of 25th March 2021 are nullified.

e. The 1st and 2nd Respondents shall update the Chapter's voters' register, as advised earlier by the 4th Respondent.

f. Upon updating the voters' register; upon inspection of that register by members; and with the concurrence of the 3rd and 4th Respondents, the Kenyatta University UASU Chapter, shall hold fresh elections within 60 days of this Judgment.

g. No order on costs in Petition No. 043/2021.

Dated, signed and released to the Parties electronically, at Chaka, Nyeri County, under Ministry of Health and Judiciary Covid-19 Guidelines, this 20th day of August 2021.

James Rika

Judge