



**Benjamin & 40 others v Kenya Medical Practitioners & Dentists Union & another; Commissioner for Labour & 73 others (Interested Parties) (Petition E080 of 2021) [2021] KEELRC 2314 (KLR) (29 November 2021) (Ruling)**

Neutral citation: [2021] KEELRC 2314 (KLR)

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

**BETWEEN**

**DR MAGARE GIKENYI J BENJAMIN & 40 OTHERS & 40 OTHERS & 40 OTHERS & 40 OTHERS ..... PETITIONER**

**AND**

**KENYA MEDICAL PRACTITIONERS & DENTISTS UNION & ANOTHER & ANOTHER & ANOTHER & ANOTHER ..... RESPONDENT**

**AND**

**COMMISSIONER FOR LABOUR ..... INTERESTED PARTY**

**VELOCITY LIMITED ..... INTERESTED PARTY**

**PROF SHELBY DARNEL & 71 OTHERS & 71 OTHERS & 71 OTHERS & 71 OTHERS ..... INTERESTED PARTY**

**RULING**

1. The Petitioners/Applicants filed a Notice of Motion dated 27<sup>th</sup> May 2021 seeking several conservatory orders involving the 1<sup>st</sup> Respondent Union elections and the result of the said elections and restraining of any officials registered/gazetted as having been elected in the election, from conducting business for or on behalf of the 1<sup>st</sup> Respondent. They also seek for an order directing the Trustees of the Union as registered with the Registrar of the Trade Union, to provide for the meeting of administrative costs of the union including the payment of salaries for administrative staff in the interim period, pending a decision by members at an AGM/Annual Delegates Conference (ADC). Further, any other relief/modification of the Petitioners prayers which this Honourable Court may deem fit and for cost to be in the cause. The application is premised on the grounds that on 25<sup>th</sup> September 2020, the 1<sup>st</sup> Interested Party herein gave notice to all registered trade unions to hold elections of their officials, to



enable Central Organizations of Trade Unions (COTU) and Trade Union Congress of Kenya (TUC-K) hold their elections before 30<sup>th</sup> August 2021. That the 1<sup>st</sup> Respondent thus constituted a 5-member Independent Electoral Committee (IEC) for purposes of holding elections for new office bearers and that on an undated memo, the IC declared all seats/positions for branch and national office vacant for purposes of the 2021 Elections. They assert that the 1<sup>st</sup> Respondent's IEC then announced that the elections would be on 29<sup>th</sup> April 2021 but on the night of 28<sup>th</sup> April 2021, postponed the elections to 6<sup>th</sup> May 2021 due to purported unavoidable circumstances. The Petitioners aver that on the said 6<sup>th</sup> May 2021, elections took place through e-voting from 7am and polls closed at 6pm and that at around 6:45pm, results were projected showing 'winners' and 'losers' without verification from aspirants and IT experts. Further, the IEC then announced official results at around 8pm and gave notice for anyone disputing the results to file an appeal within seven days which would be determined by the committee within three days. That on the following day 7<sup>th</sup> May 2021, despite the filing of appeals against the said results, the 29<sup>th</sup> Interested Party herein hurriedly drafted Form Q and sent to the 2<sup>nd</sup> Respondent informing her of elections results and urging her to register/gazette the 'new officials'.

2. It is the Applicants' assertion that the handover ceremony of the tools of trade to the new officials took place and bank signatories hurriedly changed to the purported new officials contrary to Article XIV section (5) of the 1<sup>st</sup> Respondent's constitution and which constitution also provides for the assumption of Office to be after inauguration of the elected officials at the May Annual Delegates Conference. That the Petitioners and multiple aspirants have requested for end to end online audit verification and opening of servers for verification but their requests have borne no fruits. The Petitioners/Applicant assert that the actions of the 1<sup>st</sup> Respondent are illegal, irregular, irrational and discriminatory and that the said union elections were a sham especially because they and their IT experts could not monitor results before, during and after results. They generally question the activities of the 1<sup>st</sup> Respondent's IEC before, during and after the union elections and term the same unlawful and unprocedural and also note that the IEC concluded the elections before hearing all appeals and doing the election results' verification. The summary of their request to the 1<sup>st</sup> Respondent's IEC is that they want read-only server access to have in-depth verification of the voting and tallying processes up to the announcing of results and that theirs is not to have a repeat election. That nullification of results should only occur if it becomes difficult to know the winners of the said elections.
3. The Application is supported by the affidavits of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Petitioners who depone that their concerns is that the whole election process was not followed and that they as aspirants have not been allowed to verify the election results. That failure by the 1<sup>st</sup> Respondent to open the servers for scrutiny points to opaqueness of the electoral process and that it is in the interest of the union to embrace transparency and accountability.
4. In response, the 2<sup>nd</sup> Respondent and 1<sup>st</sup> Interested Party filed a Replying Affidavit sworn on 14<sup>th</sup> July 2021 by Elizabeth Gicheha who avers that the mandate of the 1<sup>st</sup> Interested Party is registration and regulation of trade unions, employer organizations and federations. She depones that in compliance with a circular directive by the 1<sup>st</sup> Interested Party, the 1<sup>st</sup> Respondent conducted elections that were presided over by The Commissioner for Labour - the 2<sup>nd</sup> Respondent herein who then delivered to her a report and notice of change of names of officers on 7<sup>th</sup> May 2021. That she considered the same and went ahead to register all the names in the Form Q and when an objection to the said elections was expressly raised with her in a letter sent through email on 10<sup>th</sup> May 2021, she responded indicating that the objection had been made out of time. It is her averment that nobody had raised any objection by the time the registration was done and she thus acted in good faith when she registered the names as presented to this Court within 30 days of her decision. That the suit herein was however filed on 11<sup>th</sup> June 2021, two days outside the statutory requirement, yet her decision was made and communicated



vide har letter dated 11<sup>th</sup> May 2021 and that the same should thus be dismissed. She further avers that the issue of transparency of the election is an issue between the Petitioners and the Respondents and the 1<sup>st</sup> interested party has no role to play on the issue and that the 1<sup>st</sup> Interested Party should not be condemned to pay costs for carrying out official duties.

5. In her Submissions, the 1<sup>st</sup> Interested Party relies on the case of *Hon. Justus Oloo Ageka & 6 Others v Registrar of Trade Unions & 2 Others* (2014] eKLR where Ndolo J. stated that the jurisdiction of the Industrial Court in matters of union registration is appellate in nature and that Section 30 of the Labour Relations Act specifically provides that any person aggrieved by a decision of the Registrar of Trade Unions may appeal against the decision to this court within thirty (30) days thereof. On the argument that the matter is time barred as no application was lodged against the 1<sup>st</sup> Interested Party within the timelines, she relies on the decision in *National Union of Water & Sewerage Employees & Kenya County Government Workers Union & 2 Others v Attorney General & 6 Others* [2014] eKLR.
6. The Petitioners/Applicants did not file any submissions and the decision is made notwithstanding this lapse on the part of the Petitioners/Applicants. The elections substratum of this Petition were held on 7<sup>th</sup> May 2021. The holding of elections after 1<sup>st</sup> May 2021 however is cause for concern as there was the issue of compliance with the requirement to unveil the officials at the Annual Delegates Conference held in May. The elections called by the 1<sup>st</sup> Respondent's Independent Electoral Committee were to be held on 29<sup>th</sup> April 2021 but curiously on the night of 28<sup>th</sup> April 2021, the IEC postponed the elections to 6<sup>th</sup> May 2021 due to purported unavoidable circumstances. Clearly, where a party alleges non-conformity with the law in regard to a particular election, the Petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did in fact affect the validity of the elections. It is on that basis that the Respondent herein bears the burden of proving the contrary. The Latin maxim *Omnia presumuntur rite et solemniter esse acta*: all acts are presumed to have been done rightly and regularly; comes into play. The Petitioner herein was required to avail credible evidence of the 1<sup>st</sup> Interested Party's departures from the prescriptions of the law in regard to the elections held. There was an abrupt change of date and in the Court's view, the result of this abrupt change prima facie leads to doubt as to the veracity of the poll as the acts of the 1<sup>st</sup> Interested Party's IEC seem irregular in that regard. In the Court's considered view there is reason to allow the opening up of the servers to verify the authenticity of the results. To that end the Court will issue an order directing the electronic record of the elections held on 6<sup>th</sup> May 2021 be availed within 48 hours of the Ruling herein and such access to be "read only" access to be supervised by the Deputy Registrar of this Court who should be facilitated by the Petitioners and 1<sup>st</sup> Respondent and 1<sup>st</sup> Interested Party in the exercise and the results of the scrutiny to be filed within 2 days of the access being granted. Matter will be mentioned on 14<sup>th</sup> December 2021 to ascertain the results and for further orders.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF NOVEMBER 2021**

**NZIOKI WA MAKAU**

**JUDGE**

