



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 121 OF 2018

CONSOLIDATED WITH NAKURU PETITION NO. 15 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL

RIGHTS AND FREEDOMS UNDER CHAPTER FOUR, ARTICLES 27(1),

36(1) AND 41(2)(C) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ARTICLES 1, 2, 3, 4(2), 10, 19, 20, 21, 22, 23, 27, 36, 41,47, 48, 50(1),

73, 75, 156, 159, 165, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED VIOLATION OF SECTION 4 AND 5 OF THE FAIR

ADMINISTRATIVE ACTION ACT 2015, SECTION 31(1), 33, 34 AND 35 OF THE LABOUR

RELATIONS ACT, 2007; SECTION 5 AND 7 OF THE LEADERSHIP AND INTEGRITY

ACT 2012; AND ARTICLE 14 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE LABOUR RELATIONS ACT

AND

IN THE MATTER OF UNION OF KENYA CIVIL SERVANTS

BETWEEN

JUSTUS KINYWA MUGO.....PETITIONER

VERSUS

UNION OF KENYA CIVIL SERVANTS.....RESPONDENT

AND

REGISTRAR OF TRADE UNIONS.....INTERESTED PARTY

JUDGMENT

The Petitioner herein vide his Petition dated and filed in Court on 5th November, 2018 contends that he was elected on 27th October, 2016 in the national elections of the Respondent trade union held at the Nyali International Beach Hotel, Mombasa. The Petitioner further contends that following his election to the position of National Treasurer he holds office by virtue of his election under the Constitution of the Union and Section 31 of the Labour Relations Act.

The Petitioner avers that on 13th July, 2017 the office of the Secretary General of the Union did proceed to write to the Registrar of Trade Unions, the Interested Party herein purporting that he (the Petitioner) had retired under the 50 year Rule and that as a result it was necessary to replace him as the National Treasurer under the provisions of Article 4 and Article 7(4) of the Constitution of the Union.

The Petitioner further avers that he did object to this scheme to illegally remove him from office vide his letter of protest to the Registrar dated 19th July, 2017 and that the Registrar subsequently responded via the letter dated 20th July, 2017 advising the union that the Petitioner was rightfully in office despite his resignation from Public Service by dint of Section 31 (1) of the Labour Relations Act.

It is further the Petitioner's contention that at the time of his election to office as National Treasurer he met the requirements of Section 7(4) of the Constitution of the union having been a Public Servant and a member of the Union an opinion that was equally shared by external lawyers of the union, Messrs Rachier Amollo Advocates LLP.

The Petitioner states that under Article 11 of the Constitution of the Union he is to hold office for a term of five (5) years and that Articles 4 and 7(4) of the Constitution of the Union are consequently inconsistent with the Constitution of Kenya, 2010 and Section 31(1) of the Labour Relations Act.

He further states that the Secretary General's actions are in violation of Articles 27(1) that guarantees him equal opportunity before the law and his entitlement to equal protection by the law as well as Article 36(1) of the Constitution of Kenya that guarantees him the right to participate in the activities of the union.

The Petitioner further contends that his rights as protected under Section 4(2)(c) of the Labour Relations Act that allows him the right to hold office having rightfully elected to the office of National Treasurer have similarly been infringed.

The Petitioner avers that by a letter dated 22nd October, 2018, the office of the Secretary General invited members of the National Executive Board for a meeting on 12th and 13th November, 2018 at which one of the agenda items was "*Legality of holding a National Office by Bro. Mugo*", which he (the Petitioner) saw as an attempt by the said office to create an issue from a non-issue for which he urged this Court for protection against the unconstitutional and unlawful attempts by the office of the Secretary General to remove him from office on tenuous grounds.

In his Petition he seeks the following reliefs:

1. A declaration that the Petitioner is entitled to hold office, and complete his term of office, as the National Treasurer of the Respondent.
2. A declaration that the Respondent and its officers and its organs including the National Executive Board, the Advisory Council, the National Delegates' Conference, the National Annual Delegates' Conference, the Special National Delegates' Conference and the National Administrative are not entitled to consider the removal of the Petitioner from the office of National Treasurer under the Constitution of the Respondent.
3. A declaration that the attempts by the office of the Secretary General of the Union to remove the Petitioner from office are unconstitutional, unlawful and ultra vires the Constitution of Kenya and the Labour Relations Act and in contravention of his rights.
4. A declaration that Article 7(4)(a) of the Constitution of the Respondent is unconstitutional, unlawful and ultra vires the Constitution of Kenya and the Labour Relations Act.
5. Costs of the Petition against the Respondent.

Given the urgency in this matter the Petitioner filed his Petition together with a Notice of Motion Application filed under Certificate of Urgency under Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016, Articles 27(1), 36(1) and 41(2)(c) of the Constitution of Kenya, 2010, Sections 4(2)(c) and 31(1) of the Labour Relations Act and all enabling provisions of the Law seeking the following orders:

1. This Application be certified urgent and be heard ex-parte in the first instance.
2. A conservatory order in the nature of injunction be issued restraining the officials of the Respondent, The Respondent National executive Board and other organs of the Respondent including the Advisory Council, the National Delegates' Conference, the National Annual Delegates' Conference, the Special National Delegates' Conference and the National Administrative from

considering the removal of the Petitioner as the National Treasurer of the Respondent pending hearing and determination of this Application.

3. A conservatory order in the nature of injunction be issued restraining the officials of the Respondent National executive Board and other organs of the Respondent including the Advisory Council, the National Delegates' Conference, the National Annual Delegates' Conference, the Special National Delegates' Conference and the National Administrative from considering the removal of the Petitioner as the National Treasurer of the Respondent pending hearing and determination of the Petition filed herein.

4. The costs of this Application be borne by the Respondent.

The Application was premised on the grounds that:

- a) The Petitioner's tenure as the National Treasurer is under imminent threat of being terminated.
- b) The Petitioner is the National Treasurer of the Respondent union having been so elected on 27th October, 2016 in the National Election held at Nyali International Beach Hotel, Mombasa.
- c) The Petitioner is entitled to hold office as an official of the Respondent union by virtue of Section 31(1) of the Labour Relations Act.
- d) By virtue of Article 27(1) of the Constitution of Kenya the Petitioner is entitled to equal protection and equal benefit of the law encapsulated in Section 31(1) of the Labour Relations Act having been employed in the Public Service sector for which the union was registered.
- e) The office of the Secretary General has been purporting that there is a question of legality of holding a National Office by the Petitioner.
- f) The 1st Assistant Secretary General one Jerry S. Ole Kina has been engaging in manoeuvres and machinations to remove the Petitioner from office.
- g) The Petitioner's right to hold office of the National Treasurer has been under attack from the office of the Secretary General and the threat has now become more real than perceived.
- h) By a letter dated 22nd October, 2018, the office of the Secretary General has invited members of the National Executive Board for a meeting on 12th and 13th November, 2018. One of the agenda items is titled "*Legality of holding of National Office by Bro. Mugo.*"
- i) The Petitioner is apprehensive that the intention of the inclusion of this agenda item "*Legality of holding of National Office by Bro. Mugo*" is to formulate a non-issue and conflate it into an issue to anchor his removal from office if prior goings-on and unsuccessful attempts at this scheme are anything to go by.
- j) The Petitioner deserves the protection of this Court against the unconstitutional and unlawful attempts by the office of the Secretary General to remove him from office on nebulous grounds in disregard of Section 31 (1) of the Labour Relations Act.
- k) If the attempts, manoeuvres, machinations and confluences of the office of the Secretary General through the 1st Assistant Secretary General and other officials or organs of the union are not halted they are likely to culminate in the removal of the Petitioner from office which will subject him to violation of his Constitutional and Statutory rights and cause him irreparable harm.

The Application is further supported by the Affidavit of JUSTUS K. MUGO, the Petitioner herein deponed on 5th November, 2018, in which he reiterates the averments made on the face of the Notice of Motion Application.

In Response to the petition and the Notice of Motion Application dated 5th November, 2018, the Respondent filed a Notice of Preliminary Objection dated and filed in Court on 9th November, 2018 raising the following grounds:

1. That the Petitioner does not merit the grant of the reliefs sought as he lacks *locus standi* to bring the said action against the Respondent.
2. That the Petitioner's suit and the said Application are incompetent, misplaced and bare of any reasonable cause(s), ground(s) or proof to warrant the grant of the Orders sought.
3. That the Petitioner's suit and said Application are fatally incompetent and are riddled with falsehoods, deceit and are an overwhelming display of an attempt to mislead this Court into granting the reliefs sought which are unmerited.
4. That consequently the said Application and the entire suit are scandalous, frivolous and vexatious and are otherwise an abuse to the Court process and both should be struck out with costs to the Respondent.

The Interested Party through the Office of the Attorney General filed a Replying Affidavit sworn by E. N Gicheha, the Registrar of Trade Unions in which she confirms that the Petitioner was duly elected to the position of National Treasurer on 27th October, 2016 following a directive by the Interested Party made in compliance with the provisions of Section 34(2)(b) of the Labour Relations Act.

She further contends that under Section 31(1) of the Act officials of a trade union or employer's organization shall be persons who are or have been engaged or employed in the sector for which the trade union or employer's organization is registered.

It is further the Interested Party's contention that there is no dispute that the Petitioner was a Civil Servant prior to his resignation to contest for a political position and that he was duly elected as the Respondent's National Treasurer.

The Interested Party further avers that the Petitioner is properly in office until he is lawfully removed in accordance with the provisions of the Constitution of Kenya, the Labour Relations Act and the Union Constitution. It is further contended that where the union's constitution is in conflict with the Act, the provisions of the Act take precedence.

The Interested Party avers that the grounds for removal of the Petitioner from the office of National Treasurer are as provided under Article 11 and 12 of the Union Constitution and that the Petitioner's resignation from employment is not one of the said grounds.

She further contended that the Provisions of Article 7(4) of the Union's Constitution only applies on election. In the circumstances the Interested Party urged this Court to allow the Application and Petition as prayed.

Submissions by the Parties

It is submitted by the Petitioner that he was lawfully and procedurally elected on 27th October, 2017 to the position of National Treasurer and that he is entitled to hold office for a period of 5 years as provided under Article 11(1), (2) and (3) of the Union Constitution. He further submitted that Section 35 (5) of the Labour Relations Act, 2007 as read together with Article 11(1), (2) and (3) of the Union's Constitution further prohibits the change of officials until the same is registered by the Registrar of Trade Unions. The Petitioner relied on the case of *Nairobi ELRC Petition No. 35 of 2018, Kenya National Union of Teachers & Wilson Sossion Vs Registrar of Trade Union & 2 Others.*

The petitioner contends that in light of the foregoing he was entitled to hold office of the National Treasurer until the expiry of his term on 26th October, 2022.

The Petitioner contends that the Respondent failed to follow the procedure in its attempt to oust him from office as a union official as stipulated under Article 11 and 12 of the Union Constitution and therefore there was no substantive justification and procedural fairness in the Respondent's action which is contrary to the Petitioner's rights as protected under Articles 47, 48 and 50 of the

Constitution of Kenya, 2010.

It is on this basis that the Petitioner contends that Articles 4 and 7(4) of the Constitution of the Union are inconsistent with the Constitution of Kenya, 2010 and the Labour Relations Act as they seem to claw back rights that have been guaranteed therein. He further contends that the two provisions are unlawful and ultra vires to the Constitution of Kenya. He urged the Court to declare them as such.

In conclusion the petitioner urged this Court to allow his Petition as drawn.

Respondent's Submissions

The Respondent on the other hand submitted that the Petitioner having resigned from his employment ceased being a civil servant and as such can no longer hold office of the National Treasurer having retired from service under the 50 year Rule, which retirement took effect on 15th February, 2017.

The Respondent contended that contrary to the provisions of Article 4(2) of the Union Constitution, the Petitioner's subscription to union membership is not up-to date. It is further the Respondent's contention that the petitioner is therefore not a member of the Union and therefore not eligible to hold a National Office pursuant to Article 7(4) of the Union Constitution.

In light of the above the Respondent submitted that the Petitioner was not eligible to hold office having not complied with the provisions of Article 4(2) of its Constitution as read with Article 7(4) of the union constitution.

The Respondent submitted that the petitioner has failed to demonstrate that his rights have been violated when his rejection is from members of the union who elected him and that he is not qualified to hold office having not been a fully subscribed member.

The Respondent further contended that the Petitioner is wrongfully and intentionally misinterpreting the law to suit his own interest. It urged this Court to dismiss the Petition with costs.

Interested Party's Submissions

The Interested Party submitted that the Petitioner is rightfully in office having duly been elected to that office.

It is further submitted that removal from office is clearly set out in Article 12 of the Union of Kenya Civil Servants Constitution, that

retirement from civil service is not a valid reason for removal under the Union's Constitution. The Interested Party submitted that the Petitioner having been elected is to hold office for a period of 5 years.

The Interested Party contends that the ouster of the Petitioner as decided in a National Executive Board Meeting held on 6th July, 2017 without notification to the Petitioner or according him an opportunity to be heard is contrary to the petitioner's right to Fair Administrative Action as envisaged under Article 47 of the Constitution of Kenya, 2010 as well as Section 4(3)(b) of the Fair Administrative Actions Act. The Interested Party relied on the case of *Republic Vs National Police Service Commission Ex-parte Daniel Chacha Chacha (2016) eKLR*.

In conclusion the Interested Party submitted that it has no legal ground to remove the name of the Petitioner as the National Treasurer of the Union from the register.

Analysis and Determination

Having considered the pleadings, evidence, submissions and authorities cited by the parties, the following are the issues for determination:-

1. Whether the Petitioner having been lawfully and procedurally elected on 27th October, 2016 can retain his position until expiry of his term as provided under the Union's Constitution.
2. Whether Articles 4 and 7(4)(a) of the Union's Constitution are inconsistent with the Constitution of Kenya, 2010 and the Labour Relations Act.
3. Whether the Petitioner is entitled to the reliefs sought in his Petition.

On Issue Number 1

The Petitioner contends that he was rightfully elected on 27th October, 2016 to the position of National Treasurer and that at the time of his election he had fully complied with the provisions of Article 7 (4) of the Union's Constitution. He further contends that upon his election he is to hold office for a period of 5 years as guaranteed under the provisions of Article 11(1), (2) and (3) of the Union Constitution.

It is the Petitioner's submission that Section 35(5) of the Labour Relations Court Act as read together with Article 11(1), (2) and (3) of the union constitution prohibits change of the officials until the same is registered by the Registrar of trade unions.

It was therefore the Petitioner's submissions that having been lawfully and procedurally elected he is entitled to hold office for the entire term of five years. He further submitted that his removal (if at all) must be in compliance with Article 11 and 12 of the Union Constitution and that the reasons cited for his ouster do not fall under the ambit of Article 11 and 12 of the said constitution.

The Respondent on the other hand submitted that the Petitioner ceased being a civil servant following his resignation from office to vie for an elective post (Nationally) in Manyatta Constituency, Embu County. It is on this basis that the Respondent averred that the Petitioner could no longer hold office of the National Treasurer as he was no longer a civil servant his retirement under the 50 year rule having taken effect from 15th February, 2017.

The Respondent further contended that the Petitioner was not a fully subscribed member of the union and had not complied with the provisions of Article 4(2) of the Union's Constitution and that pursuant to the provisions of Article 7(4) is not eligible to hold office within the Union.

The Respondent further submitted that a person can only hold office if he/she complies with Article 4(2) as read with Article 7 (4) of the Union's Constitution and that the petitioner is not eligible to hold office having not complied with the said provisions of the Union Constitution.

The Registrar of Trade Unions (the Interested Party herein) submitted that the Petitioner was lawfully elected and that he is to hold the office for a period of 5 years.

It is further submitted that the grounds stated for the Petitioner's ouster are not grounds set out in the Union's constitution. It therefore submitted that it had no reason or legal ground to remove the name of the petitioner from the register the National Treasurer of the union.

It is not contested that the Petitioner was rightfully elected to the position of National Treasurer having been elected on 27th October, 2016. At the time of his election the Petitioner complied with the provisions of Article 7(4) of the Constitution of the Union of Civil Servants that provides:

"A person shall not be eligible for election as a National Official if that person:-

- a) is not Public Servant*
- b) is not a member of the union*

c) is not proficient in English and Kiswahili languages

d) Owes the union any amounts being arrears of unpaid subscriptions or owes the union any amount which is due to the union and remains unpaid

e) Has not been a member of the union for at least the last two years immediately preceding the date of the election despite having been employed in the Public Service for two or more years, and was otherwise eligible for membership during that time

f) Has not been in employment in the public service for at least six months.

Eligibility to membership of the respondent union is governed by the provisions of Article 4 of the Union's Constitution which provides as follows –

“Eligibility for Membership

(1) Membership of the Union shall be open to employees in the Public Service of the Government of the Republic of Kenya, commonly known as “Public Servants” and whose remuneration is derived directly from estimates voted by the Parliament of Kenya provide or from the Consolidated Fund of, Government of Kenya.

(2) Every member shall pay such amounts of prescribed monthly subscriptions as may from time to time be determined by the National Delegates Conference Special Delegates Conference:-

(a) through check-off system; or

(b) by cash in advance annually at a rate to be determined by a National Delegates Conference.

(3) Upon admission to membership of the Union, a member shall be bound by this Constitution, the Rules of the Union, the General Standing Orders and resolutions and decisions of the organs of the Union.

(4) Any subscription or other donations paid to the Union shall not be refundable except where such subscription or donation was made in error and the final decision to that effect shall be made by the National Executive Board.”

The Petitioner was at the time of his election eligible for election thereby making his election lawful and procedural.

Having been properly elected what are the terms of service?

Article 7(2) of the Union's Constitution provides as follows:

“Except as otherwise expressly provided, in this Constitution, all National Officials shall be elected every five years by means of secret ballot by the Quinquennial National Delegates Conference.”

This means that once elected a National Official was expected to hold office for a period of 5 years or until his removal as provided under the Union's Constitution.

Further Article 11(1) of the Union's Constitution provides:

“Every elected official of the Union shall hold office for a term of five (5) years, but shall be eligible for re-election.”

What then are the instances for vacation of office?

Article 12 of the Union's Constitution provides for the discipline of National officials as follows:

“12: Discipline of National Officials

(1) National Official may be suspended from office as may be determined by the National Executive Board:-

(i) When he/she fails within thirty days of demand in writing by the Secretary General to pay Union subscriptions, which are, more than thirteen weeks in arrears;

(ii) When he/she is guilty of gross contravention of any of the provisions of this Constitution and the Rules and the General Standing Orders of the Union;

(iii) Has contravened the provisions of the Financial Manual of the Union thereby occasioning loss to the Union;

(iv) *Persistently acts in a manner generally detrimental to the interests of the Union.*

(2) *The next Advisory Council shall deliberate on the matter and decide whether to uphold the suspension, remove the official from office or rescind the decision of the National Executive Board of suspending the official.*

(3) *No official shall be suspended or expelled unless he/she has been given an opportunity to state his/her case personally or in writing at a meeting of the National Executive Board, about which he/she has received notice of not less than fourteen days in writing. Such notice shall include details of the allegations with which the member is being charged.*

(4) *An official who has appeared before the Advisory Council in accordance with this Article, if he/she is dissatisfied with the decision of the Advisory Council, has the right to restate his/her case at, the Delegates Conference, where the matter will be deliberated.*

(5) *An officer appearing before the Advisory Council in terms of this Article, shall be entitled to call witnesses in support of his/her case.*

(6) *Any decision taken by the Advisory Council to uphold suspension or expulsion of a member or official shall remain effective until reversed by a next National Delegates Conference.”*

From the foregoing it is clear that the Constitution of the union is silent on removal from office on grounds of retirement from employment.

Whether Articles 4 and 7(4)(a) of the Union’s Constitution are inconsistent with the Constitution of Kenya, 2010 and the Labour Relations Act.

The petitioner did not explain how in his opinion Article 4 and 7(4)(a) of the Unions’ Constitution is inconsistent with the Constitution. Article 4 provides for eligibility for membership which is not in any way inconsistent with the Constitution or the Labour Relations Act. Further, Article 7(4)(a) provides for eligibility for election to National Office for the union which is also not inconsistent with the Constitution as it only provides for eligibility for election. In every union there is need for rules on membership as well as rules governing election of officials. Further, the First Schedule to the Labour Relations Act, at clauses (2) and (4) provides that these are matters which must be provided for in the Constitution of the Union.

I therefore find that the two sections are not inconsistent with the Constitution of Kenya or the Labour Relations Act.

Whether the Petitioner is entitled to the reliefs sought

Article 12 of the Union’s Constitution elaborately provides for the process of suspension and subsequent removal of an official. In the absence of such procedure a removal would be in contravention of the said Constitution. The Constitution of the union does not bar the petitioner from holding office for reason that after his election he has retired from Public Service. This is only necessary for purposes of election to a national office, not for removal. The Petitioner is thus entitled to hold office, and complete his term of office, as the National Treasurer of the Respondent.

On prayer b) it is my finding that the Respondent cannot be stopped from discussing the removal of the Petitioner or any other official of the Union for that matter, provided the procedure that is clearly stipulated in Article 12 of the Union’s Constitution is followed. The Court cannot interfere with how the union conducts itself unless in its exercise of its jurisdiction it breaches the law. This would be tantamount to the court venturing into boardroom matters that are the preserve of the union’s organs as set out in its constitution.

Final Orders

For the foregoing reason the petition succeeds in part. I therefore make the following orders –

1. A declaration be and is hereby issued that the Petitioner is entitled to hold office, and complete his term of office, as the National Treasurer of the Respondent.

2. A declaration be and is hereby issued that the Respondent and its officers and its organs including the National Executive Board, the Advisory Council, the National Delegates’ Conference, the National Annual Delegates’ Conference, the Special National Delegates’ Conference and the National Administrative cannot remove the Petitioner from the office of National Treasurer except in the manner provided under the Constitution of the Respondent.

Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF JANUARY 2020

MAUREEN ONYANGO

JUDGE