



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**  
**AT NAKURU**

**JUDICIAL REVIEW APPLICATION NO.5 OF 2019**

**MICHAEL NDUNG’U MUTUA MUNA .....1<sup>ST</sup> APPLICANT**  
**STANLEY KIPKURUI MUTAI .....2<sup>ND</sup> APPLICANT**  
**JOHN GITARI MUNYI ..... 3<sup>RD</sup> APPLICANT**  
**WARDA ABDALLA MOHAMMED .....4<sup>TH</sup> APPLICANT**  
**EMILY MITO SHAMIAH .....5<sup>TH</sup> APPLICANT**  
**BASHIR ABDALLA ODOWA ..... 6<sup>TH</sup> APPLICANT**  
**MODESTA L LUBULELLAH..... 7<sup>TH</sup> APPLICANT**  
**BONVES KEMEI TENAI ..... 8<sup>TH</sup> APPLICANT**  
**NASTEHA ALI MOHAMED..... 9<sup>TH</sup> APPLICANT**  
**JOHN MWANGI KARANU.....10<sup>TH</sup> APPLICANT**

**VERSUS**

**THE SECRETARY GENERAL, KENYA NATIONAL UNION OF  
TEACHERS (KNUT), WILSON SOSSION .....RESPONDENT**

**RULING**

There is application dated 10<sup>th</sup> December, 2019 filed by the respondent and application dated 16<sup>th</sup> December, 2019 filed by the applicants.

Application dated 10<sup>th</sup> December, 2019 is seeking for orders that;

The court do grant the applicant [respondent] an order of stay of the execution of the Court orders issued against the applicant on 10<sup>th</sup> December, 2019 pending the hearing and determination of the instant application and/or intended appeal

The application is supported by the respondent’s affidavit and on the grounds that the respondent has filed a Notice of Appeal against the orders of the court issued on 10<sup>th</sup> December, 2019 as by allowing the application and the orders the court failed to ascertain whether there was service upon the respondent. The respondent is not able to proceed with the meeting set for 6<sup>th</sup> December, 2019 when the court orders issued by consent in Nairobi ELRC No.569 of 2019 are still in place and when the proposed 2<sup>nd</sup> respondent had postponed the National Delegates Meeting to August, 2010.

The respondent also avers that these shall be loss if a stay of execution is not granted and is willing to provide reasonable security for the performance of the court orders as may be appropriate.

The orders issued ex parte in the absence of the respondent and are highly prejudicial. Aggrieved the respondent intends to file an appeal to the Court of Appeal.

The orders issued amounts to a negation of the consent orders issued in the ELRC No.569 of 2019 in which the applicants did not disclose to the court although they were parties to the same.

The respondent in his affidavit also avers that as the national general secretary of the respondent union, following a decision of the national executive council meeting that the annual delegates conference (ADC) be postponed to August, 2020 due to financial constraints, the court herein issued interim orders on 27<sup>th</sup> November, 2019 which compromises orders issued by consent on 5<sup>th</sup> November, 2019 in ELRC No.569 of 2019 (Nairobi). Such suit was not disclosed to the court and thus seeks stay of execution pending filing of appeal as the applicants are threatening to hold a meeting at the union offices on 16<sup>th</sup> December, 2019.

In reply, the applicants filed their Replying Affidavit sworn by Michael Ndung'u Mutua Muna that the applicants are members of KNUT and serve in various capacities in the national executive council (NEC) and aggrieved with the dilapidating state of the union under the respondent, moved the court vide application dated 27<sup>th</sup> November, 2019 seeking to compel the respondent to convene NEC pursuant to a requisition by members dated 7<sup>th</sup> August, 2019.

Upon hearing the applicants the court directed for service upon the respondent by 29<sup>th</sup> December, 2019 for attendance and taking hearing directions on 3<sup>rd</sup> December, 2019. There was service and returns filed. The respondent attended court as directed represented by his advocates seeking leave to enter appearance and to file responses which was granted and hearing allocated for the 10<sup>th</sup> December, 2019.

No response has been filed.

On 10<sup>th</sup> December, 2019 the respondent did not attend court. The court proceeded and allowed application dated 27<sup>th</sup> December, 2019.

By application dated 10<sup>th</sup> December, 2019 the respondent is seeking for stay of execution of the orders issued on 10<sup>th</sup> December, 2019 whereas the subject application had been allowed for failure to attend and or file a reply. The instant application serves no purpose.

Mr Muna also avers that The respondent is seeking stay of execution on the grounds that there exists Nairobi ELRC No.579 of 2019 to which the applicants were parties and that there is a consent order but such grounds are fraught with falsehoods, misrepresentation of facts and in concealment of material facts in that the respondent was dully served with orders of the court herein as directed, there was attendance by his advocates who took hearing directions but failed to respond or attend court, and the issues in Nairobi ELRC No.579 of 2019 are different from the instant case. The decision of the respondent to postpone the ADC and all NEC meetings to the year 2020 was unconstitutional.

The gist of the matter herein is to have the respondent compelled to convene NEC. The respondent has also replied herein without authority of NEC and his applicant should be dismissed.

The respondent has since been intimidating the applicants out of this suit. The applicants are yet to receive their salaries and or allowances for November, 2019 due to filing the instant suit.

Mr Muna also avers that the respondent has succeeded by obtaining orders of stay which in essence has overtaken the convening of the meeting scheduled for 16<sup>th</sup> December, 2019. The respondent has also failed to satisfy the principles for the grant of orders of stay.

The applicants on their part filed application dated 16<sup>th</sup> December, 2019 and seeking for orders that;

- a. The ex parte orders for stay of execution made on 11/12/2019 herein be discharged and or set aside.
- b. The court to provide a period within which the meeting referred to under paragraph 2 of the orders made on 10/12/2019 shall be convened.
- c. In default of the respondent convening a meeting of the K.N.U.T and N.E.C and/or issuing notices of such meeting pursuant to the orders of the court herein, the Deputy Registrar of the court be authorised and directed to convene said meeting and issue notices thereof.
- d. The court be pleased to issue an order for payment of the applicant's salaries, allowance and/or emoluments in full for the month of November, 2019 and an order that there shall be no harassment, victimisation and/or any adverse action against the applicants, including withholding of their salaries, allowances and/or emoluments, on account of their involvement in the matter *herein*.

The application is supported by the affidavit of Michael Muna and on the grounds that the respondent obtained orders o 11<sup>th</sup> December, 2019 through concealment and non-disclosure of material facts and by misleading the court that the issue in dispute in Nairobi ELRC No.569 and 579 of 2019 are similar to issues in dispute herein which is not the case. Whereas the dispute in the cited suits related to union NEC meeting held on 19<sup>th</sup> August, 2019 the resolutions passed are challenged especially with regard to decision to hold the ADC and NEC in the year 2020 contrary to the union constitution. The consent order did not compromise the suit as alleged.

In obtaining orders of stay of execution the respondent misled the court that he had not been served which is not correct; the decision to postpone the ADC and NEC to the year 2020 was made by the union which is not correct; that he has authority to respond herein which is

not correct. By obtaining the *ex parte* interim orders the respondent was able to scuttle the scheduled meeting for the 16<sup>th</sup> December, 2019.

In his affidavit Mr Muna also avers that the suit herein is a brave move to safeguard their rights and interests and in so doing have been victimised by their salaries and allowances from November, 2019 being withheld and unpaid by the respondent in breach of the union constitution and contrary to fair labour practices. The respondent has gone out to ensure that the orders issued herein are rendered vain noting the time sensitive nature of the orders issued to the applicants. The orders of stay should be vacated.

In reply, the respondent filed his Replying Affidavit and avers that the instant matter arose out of a decision of the union made on 24<sup>th</sup> October, 2019 to the effect that NEC and ADC should hold meetings in August, 2020 due to financial constraints.

On the orders of the court issue don 27<sup>th</sup> November, 2019 there was no service and the process server does not indicate the time and actual person served or the address casting doubt on who was served.

The respondent also avers that the requisition for a Special NEC was made by some member's ad officials of the union and could not be held for the reasons of lack of funds.

The orders of stay were issued on good basis and considering there exists Nairobi ELRC No.569 of 2019 where most of the applicants are parties and there is consent and for the fact that the respondent wishes to prefer an appeal. The dispute in Cause 569 of 2019 is similar as herein as well as the matters in Cause No.579 of 2019 which revolves around the ADC and NEC meetings and to file the current suit is *res judicata*.

The respondent is bound by the NEC resolutions as the governing body of the union. The court should also be reluctant to interfere with the running of the union where members are bound by the decisions made by its organs. NEC decided to postpone the meetings to August, 2020 due to lack of funds.

Both parties made oral submissions.

The applicants opted to move the court by way of judicial review proceedings.

Judicial review proceedings in their nature give the court power to review the lawfulness of an enactment or decision, action, or failure to act in relation to a public function. The Court of Appeal in **Grain Bulk Handlers Limited v J. B. Maina & Co. Ltd & 2 others [2006] eKLR** summarized the purpose of judicial review by stating that;

Judicial Review jurisdiction regulates the process by which a decision making power given by the law is exercised by the person or body given the jurisdiction. The subject matter of Judicial Review is the legality of such decisions.

In **Republic vs. Public Procurement Administrative Review Board & Another ex parte Gibb Africa Ltd & Another [2012] eKLR** the court set out the reach of the judicial review jurisdiction thus;

In judicial review therefore, the court's jurisdiction is limited to applying the three tests of "legality", "rationality" and "procedural propriety" to the decision under review and once the decision passes the tests the court has no business taking any further step in respect of that decision. There is always a temptation to descend into the arena and substitute the judge's decision with that of the public body whose decision is under attack. A judge should, however, avoid this temptation by all means lest he be accused of abusing the powers given to him to review the decisions of subordinate courts and tribunals.

Judicial review is different from ordinary adversarial litigation between private parties as it does not entail examination of the evidence with a view to making a decision about the substantial merits of a case, but rather an examination as to whether there was compliance with the applicable constitutional, statutory and procedural requirements.

The applicants moved the court vide application dated 27<sup>th</sup> November, 2019 against the respondent as general secretary, KNUT seeking to have him convene or be compelled to convene the NEC and ADC of KNUT on a date not later than 16<sup>th</sup> December, 2019 on the grounds that as members of KNUT and the respondent as the general secretary has failed to convene them for the NEC and ADC contrary to the union constitution. 8 members had requisitioned for the NEC vide letter dated 7<sup>th</sup> August, 2019 and which the respondent scheduled for 29<sup>th</sup> August, 2019 but later postponed the same until further notice.

Are the proceedings hence then filed against the respondent in his exercise of a public function, and affects the rights of the applicants or sued in his private capacity while exercising a function with a public element?

As noted above, judicial review proceedings only operate for a limited purpose unlike a claim filing a memorandum of Claim under the provisions of Rule 7 of the Employment and Labour Relations Court (Procedure) Rules, 2016. Where the option taken is to file judicial review proceedings, the Rules give the instant procedures.

In this regard, in the Notice of Motion dated 27<sup>th</sup> November, 2019 the only material before court was the instant application and the supporting affidavit.

The court directed for the service upon the respondent to attend for hearing directions on 3<sup>rd</sup> December, 2019.

On the due date both parties attended and the respondent's advocate requested for more time to regularise attendance and be able to file a response and hearing allocated for 10<sup>th</sup> December, 2019.

On 9<sup>th</sup> December, 2019 advocate for KNUT attended seeking to have the union enjoined herein as a party vide Notice of Motion dated 6<sup>th</sup> December, 2019. This motion has not been prosecuted.

On 10<sup>th</sup> December, 2019 the applicant attended together with advocate for the proposed 2<sup>nd</sup> respondent, KNUT but the respondent herein remained absent.

On the due motion dated 27<sup>th</sup> November, 2019 and noting the attendances on 3<sup>rd</sup> December, 2019 the court allowed the Notice of Motion. The substance of the motion had not been opposed. This in effect, the respondent was to convene the NEC and ADC on or before the 16<sup>th</sup> December, 2019.

On 11<sup>th</sup> December, 2019 the respondent attended with the instant application herein dated 10<sup>th</sup> December, 2019 seeking urgent orders as set out above. Should the court allow for the stay of execution?

In effect, on the averments of the respondent that there existed Nairobi ELRC No.569 of 2019 and the applicants being parties therein, the court issued orders of stay of its orders of 10<sup>th</sup> December, 2019. Hearing was allocated for 18<sup>th</sup> December, 2019 to allow for service upon the applicants. On the due date for hearing, the applicants were absent.

Effectively, by default of attendance, the application and orders of 10<sup>th</sup> December, 2019 were overtaken by events. There was nothing to stay.

In my view, Parties reverted back to the Notice of Motion of 27<sup>th</sup> November, 2019.

As noted above, to move the court by judicial review against the respondent without setting out as to whether the instant matter is for him to address in his public capacity or private capacity acting in the public interest, a key element in the matter is lost. Though the respondent is the general secretary of KNUT, the challenged decision(s) in my view, relates to failure to convene the NEC and ADC of the union, KNUT.

To thus move against the respondent alone and in the person of the general secretary without the subject trade union under which the respondent operates and has been elected/appointed or as the case maybe to miss a key respondent herein. Where the respondent fails to take account for and on behalf of the union, over which he is its officer, where is recourse? Who is he accountable to? It cannot be to himself.

The subject trade union is in my view a necessary party herein and to move without such party in a matter over judicial review proceedings, the applicants cannot achieve the orders sought.

The trade union, KNUT has applied to be enjoined herein. This is still pending.

The respondent has also brought to the court's attention Nairobi Cause No.569 and 579 of 2019.

Under Nairobi Cause No.569 of 2019 there is a consent order of 6<sup>th</sup> November, 2019 to the effect that;

1. The parties herein do hereby withdraw all the pending and subsisting suits against each other in this court and more specifically Causes No.569 and 579 of 2019.
2. ...
3. ...
4. The instant matters be marked as fully compromised and withdrawn.

Effectively, as at 27<sup>th</sup> November, 2019 when the applicants herein moved the court herein, the suits in Nairobi ELRC No.569 and 579 of 2019 were withdrawn. Such suits did not exist. There was no matter between the parties pending upon the withdrawal of the suits on 6<sup>th</sup> November, 2019.

The applicants properly moved the court and there is no matter of non-disclosure, misrepresentation or concealment of material facts. The subsisting suits stood withdrawn as of 6<sup>th</sup> November, 2019.

The above matters put into account, the applicants having moved the court under judicial review proceedings without abiding the provisions of Rule 7 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and even where there is any matter against the respondent, to move the court under judicial review against him in his capacity and in the person of the respondent as set out above, the orders sought now overtaken by events, the court taking consideration of the matters in their entirety, to order and direct the respondent to convene the NEC and ADC outside of the non-joinder of the subject trade union would be to move in vain.

Accordingly, the judicial proceedings herein are struck out. Each party shall bear own costs. Nothing stops the applicants from filing a

proper application under the provisions of Rule 7 of the Employment and Labour Relations Court (Procedure) Rules, 2016 where appropriate.

**Delivered at Nakuru this 13<sup>th</sup> day of February, 2020.**

**M. MBARU**

**JUDGE**

In the presence of: .....