



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO. 79 OF 2018

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS AND CONSTITUTIONAL VALUES
AND PRINCIPLES**

IN THE MATTER OF THE SALARIES AND REMUNERATION COMMISSION ACT

**IN THE MATTER OF ARTICLES 1, 2, 10, 27, 47, 232, 248, 249, 230 AND 250 OF THE CONSTITUTION OF KENYA 2010 AS
READ WITH THE SALARIES AND REMUNERATION COMMISSION ACT, THE FAIR ADMINISTRATIVE ACTION ACT,
AND ALL OTHER ENABLING PROVISIONS OF THE LAW**

BETWEEN

TRADE UNIONS CONGRESS OF KENYA (TUC-Ke).....PETITIONER

VERSUS

DR. JOSEPH KINYUA, HEAD OF PUBLIC SERVICE.....1ST RESPONDENT

HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

AND

NATIONAL ASSEMBLY.....1ST INTERESTED PARTY

CENTRAL ORGANISATION OF TRADE UNIONS (KENYA) (COTU).....2ND INTERESTED PARTY

NELLY PERIS ASHUBWE.....3RD INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Thursday 9th April, 2020)

JUDGMENT

The petitioner filed the petition on 16.08.2018 through Nyandieka & Associates Advocates. The amended petition was filed on 03.09.2018. The petitioner prays for judgment for:

- a) A declaration does issue that the Trade Unions Congress of Kenya (TUC – Ke) is the body anticipated under Article 230 (2) (c) (i) to nominate a person to represent Trade Unions in the Salaries and Remuneration Commission.
- b) A declaration does issue to the effect that the nomination of Ms. Nelly Peris Ashubwe as a representative of Trade Unions in the Salaries and Remuneration Commission is illegal, null and void.
- c) A declaration does issue to the effect that the vetting of Ms. Nelly Peris Ashubwe as a representative of Trade Unions in the Salaries and Remuneration Commission was illegal, null and void and contrary to this Honourable Court Order of 17.08.2017.
- d) An order does issue pursuant to Article 23 of the Constitution of Kenya, quashing the vetting Report and any such recommendation and appointment if any made pursuant to the vetting of the 3rd Interested Party herein, Ms.Nelly Peris Ashubwe.
- e) An order of Mandamus does issue pursuant to Article 23 of the Constitution directing Dr. Kinyua, the Head of Public Service to forward the name of Charles Godfrey Mukhwaya as the nominee and representative of the Trade Unions in the Salaries and

Remuneration Commission.

f) An order awarding costs of the petition to the petitioner.

The petitioner's case is as follows. The petitioner was registered under the Labour Relations Act, 2007 as per the certificate of registration by the Registrar of Trade Unions dated 06.11.2012 under the name "**Federation of Public Service Trade Unions of Kenya (PUSETU-K)**". The petitioner appears to have applied to the Registrar and obtained change of its name to Trade Unions Congress of Kenya. The petitioner pleads that it is an umbrella to various trade unions representing public servants including Kenya National Union of Teachers (KNUT), Union of Kenya Civil Servants (UKCS); Universities Academic Staff Union (UASU); Kenya Universities Staff Union (KUSU); Kenya Dock Workers Union (KDWU); Kenya Tertiary and Schools Workers' Union; and the Kenya Independent Commissions Workers' Union (KICOWU).

The petitioner's further case is as follows. There occurred vacancies in the membership of the Salaries and Remuneration Commission (SRC) and which is one of the constitutional commissions. The composition of the SRC includes a member nominated by an umbrella of trade unions as per Article 230(c) (i) of the Constitution of Kenya, 2010 as read with Sections 4, 6, and 7 of the Salaries and Remuneration Commission Act No.10 of 2011. The petitioner is composed of thousands of public servants employed in the public service in Kenya and as such it represents the various diverse interests of the public servants in Kenya. On 09.08.2018 the National Assembly published a notice in the print media inviting members of the public to submit memoranda in regard to the various persons nominated including the 3rd interested party herein who had been nominated in accordance with the requirements of Article 230(c) (i) as read with sections 6 and 7 of the Salaries and Remuneration Commission Act. The notice stated that the nominees would be vetted by the National Assembly Departmental Committee on Finance and National Planning on the 21.08.2018 and 22.08.2018. The petitioner urged that the 3rd Interested Party would be subjected to the vetting process and subsequent appointment despite her nomination being illegal and unconstitutional.

The petitioner's further case is that the 3rd interested party's nomination was not in accordance with the constitution and neither was it in compliance with the provisions and principles of competition and transparency. Further the petitioner had on 30.01.2018 invited its members to apply for the position of member to SRC (to represent members of Trade Unions) as per the advertisement published in the Daily Nation. The petitioner published names of applicants in the print media and after interviews, the petitioner nominated Charles Godfrey Mukhwaya to be its representative to the SRC. The petitioner forwarded the name to the 1st respondent by letter dated 08.03.2018 and for onwards transmission to the President. The petitioner's case is that the 1st respondent disregarded its nominee and instead for no justification failed to forward it to the President.

The petitioner's further case is that it has learned that on 26.01.2018 the 2nd interested party (COTU) had made an advertisement inviting applicants for nomination to the same SRC vacancy. COTU published names of applicants in the print media and at the end of its interviews nominated one John Matiang'i and forwarded the name to the 1st respondent. The said John Matiang'i withdrew his candidature and his name was retracted. The petitioner alleges that COTU thereafter arbitrarily and single handedly and in an opaque manner handpicked the 3rd interested party as a nominee to represent trade unions in the SRC. The petitioner's case is that the 3rd interested party had not shown interest in the job by applying in the first instance and she replaced John Matiang'i as a nominee without due process on the part of COTU. The petitioner therefore urges that it was not open for the 1st respondent to forward the name of the 3rd interested party to the President for vetting by the 1st interested party for appointment in that regard. The petitioner urges that it is aggrieved upon the following grounds:

a) COTU is not exclusively entitled to have a person nominated by itself to be a representative of trade unions in the SRC.

b) The petitioner is entitled to have its nominee fill the position of a representative of trade unions in the SRC by reason of the decision in **Republic- Versus- Registrar of Trade Unions and Others, Ex-parte William Ochieng Ogolla and Others, HC Judicial Review Application No. 204 of 2011 at Nairobi** where Githua J found thus, "**It is my view that the 1st respondent violated the Applicants' legitimate expectations that he will follow the law and act on their application making a decision on it whether or not to register their federation within a reasonable time which he failed to do despite reminders by the applicants. From the material placed before the Court, it is apparent that the 1st respondent's failure to perform his public duty within a reasonable time occasioned prejudice to the members of trade unions constituted as PUSETU-K who included the Applicants herein by missing the opportunity and the possibility of presenting their nominee to the Salaries and Remuneration Commission.**"

c) The 1st respondent discriminated the petitioner by disregarding the petitioner's nominee in preference to the nominee by the applicant and Article 27 of the Constitution was thereby violated. The decision by the 1st respondent violated the petitioner's right to fair administrative action per Article 47 of the Constitution and provisions of the Fair Administrative Action Act. The 1st respondent further violated the petitioner's legitimate expectation to receive a communication on its conveyed nominee and he had no authority to reject the petitioner's nominee.

d) The petitioner represents the majority of the public officers in Kenya and its nominee was suited to be appointed to SRC to represent the public servants' interests. By being locked out, interests of the public officers will be prejudiced seriously.

e) COTU represents members from the private sector whose interests are not affected in any manner or considered by SRC.

f) The 3rd interested party was not competitively nominated by COTU and it was not transparent as provided for in sections 6(1) and 7 of the Salaries and Remuneration Commission Act prescribing competitive and transparent nomination process. The 3rd interested party never applied and was not shortlisted for the nomination as per the advertisement by COTU. Further the claimant worked with Guserwa Advocate and hence her nomination exhibits a conflict of interest and she had not worked as a public officer and she is therefore not qualified for the nomination. (The Court has considered the affidavits and subsequent submissions and finds that there

is no evidence and justification for the alleged conflict of interest as the Court will not return to the issue of the alleged conflict of interest.)

g) The petition raises serious issues about implementation of Article 230(2) (c) (i) on how the trade unions should pick a nominee for appointment as a member of the SRC. There is continuing danger that the petitioner and its members shall be locked out and lack representation in the SRC despite the fact that the foregoing occurred in 2011 and the same was acknowledged by the Court.

h) The vetting of the 3rd Interested Party herein was illegal as it was done contrary to the Court order of 17.08.2018 and the vetting was null and void. The 3rd interested party subjected herself to vetting by the 1st interested party on or about 23.08.2018 despite the Honourable Court halting the said vetting and such contemplated appointment pending the hearing and determination of the petitioner's notice of motion herein dated 14.08.2018. The 1st and 3rd interested parties therefore acted in blatant disregard of the Honourable Court's order issued on 17.08.2018 despite the order being served and being aware of the same.

The petition was based on the supporting affidavit by Tom Mboya Odege (the petitioner's chairman) sworn on 14.08.2018 and the annexed exhibits and, upon the further affidavit by Dr. Charles Mukhwaya filed on 04.09.2018, the petitioner's acting Secretary General. The further affidavit states and repeats that the 3rd interested party never applied and was never shortlisted or interviewed by COTU for the nomination in issue. It is further the petitioner's case that the 1st respondent was under duty to forward the nominee by the petitioner for consideration by the National Assembly. Further it is urged that the 3rd interested party was not qualified for the nomination and it was not the petitioner's case that it ought to have been consulted. Further that Hon. Wilson Sossion wrote to the petitioner on 07.08.2018 withdrawing KNUT from the Labour Centre. Further at the meeting held on 24.07.2018 by the petitioner's National Executive Board (NEB) and as per letter dated 30.07.2018 addressed to Hon. Wilson Sossion by Dr. Charles Mukhwaya as petitioner's Acting General Secretary, the said Hon. Sossion was suspended from office of the petitioner's General Secretary. Further the Acting Secretary General of the petitioner had by letter dated 03.08.2018 instructed the petitioner's Chairman Tom Odege to sign documents on his behalf. Thus the petition was duly filed for and by the petitioner.

The petitioner filed the further affidavit of Tom Mboya Odege on 07.11.2019 and urged as follows. The purported letter by the 3rd interested party dated 07.02.2018 for application for nomination by COTU refers to advertisement by COTU purportedly on 30.01.2018 but no such advertisement has been annexed as the only advertisement issued by COTU was on 26.01.2018. Further the 3rd interested party's name does not appear anywhere in the list of the persons that duly applied and were shortlisted by COTU and as exhibited by the petitioner.

On 17.08.2018 the 2nd interested party COTU appointed Okweh Achiando & Company Advocates and the 3rd interested party appointed Nchoe, Jaoko & Company Advocates to act in the petition.

On 28.08.2018 COTU filed a notice of preliminary objection upon the following grounds:

- a) The Honourable Court lacks the requisite jurisdiction to entertain, hear and determine the petition as against the 2nd interested party.
- b) The petition is an abuse of court process and is therefore bad in law in so far as it relates to the 2nd interested party.
- c) The petition offends public policy in so far as it relates to the 2nd interested party.
- d) The petition offends the doctrines of ripeness and justifiability and contrary to provisions of sections 3, 5, 6, 7, 8, 9, 10, 11, and 12 of Public Appointments (Parliamentary Approval) Act No. 33 of 2011 and sections 11, 12, 13 and 14 of the Salaries and Remuneration Commission Act 10 of 2011 as they relate to the 2nd interested party.
- e) The petition has failed to meet the constitutional standards of admission to a hearing and violate the principles enunciated in the cases of **Anarita Karimi Njeru –versus- Republic (1976-80) 1KLR 1283** and **Justus Kariuki Mate & Another –versus- Martin Nyaga Wambora & Another [2017]eKLR**.

The 3rd interested party filed a replying affidavit on 27.08.2018 and on 30.01.2019. Her case is urged upon the following grounds:

- a) Following the advertisement by COTU on 30.01.2018 she applied for nomination to be appointed to the SRC to represent trade unions. Her application was dated 07.02.2018 and received by COTU on 10.02.2018 as per her exhibit P1. She was interviewed by COTU and her name was forwarded to the 1st respondent per the letter Ref. COTU/ADM.439/VOL IV/154 dated 09.03.2018 exhibit P2. The letter signed by COTU's Secretary General Francis Atwoli, NOM (DZA), EBS, MBS concluded thus, "**Nelly Peris Ashubwe was one of the applicant that COTU (K) shortlisted and interviewed. We recommend her for your subsequent nomination.**" Thus the 3rd interested party denies that she was handpicked as alleged for the petitioner and that her nomination and appointment was in total adherence to the laid down constitutional values and principles and procedures of the rule of law, fairness, inclusiveness, competitiveness, merit and openness.
- b) The petitioner has provided no evidence to show that Articles 47 and 230 of the Constitution have been violated.
- c) That it was true that initially COTU had nominated John Matiang'i but who declined in view that the job at SRC would be full time and therefore he decided to focus on his trade union duties at KNUT. Thus the 3rd interested party was nominated to replace John Matiang'i after the said John Matiang'i withdrew his candidature and interest.

d) The 3rd interested party is qualified and is beyond reproach considering aspects of leadership and integrity. That the petitioner was not consulted has no basis in law.

e) Article 250 provides for criteria and considerations for appointment of members and chairpersons to constitutional commissions like the SRC and the petitioner has not shown how the provisions were violated, if at all, in the manner the 3rd interested party was nominated, vetted and appointed.

f) The Court should be careful not to usurp the powers and functions of the various constitutional and statutory bodies involved in appointments and the Court is not well suited to determine the matters raised in the petition.

For the 3rd interested party, the affidavit of Hon. Wilson Sossion was also filed on 27.08.2019. Hon. Wilson Sossion stated that he was the Secretary General of the petitioner and the authorized officer for purposes of section 2 of the Labour Relations Act, 2007 and he had not given authority for the petition to be filed and there was no resolution by the governing organs of the petitioner for the present petition to be filed. Thus the petition should be dismissed. Further he was aware that the 3rd interested party was never handpicked as alleged for the petitioner but her appointment was in accordance with the laid down constitutional values and principles and procedures of the rule of law, fairness, inclusiveness, competitiveness, merit and openness. In particular, after John Matiang'i declined the nomination, COTU interviewed the applicant and forwarded her name for vetting by the National Assembly and the said Hon. Sossion wrote on 24.08.2018 to the Clerk of the National Assembly on the petitioner's letterhead and in his capacity as the petitioner's General Secretary confirming that the 3rd interested party was agreeable to both the petitioner and COTU to represent the trade unions in membership of SRC.

The respondents filed the replying affidavit of Joseph K. Kinyua on 04.12.2019 through Christine Oyugi, Senior Litigation Counsel, for the Attorney General. The respondents urged that the petition be dismissed upon the following grounds:

a) The petition is premised on the wrong appreciation of the law that it is only the petitioner who can represent the interests of the trade unions as per section 230(c) (i) of the Constitution as read with sections 4, 6, and 7 of the Salaries and Remuneration Commission Act. In particular Article 230 (c) (i) does not make specific attribution of interests for one to qualify as an umbrella body representing trade unions.

b) In any event, interests of trade unions as contemplated in Article 230 (c) (i) are represented by the 2nd interested party which is the registered organization and operating within the provisions of the Labour Relations Act, 2007.

c) The petitioner was never discriminated against as alleged because as at time the petitioner submitted its nominee, the 2nd interested party had already submitted its nominee and the 1st respondent had already acted by forwarding the same to the President.

d) Prior to instituting the petition the petitioner never sought to find out the reason why its nominee was not considered for transmission to the National Assembly.

e) Following the presumption of regularity, the 1st respondent was well within the law and legal mandate to forward the name of the 3rd interested party herein as the nominee for the 2nd interested party to the President in replacement of John Matiang'i on the *bona fides* belief that the 2nd interested party undertook the necessary compliance and procedural measures as required by law.

The 1st issue for determination is whether the petitioner is the “**umbrella body representing trade unions**” contemplated in Article 230 (2) (c) (i) of the Constitution as read with sections 4, 5, 6, and 7 of the Salaries Remuneration Commission Act 10 of 2011. The petitioner urges it is the umbrella body because trade unions that represent public officers are its members and therefore it represents the highest interests of the public officers. Second it is urged that it was decided as much in **Republic- Versus- Registrar of Trade Unions and Others, Ex-parte William Ochieng Ogolla and Others, HC Judicial Review Application No. 204 of 2011 at Nairobi**. The Court finds that in the cited case Githua J found that if the petitioner had been registered it could have had the opportunity and possibility of presenting a nominee to SRC membership. The Court was clear that the petitioner had a possibility. In this Court's opinion, the finding of such possibility did not mean that the petitioner was the umbrella body representing trade unions but such possibility existed. The Court further finds that the petitioner has not provided the evidence that it was the umbrella body representing trade unions but its case was that it was the umbrella body representing the enumerated trade unions in the public service. The petitioner did not by evidence show that it represented the majority of trade unions in the public service sectors or that members of such trade unions represented the majority of the unionisable public officers. In absence of such evidence, the petitioner's case that it represents the majority of public officers and therefore is the umbrella body representing trade unions as envisaged in Article 230 (2) (c) (i) had no legal basis because the Article, as submitted for the respondents, has no connotations of interests and further, the Article does not refer to trade unions in the public service sectors. The law appears not to have set out the criteria for identifying the “**umbrella body representing trade unions**” but in the Court's opinion and in absence of such criteria, it would be the federation of the trade unions for the time being enjoying the highest membership of the registered trade unions – usually to be confirmed by the Registrar of Trade Unions in event of any dispute. The Court considers that the Constitution refers to trade unions and not members of trade unions so that in determining the umbrella body representing trade unions, focus is on the number of registered unions and not membership of trade unions.

It is the Court's further considered view that where there exist more than one federation of trade unions like in the instant case, the registered federations should jointly constitute the umbrella body of trade unions and within such arrangements to discharge the role under Article 230 (2) (c) (i) of the Constitution as read with sections 4, 5, 6, and 7 of the Salaries Remuneration Commission Act 10 of 2011. Failing such amicable arrangements, the Court considers that the federation with the majority membership of the registered trade unions as already stated by the Court should constitute the umbrella body of trade unions for that purpose.

For the purpose of the present petition, the Court returns that the petitioner has failed to establish by way of evidence that it is the umbrella body representing trade unions in Kenya for the purposes of nominating a person for appointment as a member of SRC under Article 230 (2)

(c) (i) of the Constitution as read with sections 4, 5, 6, and 7 of the Salaries Remuneration Commission Act 10 of 2011. The declaration as sought for in prayer (a) will therefore be declined.

The 2nd issue for determination is whether the vetting and subsequent appointment of the 3rd interested party was in violation of the interim order herein issued on 17.08.2018 and therefore unlawful, null and void. On 17.08.2018 the Court (Makau J) ordered thus:

- 1) That interim conservatory orders is hereby granted stopping and/or halting the consideration of memoranda, interviewing, vetting and subsequent appointment of the 3rd interested party herein, Nelly Peris Ashubwe, following the public Notice issued on 9th August 2018 as a nominee and representative of the umbrella of trade unions in the Salaries and Remuneration Commission, pending the *inter-partes* hearing and determination of the instant motion on 29.08.2018.
- 2) That the COTU and TUK to consult of the matter even before the next hearing date to attempt to reach amicable settlement.

The petitioner submits that the vetting and subsequent appointment was done in contravention of the interim Court order. It is submitted for the petitioner that the order was made in presence of the parties and was duly served per the affidavit of service on record. It is submitted that Court orders are binding be they temporary or final and the parties were bound to comply with the interim Court orders pending determination of the petition or further orders as was held by Odunga J in **Republic –Versus- Attorney General & 2 Others Ex-parte APM Terminals B.V [2015]eKLR**. It was further submitted for the petitioner that the Court follows the holding in **Judicial Service Commission –Versus- Speaker of the National Assembly & another Petition 518 of 2013** thus, “**Conservatory orders, in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person....In my view it does not matter that the person alleged to have acted in contempt of court was unaware of the existence of the order. Whereas he may not be committed for contempt of a court order which he was not aware of, his unawareness does not sanitize the illegal action by His Excellency the President of appointing the Tribunal was undertaken in breach of the orders of this Court, that action may well be null and void and of no effect. It is as if it was never done in the first place. It is as if it never existed.**”

It was submitted for the petitioner that the Parliament and the 3rd interested party were well aware of the Court orders herein and were duly represented in the Court proceedings when the Court orders were issued halting the vetting and subsequent appointment of the 3rd interested party and even in absence of contempt proceedings, the parties were bound by Article 10 of the Constitution and the rule of law manifested in obeying court orders must be upheld.

For the respondents and the interested parties no specific submissions have been made in that regard except for the respondents it has been submitted that the vetting and appointment of the 3rd interested party was conducted in total adherence to provisions of the Salaries and Remuneration Commission Act 10 of 2011. In particular under section 7 of the Act, within 14 days of occurrence of a vacancy in the SRC the nominating body shall advertise in two local daily newspapers of national circulation an invite of applications from all persons who qualify for nomination as a member of the SRC. The nominating body shall carry out interviews and forward the name of the qualified person to the 1st respondent for submission to the President. Within 7 days of receipt of the name of the qualified person, the President nominates the member and forwards the name to the National Assembly for vetting. The National Assembly shall within 14 days of the day it next sits after receipt of the name of the nominees under subsection 7(9) consider the nomination and approve or reject any nomination. The respondents further submit that they followed the procedure in submitting the 3rd interested party’s name to the President and then the President followed the procedure in submitting the name to the National Assembly.

The Court has considered the material on record. The affidavit of Kefa Nyakundi, a court process server, sworn on 20.08.2018, states that the order of 20.08.2018 was served upon the respondents and the interested parties as well as their respective advocates on 20.08.2018. The petitioner says that the vetting proceeded on 23.08.2018. The record of the vetting proceedings and the subsequent appointments have not been exhibited. It is difficult for the Court to determine whatever considerations the vetting authority and the appointing authority (the National Assembly and the President) made about the interim Court Order prior to the conclusion of the vetting and appointment of the 3rd interested party. A contempt application filed for the petitioner in that regard was withdrawn. However, the Court has carefully considered the terms of the interim Court order. The same Court order of 17.08.2018 by its own terms stated thus, “**2. That the COTU and TUK to consult of the matter even before the next hearing date to attempt to reach amicable settlement.**” While in the further supporting affidavit of Tom Mboya Odege sworn on 06.11.2019 the petitioner denies that its Secretary General at the material time was Hon. Wilson Sossion, by its own exhibit at page 51 of the original petition bundle filed on 16.08.2018, the extract signed by the Registrar of Trade Unions shows that the petitioner’s General Secretary as at 28.03.2017 was the said Hon. Sossion. The Court considers that the same being the last extract by the Registrar, it was a mere afterthought for the petitioner to seek to change and challenge that position without evidence of a similar and current extract by the Registrar showing that the said Hon. Sossion had ceased to be the petitioner’s General Secretary. The Court holds that the petitioner must be precluded from the inconsistent pleading in that respect. Section 35 of the Labour Relations Court Act, 2007 specifically required the petitioner to notify then Registrar of Trade Unions about any changes in the particulars of its officials but no evidence of such notification has been provided. Further, section 35(5) of the Act provides that no change of officials shall have effect until it is registered by the Registrar and the Court finds that the petitioner provided no evidence of such registration of a change in the holder of its office of Secretary General. The Court therefore finds that at all material times the said Sossion was the petitioner’s General Secretary and by signing the letter dated 24.08.2018 addressed to the Clerk of the 1st interested party, the petitioner TUK and the 2nd interested party COTU must be understood (at least on the part of the vetting and the appointing authorities) to have consulted over the matter towards an amicable settlement and in terms of order 2 of the interim order. The said letter by Sossion dated 24.08.2018 stated as follows:

“Dear Sir,

NOMINEE OF NELLY PERIS ASHUBWE TO REPRESENT WORKERS AT THE SRC

With respect to the above stated matter, I wish to confirm that the above nominee is agreeable to us to represent workers at the SRC.

Please, ignore any objection emanating from any quarter as illegitimate and procedural and is not the consensus of the labour movement.

The above nominee shall represent the interests of both TUC- Kenya and COTU as agreed by both parties.

Yours faithfully,

Signed

(HON. WILSON SOSSION)

GENERAL SECRETARY

TUC – KENYA

Thus the Court finds that in light of such letter done on the petitioner's official letterhead and prior to the date of the *inter-partes* hearing of the petitioner's application in issue, the same must be construed to have been sufficient evidence of an amicable settlement of the matter or dispute between TUC –K and COTU in terms of order 2 and therefore the Court returns that the vetting and subsequent appointment of the 3rd interested party was not in contravention of the interim order. The matter appears to the Court and on that basis of such evidence to have been amicably resolved and prior to the *inter partes* hearing of the application and in terms of order 2 of the interim order. The declaration as prayed for in that regard will fail.

To answer the 3rd issue for determination, the Court returns that as submitted for the petitioner, any person is entitled to bring a constitutional petition for the enforcement of the Bill of Rights and any constitutional provision as provided for in Articles 22 and 258 of the Constitution. The Court has found that Wilson Sossion was at all material times the petitioner's authorised representative as the petitioner's General Secretary in terms of section 2 of the Labour Relations Act, 2007. However, the Court considers that the petitioner as a body corporate was entitled to sue and to be sued particularly in terms of Articles 22 and 258 of the Constitution.

To answer the 4th issue for determination the Court returns that it is trite law that where the law provides for a constitutional or statutory platform or forum for deciding a particular matter, then the statutory or constitutional forum must be exhausted prior to invoking the Court's jurisdiction. In the instant case the Court is invited to determine whether the 3rd interested party possessed the requisite qualifications and whether the 2nd interested party undertook the nomination of the 3rd interested party transparently and competitively as envisaged in the Constitution and the Salaries and Remuneration Commission Act 10 of 2011. It is clear that the nominating body (in the circumstances of the case COTU) and more importantly the vetting authority (the National Assembly) provided the constitutional and statutory authorities or forum to determine whether the 3rd interested party had the requisite qualifications and the National Assembly in vetting the 3rd respondent had authority to determine and satisfy itself that COTU was the umbrella body of trade unions envisaged in the constitution to nominate the candidate and that it had complied with the substantive and procedural statutory provisions on qualifications, competitiveness and transparency. The Court finds that the 2nd interested party was therefore entitled to urge that the petition offended the doctrines of ripeness and justiciability and was contrary to provisions of sections 3, 5, 6, 7, 8, 9, 10, 11, and 12 of Public Appointments (Parliamentary Approval) Act No. 33 of 2011 and in view of the time bound steps in section 7 of the Salaries and Remuneration Commission Act 10 of 2011. The Court finds that the matters raised in objection to the nomination of the 3rd interested party for appointment were clearly subject to consideration by the National Assembly and its relevant Committee in accordance with the elaborate provisions of the Public Appointments (Parliamentary Approval) Act No. 33 of 2011. The evidence is that the petitioner moved the Court prematurely without considering and invoking the role of the National Assembly in view of the petitioner's grievances against the nomination of the 3rd interested party and without allowing the National Assembly to deliberate the matter.

While making that finding the Court follows its opinion in Lucy Njoki Waithaka v Tribunal appointed to investigate the conduct of Lucy Njoki Waithaka & another; Kenya Magistrates and Judges Association (Interested Party) [2019] eKLR thus "The Court considers that justiciability is the concept in law that concerns itself with whether the Court is the most appropriate organ of the state or government (government in the wider sense including the three arms of government and other public agencies or bodies) to deal with the dispute. The Black's Law Dictionary 10th Edition at page 996 defines "justiciability" as the quality, state, or condition of being appropriate or suitable for adjudication by a court. The case may not be suitable for adjudication by the court due to a number of reasons such as under mootness doctrine where the real dispute has ceased to exist. The dictionary lists elements of the doctrine of justiciability such as advisory opinions, feigned and collusive cases; standing, ripeness, political questions and administrative questions. The Court considers that the application of the doctrine of justiciability is highly modified by the provisions of the Constitution of Kenya 2010 and which provisions have tended to admit than deny the forum in courts of law more readily and often so than not. The Court considers that a sound development and application of the doctrine of justiciability should lead to rules related to availability of alternative and more convenient remedies, Thus as was held in Secretary, County Public Service Board & Another –Versus- Hulbhai Gedi Abdille [2017]eKLR by the Court of Appeal , an alternative and more convenient remedy in some other tribunal or forum should, in the Court's opinion be a good ground for the Court to decline to act. The Court considers that a sound application of the doctrine of justiciability should be one of the better mechanisms for keeping courts within what actually is or is perceived to be their proper constitutional sphere of activity."

In the present case, section 7 of the Public Appointments (Parliamentary Approval) Act No. 33 of 2011 provides that the issues for consideration by the relevant House of Parliament in relation to any nomination shall be:(a) the procedure used to arrive at the nominee; (b) any constitutional or statutory requirements relating to the office in question; and (c) the suitability of the nominee for the appointment

proposed having regard to whether the nominee's abilities, experience and qualities meet the needs of the body to which nomination is being made. Section 6 on approval hearing provides thus, (1) Upon receipt of a notification of appointment, the Clerk shall invite the Committee to hold an approval hearing. (2) The Committee shall determine the time and place for the holding of the approval hearing and shall inform the Clerk. (3) The Clerk shall notify a candidate of the time and place for the holding of an approval hearing. (4) The Committee shall notify the public of the time and place for holding an approval hearing at least seven days prior to the hearing. (5) Subject to this Act, all Committee proceedings on public appointments shall be open and transparent. (6) Despite subsection (5), a Committee may, on its own motion or on the application of a candidate or any other concerned person, determine that the whole or part of its sittings shall be held in camera. (7) An approval hearing shall focus on a candidate's academic credentials, professional training and experience, personal integrity and background. (8) The criteria specified in the Schedule shall be used by a Committee during an approval hearing for the purposes of vetting a candidate. (9) Any person may, prior to the approval hearing, and by written statement on oath, provide the Clerk with evidence contesting the suitability of a candidate to hold the office to which the candidate has been nominated. (10) A candidate may, at any time, by notice in writing addressed to the Clerk, withdraw from the approval process and the candidate's nomination shall thereupon lapse.

The Court finds that such elaborate statutory procedure offered the petitioner the proper forum but it was never utilized or invoked by the petitioner. Where there was such alternative avenue for resolving the petitioner's grievances with respect to the 3rd interested party's nomination, vetting and subsequent appointment, the Court finds that the petitioner has failed to meet the threshold for the exercise of the Court's rare jurisdiction to intervene in the performance of the human resource functions by the relevant person or authority. The Court follows its opinion in Geoffrey Mworira-Versus- Water Resources Management Authority and 2 others [2015]eKLR thus, "The principles are clear.

The court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process."

In the present petition the Court finds that the grievances subject of the petition could and were to be resolved by the National Assembly in the procedure prescribed in the Public Appointments (Parliamentary Approval) Act No. 33 of 2011 but which the petitioner failed to invoke. In so far as the petitioner failed to move the National Assembly as was expected and required and the record of the Assembly on vetting the 3rd interested party having been not exhibited, the Court finds that it is outside its jurisdiction on account of the doctrine of justiciability to delve into the procedure and merits of the nomination, vetting and the subsequent appointment of the 3rd respondent as a member to the SRC. The quashing order of certiorari as prayed for would only issue if the decision or proceedings to be quashed are exhibited before the Court or if, with leave of court (which was not applied for and obtained in the instant case) the decision or proceeding is not so exhibited as per the relevant provisions of Order 53 of the Civil Procedure Rules. Accordingly the Court returns that the quashing order (being essentially certiorari) as prayed for will not issue.

To answer the 5th issue for determination, the Court holds that an order of judicial review of mandamus shall not issue unless it is shown that the respondent is the duty bearer and despite a demand that the duty is performed the respondent has refused, declined, neglected or is indifferent in view of the demanded performance. As submitted for the respondents, the petitioner has failed to show that it demanded of the 1st respondent (or even the National Assembly) to offer explanation or reasons why its nominee one Charles Godfrey Mukhwaya was not submitted for the vetting process and subsequent appointment. Instead, the Court has found that the petitioner moved the Court prematurely without presenting its concerns to the National Assembly as the prescribed constitutional and statutory forum. Further the Court finds that the petitioner has failed to show that indeed it was the umbrella body representing trade unions in Kenya and therefore the body contemplated in the Constitution for making the nomination of the member to SRC. The Court has found that the petitioner and COTU plus such other federation of trade unions as may exist could enter a memorandum of understanding in constituting the umbrella body representing trade unions for future nominations or in alternative legislative intervention may be invoked in designating the umbrella body representing trade unions in that regard. Thus, the duty as alleged against the 1st respondent has not been established on the part of the petitioner. In the circumstances the prayer for an order of mandamus will collapse. Similarly the Court returns that the alleged violations of Articles 27 on discrimination and Article 47 on fair administrative action have not been established. Thus the judicial review orders for certiorari and mandamus as prayed for will not issue.

To answer the 6th issue for determination, the Court returns that in view of the undisputed public interest involved in the case, the parties' margins of success and the growth of jurisprudence around the nascent Constitution of Kenya, 2010 each party shall bear own costs of the petition.

In conclusion, judgment is hereby entered for the determination of the petition as amended with orders for:

1) The declaration that the petitioner and COTU plus such other federation of trade unions as may exist as duly registered by the Registrar of Trade unions to enter a memorandum of understanding towards constituting the umbrella body representing trade unions for future nomination of a person for appointment as a member of SRC under Article 230 (2) (c) (i) of the Constitution as read with sections 4, 5, 6, and 7 of the Salaries Remuneration Commission Act 10 of 2011 or in alternative, legislative intervention may be invoked towards designating the umbrella body representing trade unions in that regard.

2) Each party shall bear own costs of the petition.

Signed, dated and delivered in court at Nairobi this Thursday, 9th April, 2020.

BYRAM ONGAYA

JUDGE