



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 202 OF 2019

(Before Hon. Lady Justice Hellen S. Wasilwa on 21st May, 2020)

KENYA NATIONAL UNION OF NURSES.....CLAIMANT

VERSUS

THE TRUSTEES OF THE COUNTY PENSION FUND.....1ST RESPONDENT

THE BOARD OF TRUSTEES LOCAL AUTHORITY PENSION FUND....2ND RESPONDENT

THE COUNTY PENSION FUND FINANCIAL SERVICES LIMITED.....3RD RESPONDENT

HON. HOSEA KILL.....4TH RESPONDENT

THE COUNCIL OF GOVERNORS.....5TH RESPONDENT

THE HON. ATTORNEY GENERAL.....6TH RESPONDENT

THE AUDITOR GENERAL.....7TH RESPONDENT

RETIREMENT BENEFITS AUTHORITY.....8TH RESPONDENT

LAPTRUST RETIREMENT SERVICES LIMITED.....9TH RESPONDENT

AND

THE ETHICS AND ANTI-CORRUPTION COMMISSION.....INTERESTED PARTY

RULING

1. Before this Court is the Proposed Interested Party’s Application dated 19/11/2019 seeking to be joined to this Petition as an Interested Party. The Applicant also seeks to have the costs of the application provided for.
2. The Application is supported by the grounds set out therein and the Supporting Affidavit of John K. Biiy sworn on 19/11/2019.
3. The 3rd Respondent has filed the Replying Affidavit of Isaac K. Mitei sworn on 17/1/2020, in support of the application
4. The Petitioner has opposed the application vide its Grounds of Opposition dated 2/12/2019 and the Replying Affidavit of Seth Ambusini Panyako, sworn on even date.

The Applicant’s Case

5. The Applicant avers that John K. Biiy is a key member of the Petitioner's National Executive Council (NEC) and was not involved in the filing of this Petition and that there was no resolution from the Petitioner's NEC to file the same.
6. The Applicant avers that the petition is in breach of the Petitioner's constitution, which requires that: for a case of such magnitude to be filed, a resolution of the NEC authorizing the same must be passed.
7. It is averred that clause 7 of the MOU executed on 2/11/2015 provides for a mechanism to resolve an issue regarding break of service between the parties before a suit can be filed in Court.
8. It is further averred that the General Secretary continues to act unilaterally in executing the Petitioner's operations such as arbitrarily commencing court proceedings, signing MOUs with government and private entities and forming illegal organizations without the knowledge of the Petitioner's members, for his own personal gain.
9. The Applicant avers that on 5/12/2016, the General Secretary unilaterally, arbitrarily and without any resolution or consent of the NEC, signed another MOU with the Local Authorities Provident Fund (LAPFUND) and which details are a mystery to the Petitioner's members to date. It is averred that this was in breach of the existing MOU and is the subject matter of ELRC 12 of 2017.
10. The Applicant states that on 30/10/2019, LAPFUND misrepresenting itself as CGRS, wrote a letter to the General Secretary seeking to sensitize the Petitioner's members on the new Act. The Petitioner's representatives were also sensitized on joining the Board of Trustees of the CGRS, a creature of CGRS Act, which had not yet been operationalized.
11. The Applicant avers that the letter was received on the same date and the Petitioner's official stamp affixed on it with a post date of 4/11/2019, to conceal the conspiracy. Thereafter, the General Secretary invited all national and branch officials for a sensitization meeting on the CGRS Act, to be held on 1/11/2019 at Isiolo County and which was facilitated by LAPFUND representing itself as CGRS.
12. It is deposed that the General Secretary instituted a suit against the 5th Respondent using the Petitioner's name as a disguise, in order to protect his and LAPFUND's personal interests as opposed to the 29,000 member he represents. As result, the good working relationship that the Petitioner's members had with the 5th Respondent has been strained.
13. Further, he registered a private limited company known as KNUN Foundation without the sanction of NEC and National Governing Council (NGC) as a conduit to solicit for finances from unsuspecting government and private agencies as a way of enriching himself (the foundation later changed to Care Mark Foundation). For instance, he used the Foundation to enter into an agreement with AAR on the pretext of providing indemnity cover to the Petitioner's members and which details remain unknown.
14. The Applicant avers that the General Secretary continues to be militant in his interactions with the Respondents, the President of Kenya, Council of Governors and state officers in charge of the relevant government institutions. Further, he continues to create non-existent problems like instituting unnecessary cases and calling for strikes, for financial gain. This has resulted in the partial freezing of the Petitioner's bank account and cost the Petitioner its members' goodwill.
15. It is averred that the Petitioner's members voluntarily subscribed to the 3rd Respondent as a scheme of choice, which culminated in the MOU of 2/11/2015.
16. It is the Applicant's position that the main reason for filing this petition is to source for funds from LAPFUND and blackmail the Respondents.

The 3rd Respondent's Case

17. The 3rd Respondent's case is that the Applicant is the national chairman and a member of NEC and NGC. As such, he oversees enforcement of the Petitioner's Constitution and manages the affairs of the union hence has a legitimate stake in this matter.
18. In his affidavit, Isaac Mitei avers that the application has raised material issues of law and fact which go into the root of the dispute. For instance, that the suit is incompetent since it was not sanctioned by the NEC or NGC and that the petition is prematurely before this Court.
19. He is of the view that the Petitioner's response to the application does not raise any significant concerns to warrant a dismissal of the instant application and avers that it is in the interest of justice for the application to be allowed.

The Petitioner's Case

20. The Petitioner's case is that the application lacks merit and is an attempt to delay and prejudice the fair hearing of the Petition. Further, the application is scandalous, vexatious and frivolous hence should be dismissed with costs.
21. It is averred that the application is defective in law as it offends the provisions of section 2 as read together with section 73 (3) of the Labour Relations Act which requires an authorized representative only, to present a case in Court.
22. The application also offends the provisions of section 35 (6) of the Act which provides that a person not registered by the Registrar in accordance with the section shall not act or purport to act as an official of a trade union. The applicant is not an official, member or employee of the Petitioner. Therefore, there is no basis for joining him to this suit as he has no interests to protect and would be of no assistance.

23. The Petitioner also avers that the injunction in Cause 12 of 2017 relied upon by the Applicant has lapsed by dint of order 40 rule 6 of the Civil Procedure Rules, 2010.

24. In his affidavit, Seth Panyako avers that the Applicant has failed to disclose that he was expelled from his positions at the NEC meeting held on 15/6/2017 and has filed numerous unsuccessful applications seeking to be recognized as an official. He was also dismissed from employment.

25. The Affiant avers that the Applicant has always acted to the detriment of the Petitioner and its members. Further, he is currently defending several suits and is under active criminal investigations for fraudulent diversion of union money. He further avers that there is evidence that the Applicant has been involved in defrauding the public of its funds, which evidence shall be adduced at the hearing of the petition.

26. He contends that the Petitioner's Constitution does not contain any provision requiring the NEC to pass an authorizing resolution before a case of such magnitude can be filed. He further contends that he has always acted in the best interests of the Petitioner and invites the Applicant to provide further particulars of his misconduct.

27. In response to paragraph 5 of the Applicant's affidavit, the Affiant contends that on 9/11/2016, NGC unanimously resolved to advise employees employed in the counties to join the LAPFUND pension scheme as they awaited the enactment of an Act of parliament to merge the LAPTRUST and LAPFUND schemes.

28. It is his position that the current lawful pension scheme in the county governments is the CGRS and avers that the freezing order was vacated.

The Applicant's Rejoinder

29. In his affidavit sworn on 11/12/2019, the Applicant denies the allegation that his application is frivolous and contends that it raises pertinent issues regarding the Petitioner's management since the general secretary cannot make unilateral decisions that bind the union.

30. He contends that he is the chairman and a member of the Petitioner and avers that the constitution grants him the power of observing the compliance of the union's constitution and the relevant laws. It is his contention that he does not have to be the Petitioner's employee for him to be joined to this suit.

31. He denies there being a meeting on 15/6/2017 that resolved to expel him and avers that such resolution would have been null and void since all disciplinary matters that had been initiated by the general secretary were stayed pending the hearing and determination of ELRC Cause 12 of 2017, vide the order issued on 6/4/2017.

32. In response to paragraph 18 and 19 of the replying affidavit, he avers that he chaired the NGC meetings of 9th and 12th November 2016 whose resolutions were altered and the minutes signed by unauthorized persons. In response to paragraph 21, he maintains that the County Government Retirement Scheme Act has not been operationalized.

33. He denies the contents of paragraph 23 and contends that the issue of lapsing of the orders is still the subject of litigation in Cause 12 of 2017.

34. The Application was disposed of by way of written submissions with the Applicant filing his submissions on 29/1/2020 while the Petitioner filed theirs on 24/2/2020.

The Applicant's Submissions

35. The Applicant submits that he is still the Petitioner's chairman as was held in the ruling of 1/9/2017 in Cause 1069 of 2017, the ruling of 6/4/2017 and order of 20/12/2017 in Cause 12 of 2017. It is his position that the ruling delivered on 6/3/2019 did not give any definitive order regarding the lapse of any order and that the said ruling does not have any bearing in this case.

36. The Applicant submits that pursuant to articles 22, 48 and 50 of the Constitution and the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, he is entitled to be joined to these proceedings as an interested party in light of his position in the union and the stake he has in these proceedings.

37. He relies on the case of **Yusuf Abdi Adan & Another vs. Hussein Ahmed Farah & 3 Others; Nairobi HCCC 100 of 2016** where the Court held that a person seeking to be joined as an interested party could be joined by dint of articles 48 and 50 of the Constitution.

38. He urges that he has demonstrated that he is entitled to be joined as an interested party.

The Petitioner's Submissions

39. The Petitioner used the test set out in the case of **Trusted Society of Human Rights Alliance vs. Mumo Matemo & 5 Others [2014] eKLR** as the basis of its submissions. The Supreme Court stated as follows:-

“An interested party is one who has a stake in the proceedings, though he or she was not a party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest

will not be well articulated unless he himself or she herself appears in the proceedings and champions his or her cause.”

40. The Petitioner therefore submits that having affirmed that the Applicant has no subsisting relationship with it, then the Applicant has no interest in the matter and any interest he has, has been represented well by the Petitioner. However, the Petitioner has demonstrated the prejudice it stands to suffer if the Applicant is joined to this suit.

41. The Petitioner further submits that since the Applicant is not an official, member or employee of the union, he will not be affected by outcome of the petition. As such, the Applicant only seeks to maliciously propagate his personal agenda hence the instant application and the filed affidavits should be struck out for being frivolous and vexatious.

42. I have examined the averments of both Parties herein. The Applicant wishes to be enjoined in this Petition stating that he has an interest as Chair of the Petitioner.

43. If indeed the Applicant is Chair of the Petitioner then by virtue of that position, he is already part and parcel of this Petition.

44. As submitted by the Petitioner, in **Mumo Matemo case** (supra) the person seeking joinder must be a party who was not party of the suit *ab initio*. The Applicant submits that he is Chair of the Petitioner and so by virtue of this submission, he is part and parcel of the Petitioner and therefore his interests if at all will be addressed by the Petitioner.

45. In view of this argument, I find the application by the Applicant unmerited and I disallow it. I order that the Petition proceeds now with the Parties currently in the suit.

46. Costs in the cause.

Dated and delivered in Chambers via zoom this 21st day of May, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mageto for Interested Party – Present

Otieno for 3rd and 4th Respondents – Present

Odhiambo holding brief Muthomi for 1st, 2nd and 9th Respondents – Present

Miss Kinyua for 6th Respondent – Present