



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT KERICHO

PETITION NO. 4 OF 2019

GWIYO KWARAA DAMON 1ST PETITIONER
RONALD ACHOKI 2ND PETITIONER
JOPHINUS MUSUNDI 3RD PETITIONER
NEWTON F. KIMANTHI 4TH PETITIONER
FLORENCE MUNORU 5TH PETITIONER

VERSUS

KENYA NATIONAL UNION OF NURSES 1ST RESPONDENT
SETH PANYAKO 2ND RESPONDENT
AGNES WANGECHI MANDERU 3RD RESPONDENT
HENRY ADOLWA MAJANGA 4TH RESPONDENT

AND

REGISTRAR OF TRADE UNIONS INTERESTED PARTY

JUDGEMENT

The petitioners are seeking the following orders;

1. Spent.
2. Declaration be issued that the 2nd, 3rd and 4th respondents violated the union constitution, the Labour Relations Act and the constitution of the Republic of Kenya.
3. An order of injunction be issued restraining the officials of the union from accessing, withdrawing and/or dealing with the union bank account at
Barclays bank, Queensway Branch Account No.2027765079 and Co-operative Bank, Agha Khan Walk branch Account No.011203095200 save for mandatory expenses which include and limited to employee salaries, rent, office expenses and minimum miscellaneous expenses on need be basis and upon court sanctioning the same.
4. That the respondents to render accurate audited accounts of all monies received and spent by the 1st respondent for the year ended 31st June, 2016, 31st June, 2017, 31st June, 2018 and 31st June, 2019.
5. The 2nd, 3rd and 4th respondents be suspended from their respective offices and from operating the 1st respondent bank accounts at **Barclays bank, Queensway Branch Account No.2027765079 and Co-operative Bank, Agha Khan Walk branch Account No.011203095200** and in place of the 2nd, 3rd, and 4th respondents be substituted with the chairman of the union, the deputy secretary general and one trustee who has not been the bank signatory to any of the union accounts.

6. The court be pleased to issue orders surcharging the 2nd, 3rd and 4th respondents of any 1st respondent monies/funds spent without approval of the relevant constitutional organs and / or monies misappropriated by the 2nd, 3rd and 4th respondents.

7. The court do issue forensic audit of all the financial positions of the union for the period of the financial ears ended 31st June 2013 up to 31st May, 2019.

8. An order collecting and conserving all the union assets, property, documents, vehicles belonging to the union.

9. The registrar of trade union to in the meantime be directed to appoint a caretaker committee for purposes of running the union offices and affairs until new officials of the union are elected.

10. Costs and interest of the petition.

The petition

The petitioners are adults and members of the 1st respondent, a trade union and have filed the petition for and on behalf of all members of the 1st respondent. The 2nd respondent is the secretary General of the 1s respondent. The 3rd respondent is the national treasurer and the 4th respondent is a trustee of the 1st respondent.

The interested party is appointed under section 31 of the Labour Institutions Act, 2007.

The petitioners case is that the respondents are in violation of the 1st respondent constitution specifically chapter viii (1), chapter xi (3), (4) (a) to (i), chapter xii, chapter xiii, chapter xiv and chapter xv.

The 2nd, 3rd and 4th respondents in cohort with others are incurring irregular, unauthorised and unlawful expenditure of the 1st respondent finances without authorisation from the National Governing Council (NGC), the National Executive Council (NEC) and finance committee. There are no and have never been any budgetary estimates read and adopted by the relevant union organs so as to enable the respondents to spend the union funds.

There are no audited accounts of the union since inception particularly for financial years ending 31st June, 2016, 2017, 2018 and 2019 respectively.

There are no audited accounts presented to the interested party and previous audited accounts presented were not approved by the relevant union organs and are tainted with misdeeds. The union accounts should be subjected to forensic audit for the period of 2013 to 2019 in lien with the union constitution and the requirements of the labour Relations Act.

The National Governing Council and National Executive Council have failed to discharge their constitutional mandate pursuant to chapter xi, xii, xiv and xv of the 1st respondent and which would have salvaged the union resources.

The 1st respondent constitution provides of the National Governing Council as the supreme organ and for the financial committee to look into proper disposal of the funds, prepare annual budgets and estimates of the income and expenditure and plans of the union funds. This was never done for the financial years ended 31st June, 2016, 2017, 2018 and 2019 and the 2nd, 3rd and 4th respondents are withdrawing and spending the union monies without authorisation and this has and will continue to prejudice the affairs of the union and interests of the union members unless orders sought in the petition are issued restraining the respondents from their continued unlawful acts.

The continued incurring irregular, unauthorised and unlawful expenditure of the union funds in contravention of chapter 4 of the union constitution shall render great injustice and prejudice the affairs of the union and the interests of its members. The 2nd, 3rd and 4th respondents are engaging in concerted efforts of wasting the resources of the union in total contravention of the union constitution and if not stopped the union shall continue losing its resources and run it down.

The 2nd, 3rd and 4th respondents have been illegally applying union funds and properties on personal partisan interests including political campaigns in the year 2017 and in contravention of the union constitution. The 2nd respondent has also unilaterally spent union funds in contravention of the union constitution. The 2nd respondent has issued illegal strike notices which were never sanctioned by the union organs thus spending union funds unlawfully and subjecting members to uncalled for disciplinary actions by the employers in total violation of the union constitution.

The petition is also that the Interested Party has on various occasions called for inspection of the union books of accounts pursuant to section 42, 43 and 44 of the Labour Relations Act, 2007 (the Act) but the respondents responded to the Interested Party with insults and declined to allow such inspection contrary to the union constitution.

The 2nd respondent has spent union funds to purchase motor vehicle No.KCQ 490U registered in his name and this amounts to theft of union funds and assets.

The 2nd respondent in cahoots with the 3rd and 4th respondents unlawfully sold the union vehicle No.KBV 269N without sanction by the union organs and contrary to section 37 of the Act. These respondents diverted union funds and assets and used the same to print campaign

material when the 2nd respondent was running for political office to be senator Kakamega County in the year 2017. These respondents withdrew Ksh.1, 000,000 from the union accounts on the pretext that these monies were to purchase t-shirts to be used by members during Labour Day celebrations on 1st may, 2017 yet no member participated and no t-shirts were purchased for the event. These monies have never been returned to the 1st respondent.

The petition is also that the 2nd, 3rd and 4th respondents are signatories to all union bank accounts at **Barclays bank, Queensway Branch Account No.2027765079 and Co-operative Bank, Agha Khan Walk branch Account No.011203095200** from which they continue to withdraw unauthorised union monies. They cannot account for members monies for the financial years ended 31st June, 2016, 2017, 2018 and 2019 respectively and should therefore be directed to deposit to court within 7 days all the 1st respondent bank statements for the year 2016 to 2019 and all payment vouchers and receipts for the same period and all bond, securities and list of all the assets and liabilities of the union for purposes of scrutiny to ascertain the extent of wastage of finances and assets.

These respondents should be suspended from their respective offices of the union for the purposes of scrutiny of the union accounts, funds, assets, liabilities and avert huge losses to the union. Unless the court intervenes and stop illegal withdrawal of monies from the union accounts at **Barclays bank, Queensway Branch Account No.2027765079 and Co-operative Bank, Agha Khan Walk branch Account No.011203095200** the object of the petition shall be rendered nugatory.

The petition is supported by the affidavit of the 1st petitioner, Gwiyo Kwaraa Damon with the support of the other petitioners. He has also attached various records in support of his averments and annexure "GKD14" a list of 1st respondent members in support of the petition.

Respondents

In reply, the 1st and 2nd respondent filed Notice of Preliminary Objections that;

- 1. the petition is barred by the rule of Sub judice and therefore untenable for the reason that there are similar suits subsisting with similar cause of action and respondents in Nairobi ELRC No.12 of 2017, Cause No.747 of 2018 & Cause No.1069 of 2017 and therefore not tenable.*
- 2. The Petition is res judicata as there is already ruling of this court in Nairobi ELRC Cause No.12 of 2017 delivered on 6th April, 2017 and a judgement in Cause No.1447 of 2014 consolidated with Cause No.1454 of 2014 * 1545 of 2014 delivered on 15th July, 2016 and therefore untenable.*
- 3. The petition offends the mandatory provisions of rule 9 of the Employment and Labour Relations Court (Procedure) rules, 2016 and Part II Rule No.4(1) & (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 as the 1st petitioner has failed to adduce any authority from the 2nd, 3rd, 4th and 5th petitioners to act on their behalf in this petition in his own affidavit dated 11th June, 2019 hence no locus standi to file the petition.*
- 4. The petitioners have not demonstrated and or described any right or fundamental freedoms provided for in the constitution that is alleged denied, violated or infringed in accordance with Part II Rule No.4 (1) & (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 thus the petition is premature and an abuse of court process.*
- 5. The petition is frivolous, misconceived, incurable and fatally defective and therefore untenable as it offends the mandatory provisions of section 30 of the Act.*
- 6. The petition is in contravention of section 134 of the Evidence Act on privileges of Advocates and must fail on the principle of conflict of interest and confidentiality as the Counsel on record on behalf of the petitioners is also acting for and on behalf of the 1st respondent in Eldoret ELRC Cause No.233 of 2018 hence barred from instituting the suit against the 1st and 2nd respondents.*

2nd respondent

The 2nd respondent also replied to the petition in his Replying Affidavit filed on 17th December, 2019 and avers that he is the general secretary of the 1st respondent and the 2nd respondent herein and adopts the Replying Affidavit to the application by the petitioners herein and that the instant matter is *res judicata* the same having been conclusively addressed by the court under ELRC Cause No.1447 of 2014 consolidated with ELRC Cause No.1454 of 2014 and 1545 of 2014. The petitioner's herein substantive claim is for the Interested Party to appoint a caretaker committee for purposes of running the affairs of the 1st respondent until new official are elected.

The subject of the suit in ELRC Cause No.1447 of 2014 on 4th September, 2014 was seeking for the dissolution of National Executive Council, fresh election; appointment of a caretaker committee and in judgement on 15th July, 2016 the court found no merit in the suit and dismissed it together with the consolidated suit with costs.

The petitioners have filed several suits against the 1st respondent;

Current **petition No.4 of 2019** on the grounds that there is a violation of the union constitution, injunction to stop access to bank accounts; calling for an audit of union accounts and a forensic audit of books, accounts, assets, and there be appointment of a caretaker committee until elections are held; ELRC No.12 of 2017 the chairman against the 2nd respondent and the Interested Party seeking for declarations that the 2nd

respondent is in abuse of office and the office be declared vacant and the National Governing Council to declare the seat vacant and the general secretary be ordered to surrender the official vehicle No.KCC 757R, KBV 296N, lap top, Ipad, and phone. The suit is still pending determination.

ELRC No.747 of 2018 suit against the 2nd respondent seeking to compel him to return the 1st respondent assets; appointment of auditors to conduct a special audit of the union; that he is unfit to hold office and the office bearers be removed and stopped from entering office;

ELRC No.1592 of 2018 – suit seeking to have all office bearers be declared vacant, barred from operating union accounts and there be new elections;

That the instant petition is a replica of ELRC No.1447 of 2014 consolidated with ELRC Cause No.1454 of 2014 and 1545 of 2014 consolidated. It relates to similar issues already adjudged by the same court and thus in abuse of court process. The petition does not raise any new matters outside of what is already addressed and should be dismissed with costs.

3rd respondent

The 3rd respondent, Agnes Wangechi Munderu filed Replying Affidavit on 28th January, 2020 in reply to the petition and avers that the petition is *res judicata* and there exists other suits over similar issues raised herein and the multiplicity of such suits in abuse of court process.

The petitioners are seeking for audited accounts of the 1st respondent and her office as treasurer of the union has the mandate under chapter viii(1), ix(5), xi and xiii of the constitution and section 42, 43, 44, 45, 46 and 47 of the Act on the management of trade union funds have been complied with. Section 44(a) of the Act requires that audited books of accounts be availed for inspection by the members upon giving 72 hours written notice to the general secretary and there is no demonstration that the petitions have applied these provisions.

The Interested Party has not issued notice for non-compliance by the respondents in line with the law. There are audited books of accounts of the 1st respondent and the court has no mandate under section 47 of the Act to undertake such process.

The 3rd respondent also avers that the expenditures of the 1st respondent are authorised by its constitution and the relevant organs including the finance committee and the powers of the court under section 47 of the Act are limited.

The petitioners have not set out which constitutional rights have been violated and should be dismissed with costs.

Interested party

The Interested Party entered appearance vide Notice filed on 16th August, 2019 but did not file any responses or attend court at any given instance despite service of all pleadings.

Written submissions

The parties agreed to address the petition by way of written submissions.

The petitioners submitted that they are members of the 1st respondent and 1st petitioner is the Deputy National Organising secretary from 26th February, 2016.

The suit herein is not *res judicata* as alleged by the respondents as the issues set out in the petition have not been substantively addressed in any other suit so as to bar litigation herein. The parties in the other suits cited by the 2nd and the 3rd respondents are substantively different from herein and none of the petitioners are party to the cited suit.

The issues in dispute is to have forensic audit of the union accounts from June, 2013 to May, 2019 an issue different and separate from the other cited suits. The petition is also about the perseveration of the property of the 1st respondent until new elections are held. Where there is finding of misuse and misappropriation of union funds the respondents be surcharged and be restrained from dealing with the union properties/assets contrary to the union constitution and for personal benefit.

Section 39 of the Act regulates the activities of a trade union and for which union funds should be used for. This section is replicated in the union constitution at chapter xi (4).

Sections 41, 42, 43 and 44 of the Act provides that where there is misappropriation of union funds, a member of the union is at liberty to move the court and obtain orders which includes restraining the union officials from further use of any funds and to render accounts. The court has jurisdiction to order for such measures and the modalities for an audit are set out under section 42 of the Act. this is where the union officials have failed and or refused to render accounts annually through a resolution, which is mandatory.

The respondents have not rendered accounts with regard to the 1st respondent. the remittance of union dues by 1st respondent members becomes fruitless where the respondents have failed to give an account of all funds received from previous years and all bonds, securities and other properties of the union and section 46 of the Act allow the Interested Party to call the union treasurer, the executive or management to render detailed account of the union funds and failure to comply a sanction should follow.

The 3rd respondent as a trustee of the 1st respondent and has failed to carry out the due mandate under the union constitution and in law. Efforts by the Interested Party to inspect the books of accounts of the 1st respondents have been frustrated by the 2nd, 3rd and 4th respondent. the petition should be allowed as prayed with costs.

1st and 2nd respondents

The 1st and 2nd respondents submitted that the petition herein is in abuse of the court process as held in the case of **Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 Others [2009] eKLR**. there is abuse of process and the 2nd and 3rd petitioners have no interest(s) herein as they are not *bona fides* members of the 1st respondent and not suited in this petition. Also the 1st and 2nd petitioners are illegally operating Kenya Commercial bank (KCB) Moi Avenue Branch, Account Number 1254417206.

The objections raised by the respondents are in the nature that the petition is *res judicata*. there is conflict of interest on the part of Counsel for the petitioners who also represents the 1st s in **Eldoret ELRC No.233 of 2018**.

The respondents also submitted that is *res judicata* having been conclusively determined in Nairobi ELRC no. 1447 OF 2014 consolidated with ELRC No. 1454of 2014 & 1545 of 2014 and there is a multiplicity of suits on the same issues addressed in ELRC No. 12 of 2017, Nairobi ELRC No. 747 OF 2018 and ELRC 1592 of 2018. The allegations made against the respondents are false and without proof. There is no violation of the union constitution of the provisions of the law.

The Union's Trustees Charles Alisoreng and Purity Matu in their affidavits confirm that the Union is being managed properly as per the law, and that all properties and funds are being utilized as per the law and in the best interest of the Union members.

The respondents also submitted that there is no authority to the 1st petitioner to file the suit and make his affidavit in support of the petition. There is no letter of authority or schedule of claimants supporting the petition. This coupled with the fact that the 2nd and 3rd petitioners are not bona fides members of the union make the petition an abuse of court process. There is conflict with the provisions of section 41 of the Act.

The petition is *sub judice* as there is a similar suit with regard to the same matter in;

ELRC CASE NO. 12 OF 2017 John K. Biiy versus Seth Panyako, Registrar of Trade Unions, Kenya National Union of Nurses pending hearing;

ELRC Cause No. 747 of 2018 John K. Biiy, Simon K. Kibii and 7 others v Seth Panyako, and 3 others, pending hearing; and

Cause No. 1592 of 2018 John k. Biiy and 4 others v Joseph Ngwasi and 16 others; matter pending hearing.

The instant petition is therefore a replication of matters between the same parties over similar issues.

The petitioners have failed to articulate how the union constitution has been violated by the respondents. The National Governing Council has a membership of 164 and National Executive Council has a composition of 14 members and the petitioners opted to file suit against 4 respondent. this is with malice.

The allegations made that there is misuse of union funds and assets is without evidence and made in general terms devoid of any credence. Where funds were withdrawn from union accounts, this was with approval of the relevant organs. There is no proof that motor vehicle registration no. KBV 269N. KCQ 490U was sold or purchased irregularly.

All union assets vest in the trustees who confirm that these have been put into good use.

The respondents also submitted that with regard to audited books of accounts, section 44(a) of the Act sets out the applicable procedure for any member seeking to apply for the record. There is no pending request made by the petitioners. The 2nd and 3rd respondent do not merit such an application.

Where the 1st respondent has not complied with its legal mandate, section 45 of the Act allow the Interested Party to act and address which is not the case here.

The petition is therefore meant to usurp the union leadership without the due process and the applicable law and should be rejected and the petition dismissed with costs.

3rd and 4th respondents

The respondents largely adopt the pleadings, the affidavits and in essence agree with the written submission made by the 1st and 2nd respondents.

On the pleadings, the affidavits and written submissions, the issues which emerge for determination can be summarised as follows;

Whether the suit is *res judicata*;

Whether the suit is *sub judice*;

Whether there is conflict of interest with regard to the counsel for the petitioners and the 1st and 2nd respondents;

Whether there are constitutional violations;

Whether there is violation of the 1st respondent union constitution;

Whether there is violation of the provisions of sections 43, 44, 45 and 47 of the Act and by extension Article 41 of the Constitution, 2010;

Whether the remedies sought should issue; and

Who should pay costs.

A suit is *res judicata* as correctly submitted by the 4th respondent in the case of **Benjamin Koech versus Baringo County Government & 2 others; Joseph C. Koech (Interested Party)** that;

The principle of finality or res judicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision

In this regard, the Court of Appeal in addressing what is *res judicata* in the case of **Kenya Commercial Bank Limited v Benjoh Amalgamated Limited [2017] eKLR** held that;

... the general rule is that where a litigant seeks to reopen in a fresh action an issue which was previously raised and decided on the merits in an earlier action between the same parties, the public interest in the finality of litigation (“the finality principle”) outweighs the public interest in achieving justice between the parties (“the justice principle”) and therefore the doctrine of res judicata applies. In such cases, it is usually immaterial that the decision which gives rise to the estoppel is wrong because “a competent tribunal has jurisdiction to decide wrongly, as well as correctly, and if it makes a mistake its decision is binding unless corrected on appeal

A matter is therefore *res judicata* where the issue(s) note din dispute has already been adjudged and settled in judgement by the same court on the merits conclusively. The sum and substance of the whole rule is that a matter once judicially decided is finally decided and the following ingredients can be discerned from the previous suit(s) that;

- (a) That of a court of competent jurisdiction.
- (b) Directly speaking upon the matter in question in the subsequent suit and;
- (c) Between the same parties or their privies.

The respondents have relied on several cases/suits filed against them jointly and with others and that the instant petition has been addressed or is subject of on-going litigation. Reliance was given to the following suits;

1. Nairobi ELRC No. 1447 of 2014 consolidated with 1454/2014 and 1545/2014 – John K Wandereva versus Kenya National Union of Nurses & Seth Panyako and Jophinus Musundi, Sammy B Cheserek, Lawrence Kinyua, Arphacard Kemboi, Lillian O Osunga, Lydia N Ngari.

2. Nairobi ELRC No.12 of 2017 – John K Biyy versus Seth Panyako, Registrar of Trade Union, Kenya National Union of Nurses.

3. Nairobi ELRC No.747 of 2018 – John K Biyy, Simon K Kibu, Robert Kibet, Alice N Yahuma, Lydia C Tanui, Sheilah Jemutai, Caroline Jerotich, Solomon K Katuit, Peter K Mutai versus Seth Panyako, Agnes Munderu, Kenya National Union of Nurses, Registrar of Trade Unions & Henry Adolwa, Purity Matu, Charles Alisoreng.

4. Nairobi ELRC No.1592 of 2018 – John K Biyy, Simon Kibii, Alice Yahuma, Lydia Tanui, Amos K Ngetich versus Joseph Ngwasi, Fredrick Oigo, Seth Panyako, Maurice Opetu, Asha Ali Ido, Agnes Munderu, George Shiveka, Ann Githiongo, Damon Kwaraa, Henry Adolwa, Purity Matu, Charles Alisoreng, John Gachara, Stephen Ruteere, Kenya National Union Of Nurses, Registrar of Trade Unions and Ministry of Health, Ministry of Labour & Social protection, Council of Governors.

5. Nairobi ELRC No.12 of 2017 – John Kiiy versus Seth Panyako, Registrar of Trade Union, Kenya National Union of Nurses.

These suits assessed, and the common denominator being the affairs of the 1st respondent union, the petitioners standing as set out above have not litigated on similar matters against the instant respondents before. The 1st petitioner has been a respondent in one previous suit, the 2nd petitioner has not been a party in the referenced suits, the 3rd petitioner has been a respondent and the 4th and 5th petitioners have not

been a party in any of the referenced suits above.

Though the issue of challenging the holding of office by the current office holders of the 1st respondent has substantively and or partially been in issue in other suits and instantly, the petitioners averments that they are members of the 1st respondent, in such capacity and by application of the Act have the right to urge their case against the 1st respondent, the 2nd respondent as the general secretary and any other respondent found as a necessary party to these proceedings.

The choice of who to be a respondent and a necessary party to be enjoined in these proceedings is solely at the discretion of the petitioners subject to setting out what remedies they seek against such a respondent(s).

The issues of the petition thus addressed by the petitioners are not contrary to the rules of *res judicata* in this instance.

The court takes judicial notice that a trade union such as the 1st respondent periodically is required to elect its officials. there is constant change of officials and officers and the changing roles of the parties in various positions seeking to challenge the affairs of the union entails different suits being filed to challenge one set of elected officials and upon a new election, a different set of officials may be sued as the case may require.

In this instance the 1st and 3rd respondents have been respondents in previous suits.

However none have litigated as claimants over matters set out in the instant petition.

The 2nd and 3rd petitioners have been officials of the 1st respondent. Such standing has its foundation under the provisions of the Act and thus members of the 1st respondent and cannot be extricated from proceedings herein.

With regard to alleged cases said to be on-going over similar matters and thus *sub judice*, Section 6 of the Civil Procedure Act. The section provides as follows:

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

The respondents' case is that there are on-going suits which relates to similar matters herein in the cases of **ELRC CASE NO. 12 OF 2017 John K. Biiy versus Seth Panyako, Registrar of Trade Unions, Kenya National Union of Nurses; ELRC Cause No. 747 of 2018 John K. Biiy, Simon K. Kibii and 7 others v Seth Panyako, and 3 others; and Cause No. 1592 of 2018 John k. Biiy and 4 others v Joseph Ngwasi and 16 others.**

The petitioners do not deny that these suits exist. Indeed, the 1st petitioner is the 9th respondent in **Nairobi ELRC No.1592 of 2018 – John K Biiy, Simon Kibii, Alice Yahuma, Lydia Tanui, Amos K Ngetich versus Joseph Ngwasi, Fredrick Oigo, Seth Panyako, Maurice Opetu, Asha Ali Ido, Agnes Munderu, George Shiveka, Ann Githiongo, Damon Kwaraa, Henry Adolwa, Purity Matu, Charles Alisoreng, John Gachara, Stephen Ruteere, Kenya National Union Of Nurses, Registrar of Trade Unions and Ministry of Health, Ministry of Labour & Social protection, Council of Governors.** The 3rd petitioner on the other hand is a respondent in **Nairobi ELRC No. 1447 of 2014 consolidated with 1454/2014 and 1545/2014 – John K Wandereva versus Kenya National Union of Nurses & Seth Panyako and Jophinus Musundi, Sammy B Cheserek, Lawrence Kinyua, Arphacard Kemboi, Lillian O Osunga, Lydia N Ngari.**

The suit in **Nairobi ELRC No. 1447 of 2014 consolidated with 1454/2014 and 1545/2014** where the 3rd judgement rendered. The *judicata* as set out above. petitioner was a respondent has been concluded and 3rd petitioner is herein a petitioner over matters not *res*

The suit in **Nairobi ELRC No.1592 of 2018** is on-going and the 1st petitioner is the 9th respondent and it relates to a claim that he is a member of National Executive Council holding the position of *Deputy National Organising Secretary* of the 1st respondent trade union and following litigation in Nyeri ELRC No.31 of 2017 and delivery of judgement the union stood dissolved among other claims and the claimants sought for orders against the respondents jointly and severally that their offices stood vacant and were trespassing by entering the offices of the union and an acting officer be appointed pending new elections.

These suits therefore stand out as different and separate from the instant suit. the doctrine of *sub judice* does not apply.

On the alleged conflict of interest by counsel for the petitioners and that he has acted for the 1st respondent in Eldoret ELRC No.233 of 2018, in reply the petitioners attached copies of the Memorandum of Claim filed in Eldoret ELRC No.233 of 2018 which is filed by the firm of *Mwakio, Kirwa & Company Advocates.* the petition herein is filed by **Maritim & Company Advocates.** the principles In **Kolaba Enterprise Ltd versus Shamsudin Hussein Varvani & Anor.(2014) eKLR** where the court held that a company is a separate persona in law and should be moved as such.

It should be appreciated that the separate corporate personality is the best legal innovation ever in company law. See the famous case of SALOMON & CO LTD v SALOMON [1897] A.C. 22 H.L that a company is different person altogether from its subscribers and directors.

In this case, the petitioners submissions that Mr Kirwa attending for the petitioners represents claimants in Eldoret ELRC No.233 of 2018 are

not challenged in any material way. coupled with the law of who a legal person is, the pleadings herein drawn by a different law firm, even where Mr Kirwa were to attend in both suits in Eldoret ELRC No.233 of 2018 and in the instant petition, acting for the parties against the union as the respondent in both suits is not in conflict of interest.

There is no evidence by the 1st and 2nd respondents that they have/had instructed Mr Kirwa or the firm of *Mwakio, Kirwa & Company Advocates* or **Maritim & Company Advocates** to represent its/their interest(s) in Eldoret ELRC No.233 of 2018 so as to claim there is conflict of interest. This court finds none.

With regard to alleged violation of constitutional rights, as set out in the case **Anarita Karimi Njeru versus Republic No.1 (1979) I KLR, 54** and which was echoed in the case of **Mumo Matemo v Trusted Society of Human Rights Alliance Civil APP.290/2012 (2013) e KLR** that;

if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

Though the petitioners have relied on various constitutional provisions in this petition, there is no material violation addressed with a *reasonable degree of precision* for the court to discern any violation of a constitutional nature. It is not necessary to file a petition and merely cite the constitution and several of its articles, the complaints with regard to particular violations must be addressed with precision. The court find no constitutional violations.

With regard to the violation of the union constitution and the provisions of the law, these two shall be addressed concurrently.

The petition is that the respondents have in cohorts violated the 1st respondent union constitution and the provisions of sections 43, 44, 45 and 47 of the Act. That they have been incurring irregular, unauthorised and unlawful expenditure of union funds without authorisation from National Governing Council and National Executive Council or the finance committee. There have never been budgetary estimates read and adopted by the relevant union organs so as to allow the respondents to spend the union funds and continue to run without audited books of accounts and account for its assets.

The respondents' case is that the claim that there is a violation of the union constitution is without particulars; the petitioners have never been members of the union budget committee or National Governing Council to claim for budgetary estimates and finance plans of the union. To access and seek to inspect the books of accounts is provided for under chapter xiv of the union constitution and section 44(a) of the Act and no application has been made by any petitioner in this regard.

The Act allow for the regulation and management of trade union by application of its constitution. The primary document of reference is any matter relating to a trade union such as the 1st respondent is its constitution.

The petitioners filed a copy of the union constitution annexed to the petition. The administrative structure is that the National Governing Council is the apex organ followed by the National Executive Council and the office of general secretary which is held by the 2nd respondent. Each organ is given a constitutional mandate. The 1st petitioner is defined as the Deputy National Organising secretary from 26th February, 2016 and under chapter vii(2)(xiii) of the union constitution and therefore sits at National Governing Council and National Executive Council.

On good basis, there is convening of the National Governing Council or a Special National Governing Council of convene the National Executive Council. Under chapter vii of the constitution, the National Executive Council may be constituted by two-thirds of its membership. The provisions is to have the general secretary state the place and date of such meeting as the convener.

Chapter viii allow for appointment of various committees of the union to run its affairs and which includes the finance committee to prepare annual budgets and make plans of the union funds and comprise the general secretary, chairperson, Deputy general secretary, trustees, two members from National Executive Council and the chief accountant. I take it this is the committee to be moved when books of accounts and audits, plans on finances and funds are in issue.

There is also the office of the national treasurer mandated to ensure that all payments are authorised and to prepare financial statements to National Executive Council and a balance sheet by 31st of June. This office should also ensure that there is a bank account for the union and to approve and sign all union cheques.

Under chapter XI (4) the union constitution sets out how the funds of the union may be used. The investments, making of accounts and allow for inspection of books of account as follows;

All accounts books and other official records of the union maintained at the Union Registered Officer shall be open for inspection at the Union Registered officer during hours of business by any member of the union provided that any such member shall have given at least seventy two hours written notice to the secretary general.

Chapter XV of the Union constitution also allow for audits in the following terms;

1. The National Governing Council shall appoint a qualified Accountants approved by the Regiter [Registrar] of Trade Union to audit the Accounts of the Union as soon as possible after the end of each financial year. Such auditor shall audit a general report on the financial position of the union.

2. A copy of the Auditor's report shall be conspicuously displayed at the Registered Officer of the Union.

Under the above provisions, the 1st respondent under its constitution has committed through its officers and particularly the general secretary to allow for inspection of books of accounts upon making the required application. Also the Register of Trade Unions, the Interested Party herein is required to approve a qualified accountant(s) after the end of each financial year and to have the auditor's report *conspicuously displayed* at the union's office.

Have the respondents violated these provisions?

These provisions must be read together with the Act.

Section 42 of the Act requires the treasurer to render accounts of the trade union. Upon request and directions by the Registrar of Trade Union, a trade union and the treasurer should give accounts and section 42 (3) requires the submission of the following details;

(3) An account rendered under this section shall specify—

(a) all amounts received or paid by the official since assuming office or, if the official has previously rendered an account, since the date of the last account;

(b) the balance remaining in the possession of the official at the time of rendering the account; and

(c) all bonds, securities or other property of the trade union, employers' organisation or federation entrusted to the custody of, or under the control of the official.

And an official who fails to adhere to the directions of the Registrar of Trade Unions commits an offence.

In this regard, sections 43, 44 and 45 of the Act make it mandatory for the trade union such as the 1st respondent to file its annual returns, allow for the inspection of its accounts and records and not to obstruct the Registrar of Trade Unions in undertaking these mandates. The powers granted to the Registrar of Trade Unions are wide and not restricted in time at section 46 of the Act as follows;

46. Power to require detailed accounts

(1) The Registrar may, at any time, call upon the treasurer, and the executive or management board by whatever name called, or any other official of a trade union or employers' organisation to render detailed accounts of its funds or the funds of any branch for any period, in the manner and containing such information as the Registrar may require.

(2) A person who fails to comply with a request made by the Registrar under Subsection (1) commits an offence.

Where there is no compliance as required above under section 43, 44, 45 and 46 of the Act, and there is evidence of misuse of monies or property of a trade union, section 47 should be put into motion. An aggrieved trade union member is allowed to file a complaint with the court. however the chronology of the process is important to address as section 47 provides as follows;

47. Misuse of money or property of a trade union

(1) The Industrial Court may—

(a) order any person who has in his possession or control any property of a trade union, employers' organisation or federation in violation of its rules or who has unlawfully expended or withheld its moneys, to deliver that property or pay that money to its trustees; and

(b) suspend any official who contravenes paragraph (a).

(2) A complaint under this section shall be brought by—

(a) the Registrar; or

(b) A member of a trade union, employers' organisation or federation at the time of bringing the complaint of the trade union or employers' organisation concerned.

Section 47 steps entails the following;

Make application to suspend the person/officer/official of the union who had unlawfully expended of withheld union funds, property;

The complaint be filed by the RTU; or

The complaint be filed by a member of the union.

Under section 44 and 45 of the Act, the Registrar of Trade Unions is mandated to go in and inspect books of accounts and records, and to receive annual returns and where such mandate is obstructed, a sanction should follow. In this regard, the office of the Registrar of Trade Unions is offered a vantage point to access all records of a trade union and make an enquiry and where there is obstruction move the court and obtain an order directing the officer/official(s) who has *unlawfully expended or withheld its moneys, to deliver that property or pay that money to its trustees*. The Registrar of Trade Unions is also mandated to obtain court orders allowing for the *suspension of any official who has contravened* the law by unlawfully expending or withholding monies and properties of a trade union.

The next level is to have a member of a trade union lodge the complaint/claim/petition or as the case may be with the court. Such a member is however at great disadvantage as the motions available to such a member to access books of accounts, records and inspection therefrom is dictated by the union constitution. In this case, it is by application to the general secretary under the 1st respondent union constitution at Chapter XI(4).

The question thus posed above as to whether there is violation of the union constitution becomes hazy as there is no application by the petitioners to the 2nd respondent as general secretary, treasurer or trustee to inspect the books of accounts or to visit the registered office to see the *conspicuously displayed* Audited books of accounts.

The attendance of the Registrar of Trade Unions in this regard to inspect the books of accounts of the 1st respondent is imperative. It is an absolute necessity. Without invoking such mandate, for the petitioner to move as they have sought would not yield much. The Registrar of Trade Unions carry such mandate.

The petitioners opted to enjoin the office of Registrar of Trade Unions as an Interested Party and not as a respondent. Where there are valid complaints against the respondents with regard to financial impropriety in the running of the 1st respondent funds and its properties, the office with the legal mandate to go in and cause to be inspected is that of the Registrar of Trade Unions. This legal mandate is primary and not as an interested party but as an independent office. Where such office is obstructed by any officer/officers of the 1st respondent in undertaking its legal mandate, then the Registrar of Trade Unions must move the court as of necessity and redress to stop and or avert wastage of a trade union funds and properties.

Where there is inaction by acts of omission or commission, then to enjoin the office of the Registrar of Trade Unions as an Interested Party is to avoid the obvious. Without access of all records of a trade union so as to make an enquiry, audit the books of accounts and financial operations, for the petitioners to move the court as herein is without the necessary evidence that there is unlawfully expended or withheld funds and properties of the union by its officers/officials and who should be made to account, deliver that property or pay that money to its trustees.

In the instance where the trustees have equally failed on their legal mandate, the enquiry by the Registrar of Trade Unions would equally address and cause a redress.

The office of the Registrar of Trade Union is mandated to go in and inspect the books of accounts. this is the office where annual returns should be filed. Where there is obstruction, a sanction should follow and orders obtained from the court to cause a suspension of the offending officer/official and to ensure there is an account rendered by such offending officer/official of the trade union such as the 1st respondent.

The petition hence seeking for orders that there are unauthorised expenditures and no budgetary estimates and that the 1st respondent has not had audited accounts since inception to date, the office charged to undertake this role, forensic of as the case may require is that of the Registrar of Trade Unions. Nothing stops this office from going in and undertaking its legal mandate with regard to the 1st respondent.

Where there is obstruction, section 47 of the Act allows the Registrar of Trade Unions to obtain injunctive orders off the court as set out above.

The inspection of books of accounts of a trade union is a statutory requirement. Where this has not been undertaken, it is not at the option of the 1st respondent or the 2nd, 3rd or 4th respondents. Any form of obstruction should attract a sanction, suspension and appropriate action to ensure member funds are put into good use and in accordance with the Union constitution.

The averments by the petitioners that the respondents have refused and or failed to allow the Interested Party to undertake its mandate in inspecting books of accounts is without evidence, and where this is the case, the office or the Interested Party under its statutory mandate properly moved should proceed without being caused any hindrance or prejudice following the instant petition. It is not upon the respondents or members of the 1st respondent to dictate on the Interested Party on how and when to carry out its legal mandate. Where there are hurdles created by any officer, member of respondents, the Interested Party as an office and institutionalised under the Minister has the mandate to act as under the provisions of section 41 and 44 of the Act.

As noted above, the Interested Party only entered appearance and did not participate in these proceedings so as to assist the court in the arbitration of the matters in dispute. This petition does not in any way estop the Interested Party from undertaking its legal mandate. To do so is not in *res judicata* or *sub judice*. The law enjoins such office to offer its skills, knowledge and expertise to all trade unions.

On alleged theft of union funds and purchase of motor vehicle No.KCQ 490U and other assets including funds from the union accounts and particular motor vehicles said to be registered in the name of the 2nd respondent, there is no documentary evidence of any nature as to the source of funds and the current ownership of such motor vehicle to link the same from the 1st respondent to the 2nd respondent so as to claim he usurped union funds and assets. An audit and paper trail into the same would facilitate the establishment of the source of funds and properties and where the 2nd respondent is found culpable, through the required inspections and returns to the RTU, the motions and sanction

under section 41 of the Act are open.

This would entail the filing of annual returns, inspection of accounts and records and a detailed accounts of all union funds and properties and where there is obstruction invoke the powers granted to this office under section 47 read with section 41 of the Act.

41. Injunction to restrain misuse of funds

(1) The Industrial Court [Employment and Labour Relations Court] may grant an injunction restraining unauthorized or unlawful expenditure of the funds of a trade union, employer's organisation or federation on application by the Registrar, or by five or more persons having a sufficient interest in the relief sought.

The substance of the petition thus addressed, without conclusive materials that the union constitution has been flouted, there being no attendance by the Registrar of Trade Unions that there are no annual returns by the 1st respondent through the office of the 2nd respondent so as to cause alarm and for an inspection of accounts and records and that there is no obstruction of this office from going in to cause for an enquiry and for the rendering of a detailed account and audit, the court finds no violation of the law by the respondents.

However, it is not lost to the court the various communications sent to the office of Registrar of Trade Unions by the 1st and 2nd respondents. Of particular mention is letter dated 1st August, 2016 with regard to *Inspection of Accounts for 2016* and referencing the Registrar of Trade Unions letter dated 28th July, 2016 and the 2nd respondent stating that;

....Your directive to carry out the inspection of books in mentioned branches covering the period stated is viewed as ill-timed and as a means to undermine the Union activities and its internal affairs that;

- 1. We do not understand your piecemeal inspection of January to July 2016 what you will inspect for the period of August to December 2016 which is ahead and not covered yet.*
- 2. The Union just submitted her audited accounts for the last calendar year and therefore finds your abrupt request a bit suspicious because your office is aware of the applied appeal No.6 where you are respondent. ...*

There is also letter dated 7th November, 2016 by the 2nd respondent to the Registrar of Trade Unions with regard to *Labour Relations Act 2007 Inspection of Account Head Office* and in reface to letter dated 26th September, 2016 to the effect that;

....This has reference to your letter Ref. ... in which you asked the National Office to furnish your office with the detailed accounts of the Head Office of KNUN on 21st November 2016 at 2:00 P.M for the period 1.1.2015 to 31.12.2015.

Your directive to carry out the inspection of books of accounts of the National Office covering the period stated in viewed as intent to undermine the Union activities and its internal affairs and totally contracts Article 41(4) of the Constitution of Kenya 2010, ...

....the union submitted her audited accounts for the financial year ended December 2015 which we consider sufficient to serve your intention. ...

Further note that, this Union is not a department in your office so as to be under your continued and sustained micromanagement and or supervision. ...

As noted above, the non-attendance by the Interested Party and who is Registrar of Trade Unions has denied the court crucial evidence and material in this petition. Having been enjoined as an IP, there are no substantive orders/remedies sought against the Interested Party.

It is however not lost the tenor, tempo, tone and language of communications by the 2nd respondent to this office. Caution is taken that the subject trail communications resulting in these responses are not with the court. to state more would not aid justice save to add that, the powers under section 41 and 47 of the Act with regard to the functions of the Registrar of Trade Unions and read together with section 45 of the Act, such office should not be obstructed by any officer/official of a trade union from going in and causing to be inspected and require the rendering of accounts. This shall suffice.

Before conclusion, I should add. It behoves upon every litigant approaching this court to come with clean hands. It is an imperative requirement under section 3 of the Employment and Labour Relations Court Act, 2011. It is not ordinary practice that every time a party gets an order deemed not supportive of their interest(s), wishes, likes, taste, perception and similar words to find and shout the court is compromised. Such conduct and manner only takes place where one is tainted with unclean hands.

The course of this petition has not been smooth. This called the court to be alert at all material times to avoid deterrence by words, deeds and rush to make frivolous application(s) and instead look ahead to ensure justice is done without fear, favour, prejudice or intimidation. Ordinary practice should let the parties do their work and the court to administer justice based on the pleading, applicable law so as to meet the ends of justice.

I wish to single out the Counsels for the parties who brought in professionalism and good decorum. Labour for justice, always.

Accordingly, as set out above, the court finds no violations of the union constitution or the law and the substance of the petition is lost. The petition is hereby dismissed. Each party shall bear own costs.

Dated and delivered electronically this 2nd June, 2020.

M. MBARU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship the Chief Justice on 15th March, 2020 the Order herein shall be delivered to the parties via emails. this 2nd June, 2020.

M. MBARU

JUDGE