



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 178 OF 2019

IN THE MATTER OF: THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER CHAPTER FOUR, ARTICLES 27(1), 36(1) AND 41(2)(c) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ARTICLES 1, 2, 3, 4(2), 10, 19, 20, 21, 22, 23, 24, 27, 36, 41, 47, 50(1), 73, 75, 156, 165, 258 AND 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ALLEGED VIOLATION OF SECTIONS 4 AND 5 OF THE FAIR ADMINISTRATIVE ACTIONS ACT 2015; SECTIONS 31(1), 8, 33, 34 AND 35 OF THE LABOUR RELATIONS ACT; SECTION 5 AND 7 OF THE LEADERSHIP AND INTEGRITY ACT, 2007 AND ARTICLE 14 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE LABOUR RELATIONS ACT

AND

IN THE MATTER OF: UNION OF KENYA CIVIL SERVANTS

BETWEEN

ZACHARY BINYANYA.....1ST PETITIONER

SILAS MUGAMBI KARIMBA.....2ND PETITIONER

DANIEL N. NDUNGU.....3RD PETITIONER

V

UNION OF KENYA CIVIL SERVANTS1ST RESPONDENT

TOM MBOYA ODEGE.....2ND RESPONDENT

JOHN M. NZAU.....3RD RESPONDENT

AND

REGISTRAR OF TRADE UNIONS.....INTERESTED PARTY

JUDGMENT

1. Zachary Binyanya (1st Petitioner), Silas Mugambi Karimba (2nd Petitioner) and Daniel N. Ndungu (3rd Petitioner) were all elected as office-bearers of the Union of Kenya Civil Servants (the Union) during October 2016 for 5-year terms each.
2. On 17 September 2019, Tom Mboya Odege (2nd Respondent) and acting as the Secretary-General of the Union issued notices to the 3 Petitioners asking them to hand over their offices with the Union allegedly because they had become ineligible to continue holding their offices because they had retired from the public service.
3. The Secretary-General cited the provisions of Articles 4 and 7(4) of the Union Constitution for his action.
4. The Petitioners were taken aback and they formally objected to the decision by the Secretary-General.
5. The Secretary-General did not respond to the objection by the Petitioners and on 1 October 2019, they instituted these proceedings in Court seeking urgent interdicts against removal/reinstatement into their respective offices.
6. The Court granted orders *ex-parte* reinstating the Petitioners to their positions pending the *inter-partes* hearing of the application. The orders were confirmed on 8 November 2019 (pending hearing and determination of the Petition).
7. The Court issued directions on the hearing of the Petition on 5 June 2020 as a consequence of which the following documents were filed
 - i. Respondents' replying affidavit to the Petition on 1 September 2020 (should have been filed by 28 August 2020).
 - ii. Petitioners' submissions on 10 September 2020.
 - iii. Respondents' and Interested Party's submissions were not on record by the agreed date of 30 September 2020.
8. The Petitioners identified 4 Issues as arising for the Court's determination in their submissions, being
 - i. Whether the Petitioners were lawfully and procedurally elected on the 27th October 2016 and if so whether the Petitioner (sic) can maintain his position as the national treasurer (sic) of the Respondent until expiry of his 5 years term in office.
 - ii. Whether the Respondents complied with the provisions of the Constitution of the Republic of Kenya, the Labour Relations Act and the Union of Kenya Civil Servants Constitution in its attempt to suspend and remove the Petitioner (sic) from holding office of the National Treasurer.
 - iii. Whether Articles 4 and 7(4) (a) of the Constitution of the Union is inconsistent the Constitution of Kenya, 2010 and the Labour Relations Act, and to that extent unconstitutional, unlawful and *ultra-vires* the Constitution and the Labour Relations Act.
 - iv. Who should pay costs of the Petition?

Whether Petitioners lawfully in office

9. The Petitioners were elected into their offices in 2016 while still serving as public officers. The 1st and 3rd Petitioners thereafter retired on 1 July 2018 while the 2nd Petitioner retired on 1 July 2019.
10. It is upon the retirement(s) that the Secretary-General instructed the Petitioners through letters dated 17 September 2019 to hand over their offices.
11. In challenging the move requiring them to hand over their offices, the Petitioners contended, in brief, that by dint of section 31(1) of the Labour Relations Act, they were eligible to continue holding their positions despite having left the public service.
12. The section permits any person who had or was employed in a sector within which a trade union operates to serve as an official of the union.
13. Second, the Petitioners asserted that pursuant to Article 12 of the Union's Constitution, they could only be removed from their offices on disciplinary grounds and after being afforded an opportunity to be heard but subject to a determination by the National Executive Board and ratification by the Advisory Council.
14. The Petitioners asserted that their removal from office was not on account of any disciplinary reasons and that they had not been subjected to any disciplinary or removal process either before the National Executive Board or Advisory Council.
15. Towards this end, it was urged that the action of the Secretary-General was not only unilateral but arbitrary.
16. Lastly, it was urged that the provisions of Article 4 and 7(4) of the Union's Constitution applied only in relation to eligibility to stand for office and that once elected, an official was entitled to serve a term of 5 years, and that Article 11 of the Union's Constitution did not

envisage vacation of office unless there was (a) violation by an official as contemplated by Article 12(1)(i) to (iv).

17. In sum, the Petitioners were contending that it was unlawful for the Respondents to purport to oust them from the offices they had been elected to on the ground that they had ceased to serve in the public service.
18. For the Respondents, the view was taken that since the Petitioners had retired from the public service in 2018/2019, they were holding their office(s) illegally as they no longer worked within the sector represented by the Union.
19. The Respondents in this respect asserted that the Petitioners membership of the Union ceased upon their retirement from the public service, and the continued holding of their respective offices became legally untenable.
20. The Respondents also called to their aid section 33 of the Labour Relations Act which provides that no person shall be a *voting member* of a Union unless the person is employed in the sector for which the union is registered.
21. To demonstrate that the Petitioners membership had ceased, the Respondents argued that because they were no longer on a payroll, monthly subscriptions could not be deducted as required by Article 4(2) of the Union's Constitution.
22. The Respondents further contended that based on a *direction* by the Registrar of Trade Unions in 2005, the Petitioners could not continue to hold office after retirement from public service.
23. Section 31 of the Labour Relations Act contemplates that a person who was engaged in a sector in which a trade union is registered to operate can be an official of the trade union.
24. The implication, in the view of the Court, being that a retired person or a person who has left such a sector may still qualify to be elected as a trade union official (section 31(4) of the Act makes an exception that for the position of a General Secretary, the officeholder need not have served in the sector represented by the Union).
25. Section 33 of the Act on its part provides for a cadre of union membership called a *voting member*. The Act and the Union's Constitution do not define who a *voting member* is.
26. In terms of section 31(1) of the Labour Relations Act, the Court is of the view that nothing stops the Petitioners from seeking office with the 1st Respondent notwithstanding that they had retired. However, section 31(4) of the Act denies them the right to vote.
27. The Act sets the general rules and in this respect, the Constitution of the individual Union must be examined to establish if it has placed any restrictions and/or exemptions on eligibility or qualification to contest or continue holding office.
28. Article 4 of the Union's Constitution provides for membership eligibility and it envisages payment of monthly subscriptions through a check-off system or in cash in advance as determined by the National Delegates Conference.
29. The Article does not provide explicitly how an official would lose his position.
30. Article 7 establishes the union's offices and election to the offices. Article 7(4) thereof sets out the election eligibility disqualifications for national union officials.
31. Despite setting out the election eligibility criteria for those intending to contest for national office(s), the Article is silent on how and whether a person who has already been elected to the national office would cease to hold the national office.
32. Article 7(5) nevertheless recognises that a non-member s may contest for national office provided the Registrar of Trade Unions gives permission (save for office of General Secretary).
33. Article 11 of the Constitution sets out the tenure and vacation of office. The tenure is set at 5-years subject to re-election. The term(s) expire at a national quinquennial delegates conference. The Article is silent on the vacation of office upon retirement from public service.
34. Article 12 provides for the discipline of national officials and the process of disciplinary removal (this Article does not apply in the case of the Petitioners).
35. What emerges from an examination of the statutory regime and the Union's Constitution is that vacation from office by a national official upon retirement from public service was not expressly contemplated.
36. When the Petitioners were being elected into office by the membership for the 5-year term, their respective ages were and/or must have been known to the Union.
37. In other words, the Petitioners got their mandate from the general membership.
38. The Union's Constitution has not placed any authority on the General Secretary to request a national official, or the Petitioners to vacate office upon retirement from their public service offices.

39. The General Secretary was therefore acting arbitrarily and beyond the scope of his powers to direct the Petitioners to vacate office and/or hand over. He was exercising powers he did not have. He was acting *ultra vires*.

40. The Court, therefore, finds that the action was unlawful and that the Petitioners should serve their full terms.

Due process

41. The Petitioners further challenged the lawfulness of the instruction by the Secretary-General that they hand over and vacate office on the ground that they were not allowed to be heard as envisaged by Article 12(3) of the Union's Constitution.

42. Article 12 of the Union's Constitution provides for the discipline of national officials. The Petitioners were not requested to hand over because of any disciplinary reasons or grounds, and the Court finds the Article not applicable in their case.

43. In terms of Article 15 of the Union's Constitution, the supreme organ of the Union is the National Quinquennial Delegates Conference which meets every 5 years. There was no evidence placed before the Court that this Conference ever deliberated on the question of the Petitioners vacating office on the ground of having retired from the public service, even as a matter of policy.

44. To the contrary, the evidence before the Court was that other officials who had retired from the public service during their term of office were allowed to continue holding those positions.

45. At the very least, the Petitioners ought to have been afforded a chance to make representations before the supreme organ before a decision on their continued holding of office after retirement from the public service was considered as a ground to vacate office.

46. In taking the unilateral decision, the Secretary-General violated the Petitioners right to be afforded an opportunity to be heard.

Unconstitutionality of Article 7(4) of the Union's Constitution

47. The Petitioners urged the Court to hold that Article 7(4) of the Union's Constitution was inconsistent with the Constitution of Kenya in so far as it did not protect their right to continue in office after retirement.

48. The Court has keenly looked at the impugned Article. It does not purport to set criteria for an official to continue in office after retirement from the public service. What it seeks to do is to set eligibility criteria to qualify for election as a national official.

49. It sets a prior qualification condition for eligibility to vie for a national office with the Union but does not purport to curtail the right of an official who has been elected into national office from becoming ineligible from continuing to serve the full term.

50. The Court is therefore of the view that provision does not fall afoul of the Constitution of Kenya.

Conclusion and Orders

51. From the foregoing, the Court orders THAT

(a) A declaration be and is hereby issued that the removal of the Petitioners from office by the Secretary-General of the Union was *ultra-vires* his powers and the Union's Constitution and therefore unlawful.

(b) A declaration be and is hereby issued that the Petitioners are entitled to hold their respective offices for the full term of 5-years as contemplated by the Union's Constitution.

52. The Respondents did not file submissions within agreed timelines. Despite the nature of their relationship with the Petitioners, they are ordered to pay the Petitioners costs.

Delivered through Microsoft teams, dated and signed in Nairobi on this 23rd day of October 2020.

Radido Stephen

Judge

Appearances

For Petitioners Mr. Kirwa instructed by Mwakio Kirwa & Co. Advocates

For Respondents Mr. Jaoko instructed by Nchoe, Jaoko & Co. Advocates

Court Assistants Lindsey/Judy Maina