



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NYERI**

**CAUSE NO. 31 OF 2019**

**JAMES MUNGAI MUHIA.....CLAIMANT**

**VERSUS**

**KENYA NATIONAL UNION OF TEACHERS.....1<sup>ST</sup> RESPONDENT**

**JOSEPH BII, CHAIRMAN, KNUT NAKURU BRANCH.....2<sup>ND</sup> RESPONDENT**

**BRANCH EXECUTIVE COMMITTEE KNUT NAKURU BRANCH.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant filed suit against the 3 Respondents and in the Memorandum of Claim dated 17<sup>th</sup> September 2019, he sought the following reliefs:-

- a. The declaration that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents decision to suspend the Claimant is illegal, null and void.
- b. An order quashing the suspension letter dated 19<sup>th</sup> August 2019.
- c. A permanent injunction restraining the Respondents from investigating the Claimant as per their letter of 19<sup>th</sup> August 2019.
- d. An order quashing the findings of the 3<sup>rd</sup> Respondent as contained in the suspension letter of 19<sup>th</sup> August 2019.
- e. Any other reliefs as the court may deem fit.
- f. Costs of this suit.

2. The Claimant filed copious documents in support of his claim including the impugned letter of 19<sup>th</sup> August 2019, the correspondences to the Registrar of Trade Unions, the KNUT Constitution, 2015 among others. In relation to the conclusion of the case, the Claimant submitted that the issues that arose for determination were:-

- a. Whether the Claimant's suspension was warranted and/or lawful;
- b. Whether due procedure and/or principles of fair trial were followed before suspending the Claimant;
- c. What are the remedies available to the Claimant; and
- d. Who should bear the costs of this suit?

As to whether the suspension of the Claimant was warranted/unlawful, the Claimant submitted that he was suspended vide a letter dated 19<sup>th</sup> August, 2019 whereupon the following reasons were given - dishonesty; failure to obey BEC decisions; and abuse of Office. The Claimant submitted that a close scrutiny of the contents of the said letter will reveal that the Claimant herein was suspended in 2019 for the same allegations in which he had been unlawfully terminated in 2018. The Claimant submitted that the Nakuru Court had on 31<sup>st</sup> July 2018 impugned the said contents of the letter dated 18<sup>th</sup> July 2018 and termed them illegal and of no legal force. The Claimant submitted that these contents have once again been used to prosecute the Claimant in yet another dubious attempt to oust him out of office. The Claimant

submitted that the rules of natural justice and fair trial condemn double jeopardy. The Claimant submitted that he is being condemned twice on the basis of the same allegations. The Claimant submitted that this Court sitting at Nakuru in NAKURU ELRC NO. 31 OF 2018 had the benefit of considering the contents of the letter dated 18<sup>th</sup> July 2018 and had made a determination that the said letter and its contents are illegal and have no legal force. The Claimant submitted that to turn back and reuse the said letters with similar allegations to suspend the Claimant is malicious and an outright disobedience of the decision and mind of Court - a norm adopted by the Respondents. The Claimant submitted that it can only be construed that the Respondents wanted the Claimant out of office by hook or crook and at this juncture they chose the crook means. The Claimant submitted that he was back in office by an order of Court where the Nakuru Court on 17<sup>th</sup> July 2018, after determining in the termination of the Claimant improper, ordered the Claimant's term with the Respondent shall not be interrupted and notice dated 29<sup>th</sup> June 2018 is hereby put in abeyance. The Claimant submitted that the word 'shall' was used in this sense to issue a mandatory requirement and imports a form of mandate or command. The Claimant submitted that the court's intention while issuing the said mandate was to see to it that the Claimant remains in office. The Claimant submitted that after impugning the contents of the letter meant to terminate him on the above mentioned grounds among other arising issues there was a subsisting order putting the Claimant in office and the Respondents had no mandate to suspend the Claimant unilaterally. The Claimant submitted that if they had any grievance against him, then nothing would have been easier than to approach court to illustrate reasons enough to set aside the orders and thereafter suspend him. The Claimant submitted that the greatest grievance also is that the allegations leading to the suspension were recycled and only reformulated so that to have a go at suspending the Claimant. The Claimant submitted the unlawful witch-hunt subjected the Claimant to discrimination considering that soon thereafter, an individual by the name of Paul Muiru illegally assumed office in an acting capacity. The Claimant submitted that if his grievances are not met, the Respondents would have been allowed to get away with an illegality and an outright disobedience of Court orders. The Claimant submitted that his suspension was unwarranted, uncalled for and to that extent illegal and the suspension letter should thus be quashed and a permanent injunction be issued to the Respondents from investigating the Claimant.

3. As to whether due procedure and/or principles of fair trial were followed before suspending the Claimant, the Claimant submitted that he was never supplied with the reasons for the disciplinary action being undertaken nor was he given a chance to defend himself against his 'accusers'. He submitted that he was never given a chance to be represented at the frivolous 'trial' nor was he allowed a neutral party at the table of adversaries as he was given short notice of a disciplinary meeting. The Claimant submitted that all these circumstances point to the lack of a fair trial during the meeting that was called for. The Claimant submitted that it is now trite law that due process and natural justice are components that must be considered while conducting disciplinary proceedings and cited the case of **Geothermal Development Company Limited v Attorney General & 3 Others [2013] eKLR** where it was held that:

*As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well.*

The Claimant submitted that it is now apparent that the Respondents never supplied the Claimant with any basis for the allegations, neither did they give him full information of the case against him, nor did they give him a reasonable opportunity to present a response and that as a matter of fact, the Claimant only got to know of the meeting on 10<sup>th</sup> August 2019, which notice he was served on an unofficial day - Saturday, informing him of a meeting he was mandated to attend for disciplinary hearing on a Public Holiday 12<sup>th</sup> August 2019. The Claimant submitted that he was called to attend a meeting on a public holiday and he communicated that he would be unable to attend said meeting scheduled on 12<sup>th</sup> August 2019, a day which had been gazetted as a public holiday. The Claimant submitted that on that particular date he had holiday plans with his family considering the Union and its employees never work during a Public Holiday. The Claimant submitted that the move to summon him during a public holiday was only meant to ensure his non-attendance and to deprive him of his right to association. The Claimant submitted that even from evidence adduced by the Respondents, the Claimant was only entitled to appear for duty or otherwise on a scheduled weekend or a school holiday, but not a public holiday. The Claimant submitted that this establishes that the notice and the scheduled meeting was thus improper and defeated the intents and purposes of Article 41 which states that every person has a right to fair labour practices. The Claimant submitted that for all the purposes of fair trial and natural justice, the notice and the meeting were unacceptable in law. The Claimant submitted that he even sent a message to the Chairman expressing his concerns which were that the scheduled date for the meeting is a public holiday; that the notice was short; that he had prior engagements with his family and for reasons the notice was short, the same was an inconvenience; that he wished to prepare his defence and raise pertinent issues affecting the Branch; that he sought for another date in a week's time. The Claimant submitted that it was clear that he was not comfortable with the short notice and sought a reasonable extension of one week. The Claimant submitted that it is now apparent that his pleas for the Respondents to postpone the meeting on account of short notice were futile, adding to the list of malicious actions perpetuated by the Respondents. He submitted that under Section 4(4) of the Fair Administrative Action Act there is provision that he was to be accorded an opportunity to attend proceedings in person or in the company of an expert of his choice; he was entitled to be heard; cross-examine persons who give adverse evidence against him; and request for an adjournment of the proceedings, where necessary to ensure a fair hearing. He submitted that in the case **Geothermal Development Company Limited v Attorney General & 3 Others (supra)** the Court stated

*In many jurisdictions around the world, it has long been established that notice is a matter of procedural fairness and an important component of natural justice. As such, information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be.*

The Claimant also relied on the case of **Republic v University of Nairobi Ex-Parte Lazarus Wakoli Kunani & 2 others [2017] eKLR** where the High Court held that;

*The reason for adequate notice is meant to enable the person facing administrative proceedings time to adequately prepare for the same not only in terms of addressing the allegations against him but also to enable him marshal his evidence in order to controvert those allegations. Where therefore the notice though prima facie short, the person charged feels that he or she is properly armed to deal therewith the Court will not interfere. It is therefore for an applicant to show that the period of the notice given taking into account the circumstances was not adequate for him to adequately rebut the same.*

The Claimant submitted that in his case he was categorical in his message to the Chairman that the notice was short for he needed more time to prepare his defence in order to be properly armed to defend himself. He submitted that by simple calculation, a period of 1 day was in this

instance insufficient and prejudicial to the Claimant. The Claimant submitted that to determine fair procedure in the suspension of the Claimant this Court ought to be guided by the conditions set in **Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR** where Ndolo J. observed the following in regards to fair procedure in non-judicial proceedings;

*I agree with counsel for the Respondent that internal disciplinary proceedings are non-judicial in nature. However, in order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defense. The employee is also entitled to documents in the possession of the employer which would assist them in preparing their defense. The employee is further entitled to call witness to buttress their defense.*

4. As to the question whether the Claimant was given sufficient notice of the proceedings, the Claimant submitted that he was not and neither was he supplied with the clear charges made against him. He submitted that he was not afforded sufficient time to prepare his defence. He submitted that as none of these conditions were met during his persecution the process therefore was flawed. The Claimant submitted that furthermore, the meeting was irregularly called for. The Claimant submitted that under the KNUT Constitution, 2015 at Article X(D)(4) only the Executive Secretary is given the mandate to issue notices for meetings and attend to the meetings to record minutes. The Claimant submitted that even the minutes of the Meetings in the Respondents' bundle reveal the level of unlawfulness and frivolousness at the said meeting. The Claimant submitted that firstly, Paul Muiru Mburu is indicated as attending as the Acting Executive Secretary which means that the fate of Claimant who is the truthful Executive Secretary had already been predetermined. He submitted that for Paul Muiru to have been acting as the Executive Secretary it means that there was no Executive Secretary and this clearly indicates that the Claimant had already been stripped of his title even before a decision had been reached at the frivolous meeting. He submitted that secondly, the Minutes are signed by unauthorized person (Paul Muiru) and therefore the minutes of the meeting are illegal and unverifiable. He submitted that thirdly, the unanimous decision to convene the meeting was illegal and unfounded considering the cited circular TSC/IADM/192/1X/1 and dated 15<sup>th</sup> February 2017 which only provides for attendance of teachers to classes and even then only allows the same for weekends and school holidays but there is no mention of public holidays. The Claimant submitted that he was already adjudged guilty before even completion of proceedings as conspicuously, the purported member of Mbogoini who allegedly accused him of misconduct was not even present in the meeting. The Claimant submitted that it is clear from these illustrations the length at which the Respondent sought to throw out the Claimant from his lawfully elected seat without justifiable cause. The Claimant submitted that the process leading to his suspension was flawed, bereft of due process and a mockery of the principles of natural justice and the suspension plus its resultant effects ought to be quashed.

5. As to what remedies are available, the Claimant submitted that he is entitled to the declaration that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents decision to suspend him is illegal, null and void and he thus sought an order quashing the suspension letter dated 19<sup>th</sup> August 2019; a permanent injunction restraining the Respondents from investigating the Claimant as per their letter of 19<sup>th</sup> August 2019; an order quashing the findings of the 3<sup>rd</sup> Respondent as contained in the suspension letter of 19<sup>th</sup> August 2019. The Claimant submitted that he further seeks the assistance of this court to implement the orders issued in Nakuru Court mandating the Respondent to pay him his full salaries and benefits and especially all the emoluments withheld as a result of the suspension. He relied on the case of **Donald C. Avude v Kenya Forest Service [2015] eKLR** where the court found the suspension of the claimant to be unlawful and directed the release of the claimant's emoluments withheld as a result of the suspension.

6. The Claimant submitted that on the question as to who should pay the costs of this suit, the Claimant sought that costs be granted to him and placed reliance on **Judicial Hints on Civil Procedure, 2<sup>nd</sup> Edition, (Nairobi) Law Africa) 2011** at page 101 Retired Justice Kuloba authoritatively states as follows:

*The law of costs as it is understood by courts in Kenya, is this, that where a plaintiff comes to enforce a legal right and there has been no misconduct on his part-no omission or neglect, and no vexatious or oppressive conduct is attributed to him, which would induce the court to deprive him of his costs-the court has no discretion and cannot take away the plaintiffs right to costs. If the defendant, however innocently, has infringed a legal right of the plaintiff, the plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct, is entitled to the costs of the suit as a matter of course.*

The Claimant submitted that considering he was unfairly suspended from employment, it is only fair that the costs of this suit are awarded to him for the trouble caused in institution and prosecution of this suit.

7. The Respondents' submissions were to the effect that the Claimant had served the 1<sup>st</sup> Respondent and the teaching fraternity at large in various capacities prior to his attaining the retirement age. The Respondents submitted that on 17<sup>th</sup> February 2016, the Claimant was elected as the Executive Secretary of the Nakuru Branch of the Kenya National Union of Teachers (KNUT) where he served diligently until the Teachers Service Commission (TSC) who seconded him to the Union upon election notified KNUT of his impending retirement. The Respondents submitted that guided by the notification of the retirement by the TSC as well as the provisions of the Kenya National Union of Teachers (KNUT) constitution as per Article XVIII (E) on retirement and KNUT's traditions, resolutions and/or circulars the 1<sup>st</sup> and 2<sup>nd</sup> Respondents upon being advised by the National office by a letter dated 7<sup>th</sup> May 2018, sent the Claimant on six (6) months compulsory leave pending retirement having attained the mandatory retirement age. The Respondents submitted that this communication was done through a notice of terminal leave pending compulsory retirement on age grounds dated 29<sup>th</sup> June 2018. The Respondents submitted that however, the Claimant challenged the notice of terminal leave pending compulsory retirement on age grounds and obtained Court orders suspending the notice. The Respondents submitted that the 1<sup>st</sup> Respondent promptly complied with the said orders and allowed the Claimant continue discharging his duties as ordered by the Court and upon resuming his duties, the Claimant committed certain criminal illegalities leading to the loss of Kenya Shillings Four Hundred and Eighty Thousand (Kshs. 480,000/-), money stated to belong to the Union. The Respondents submitted that the Claimant was thus procedurally suspended by the 1<sup>st</sup> Respondent after a meeting convened on 12<sup>th</sup> August 2019 resolved to suspend him for stealing union funds. The Respondents submitted that the decision to suspend led the Claimant to institute several other claims before this Court and elsewhere in a blatant case of forum shopping and abuse of Court process but fortunately the Court did not agree with him. The Respondents submitted that owing to the several cases that had been filed, this Court gave directions that the matters be consolidated and be dealt with in **Nyeri ELRC Cause Number 31 of 2019 – James Mungai Muhia v The Kenya National Union of Teachers, Nakuru Branch & 2 Others**. The Respondents submitted that the issues raised in all the matters filed by the Claimant largely revolve around the retirement, the suspension as well as dues owed to him by the Union in light of the developments highlighted hereinabove. The Respondents submitted that the issues for determination are whether the notice of terminal leave pending compulsory

retirement on age grounds was proper and what then is the correct retirement age? Whether the disciplinary process leading to the suspension of the Claimant for theft of Union funds was proper. Whether the Claimant has been paid all his dues and allowances by the Respondents. The Respondents submitted that in addition to these issues, the propriety of the notice of terminal leave pending compulsory retirement on age grounds was also to be determined.

8. The Respondents submitted that the Claimant was elected vide a secret ballot at the Branch General Meeting of 11<sup>th</sup> February 2016 for a five (5) year term subject to him remaining a teacher, paid up member of the 1<sup>st</sup> Respondent and subsistence of the release from the Teachers Service Commission, his employer. The Respondents submitted that as per the documents presented before this Court, it is undisputed that according to the records held by the 1<sup>st</sup> Respondent's office, the Claimant was born on 15<sup>th</sup> January 1959. The Respondents submitted that from an extract of the Claimant's passport contained shows that the Claimant was born on 15<sup>th</sup> January 1959. Accordingly, it was submitted, the Claimant attained the age of 60 years which is the retirement age on the 15<sup>th</sup> January 2019. The Respondents submitted that it is also an undisputed fact that the Teachers Service Commission Act, the Code of Regulations for Teachers, 2015 among other statutes stipulate that the retirement age for teachers is 60 years. The Respondents cited Regulation 161(1) of the Code of Regulations for Teachers, 2015 which provides that a teacher shall retire compulsorily upon attaining the age of 60 years. The Respondents submitted that flowing from this, the TSC on 16<sup>th</sup> July 2018 confirmed vide a letter to the KNUT Secretary-General that according to the records held by them the Claimant was born on 15<sup>th</sup> January 1959 and was due to retire on 15<sup>th</sup> January 2019. The Respondents submit that upon retirement, the Claimant ceased to be a teacher and that the role of the 1<sup>st</sup> Respondent Union's officials is implementing the Union objectives which include *inter alia*, fighting for improved terms and conditions of service for teachers and protecting teachers' interests and bringing and uniting teachers of all grades and qualifications in Kenya and providing a forum for co-operation. The Respondents submitted that the question that this Court ought to address at the very outset is whether a person who has ceased to be a teacher by virtue of retirement has the capacity to represent teachers. The Respondents submitted that it is not disputed that the Claimant was seconded to the 1<sup>st</sup> Respondent upon his election and his further engagements with the 1<sup>st</sup> Respondent were pegged on his continued secondment by his employer, the TSC. The Respondents submitted that considering the Claimant was seconded to the 1<sup>st</sup> Respondent by the Teachers Service Commission, it follows that upon retirement by the TSC, he automatically ceases to hold office since one of the qualifications to hold the 1<sup>st</sup> Respondent's branch office is being a trained and qualified teacher. The Respondents submitted that the notice of terminal leave issued to the Claimant by the 1<sup>st</sup> Respondent was proper and appropriate. The Respondents submitted that the Claimant's employment upon election was governed and regulated by among others, the 1<sup>st</sup> Respondent's constitution which provides at Article XVIII (E) that

*“Any Union Official shall cease to hold office, upon attaining the age of sixty (60) years, upon resigning by notice in writing to the National Executive Council (NEC) or Branch Executive Committee (BEC), dies, or is removed by vote at an Annual Delegates Conference (ADC) or Special Conference.”*

The Respondents submitted that this provision of the KNUT constitution is to be upheld or applied notwithstanding the pendency of the term/period for which an official is elected to serve such that even if the Claimant had been elected for a term of 5 years and he turns 60 before the end of his term, he cannot cling to office based on the remainder of the term he was elected to serve. The Respondents relied on the case of **Paul Kiplangat Kirui v Nairobi Water & Sewerage Company Limited [2019] eKLR** where Ongaya J. held that

*“...The claimant never protested the contract as renewed and he is bound. Clause 8.27.4 of the 2013 manual prescribes mandatory retirement age at 60 years of age. It would be prejudicial to issue an injunction that the claimant continues in employment beyond age of 60 years.”*

9. The Respondents submitted that in light of this, it is clear that the Claimant voluntarily vied for the post of the Executive Secretary to the branch having the knowledge of the pre-requisite qualifications amongst them being age. The Respondents submitted that the provisions of the KNUT constitution providing for election of officials after five years and vacation of office of elected officials on expiry of five (5) years is relevant for employees and officials who shall not have attained the retirement age during the currency of their term and employment. The Respondents submitted it is therefore dishonest for the Claimant to illegally hold onto office on the basis that despite attaining the retirement age, he should continue serving for the remainder of his term. The Respondents submitted that in any event the Claimant chose to vie for office knowing fully well that he would turn 60 before completion of his term, which fact would automatically cause him to vacate office. The Respondents relied on the authority in **Joshua O. Ogalo v Kenya National Union of Teachers (KNUT) & Another [2020] eKLR** where Nduma J. held as follows;

*“In the present case the court is satisfied that the Applicant was re-elected to the position of Branch Secretary on 11<sup>th</sup> February 2016 on a five-year term that was due to end on 10<sup>th</sup> February 2021. The Applicant has however attained the sixty (60) years retirement age and was served a retirement notice to take effect on 30<sup>th</sup> June 2019. The court has carefully considered the provision of Article XVII(E) of the KNUT constitution (supra) and is satisfied that a union official “shall cease to hold office upon attaining the age of sixty (60) years” notwithstanding the expiry date of the term of office of the particular union official, elected or otherwise. Accordingly, the Applicant has failed to establish a prima facie case to warrant grant of a conservatory order. The Application lacks merit and is dismissed with costs to the Applicant.”*

The Respondents submitted that further, the KNUT National Executive Council (NEC) meeting held on 1<sup>st</sup> October 1987 resolved that (a) the voluntary retirement age for the KNUT full time elected employees and those on permanent terms and conditions of service shall now be fifty (50) years and (b), compulsory retirement age of employees categorized in (a) above shall be sixty (60) years. The Respondents submitted that the above resolution was subsequently approved by the 30<sup>th</sup> Annual Delegates Conference (ADC) of the KNUT held in Mombasa in December 8<sup>th</sup> - 10<sup>th</sup> 1987 and the then Secretary General of the Union communicated the above to its members and executive secretaries on February 8<sup>th</sup> 1988. The Respondents submitted that the provisions regarding retirement in the Respondents' constitution are couched in very clear terms and is to the effect that upon attaining the age of sixty any union official automatically retires. The Respondents submitted that the records held by the Union is replete with examples of Union officials who compulsorily retired as provided by the Union constitution as well as the law and just to demonstrate cited the case of the immediate former National Chairman of the Union Mr. Mudzo

Nzili and immediate former 1<sup>st</sup> National Vice Chairman Mr. Samson Kaguma who retired in 2018 peacefully upon attaining the age of 60 years as per the statutes cited above and that these are among many others who all observed the existing regulations and the law. The Respondents submitted that the evidence has been availed in the Memorandum of Response. The Respondents submitted that the foregoing officials retired notwithstanding the pendency of the term/period for which they were elected to serve. The Respondents submitted that in any event, even if there appears to have been some oversight in some instances, such illegalities can never form a basis for unjustifiably holding onto a position as the Claimant is attempting to do when the law and union statutes provide otherwise. The Respondents submitted that the Claimant is bound by the provisions of the KNUT constitution by virtue of being a member and this Court cannot re-write the same for the parties. The Respondents cited the case of **National Bank of Kenya Ltd. v Pipeplastic Samkolit (K) Ltd & Another [2002] EA 503** where the Court stated that a court of law cannot re-write a contract between the parties as the parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. The Respondent submitted the Court should find that the Claimant was properly issued the notice of terminal leave pending compulsory retirement on age grounds. The Respondents submitted that the actions of challenging an issue that is in black and white amounts to nothing more than primitive and unjustified sense of entitlement which has no place in modern society. The Respondents submitted that the Claimant ought to accept that retirement is inevitable and proceed to find other fulfilling roles to play in society. The Respondents submitted that as to the question whether the suspension of the Claimant for theft of Union funds was appropriate, upon the issuance of the orders in July 2018 suspending the Claimant's retirement notice, the orders effectively permitted the Claimant to continue serving as the Executive Secretary. The Respondents submitted that as a result the Claimant was granted unfettered access to his office and continued executing his mandate and sometimes in August 2019 the 1<sup>st</sup> Respondent's Branch Executive Committee (BEC) became aware of fraudulent activities in its Branch Office. The Respondents submitted that the fraud involved loss of Kenya Shillings Four Hundred and Eighty Thousand (KShs. 480,000/-) belonging to the Union. The Respondents by way of a brief explanation stated that the Branch Office has a savings and loan scheme owned by close to 3000 members and the same is managed by the BEC. The scheme operates accounts in National Bank of Kenya, Tower Sacco, Cosmopolitan Sacco and Imarisha Sacco and disburses loans to members every Friday. The Respondents submitted that to ensure smooth operations, there are always pre-signed Authority to Pay (ATP) Vouchers that are used to pay loans or dividends to members who do not have accounts with Cosmopolitan Sacco. The Respondents submitted that the Claimant by virtue of his position as the Executive Secretary with the mandate to oversee Branch activities intimidated junior staff at the branch specifically to issue him the ATP Booklets containing the vouchers at the beginning of the month of August 2019 and upon returning the booklets to the office on 5<sup>th</sup> August 2019 to the accountant, it was noted from three (3) counterfoils that there were 3 irregularly paid vouchers all in the name of the Claimant. The Respondents submitted that this was immediately brought to the attention of the Executive Officer and the Treasurer and it was subsequently discovered that the Claimant had paid himself a total of Kenya Shillings Four Hundred and Eighty Thousand (KShs. 480,000/-) from the KNUT Education Fund Account at Cosmopolitan Sacco using 3 ATP vouchers with the following serial numbers 144407, 144408, 144409 for KShs. 180,000/-, KShs. 180,000/- and KShs. 120,000/- respectively. The Respondents submitted that the said payments were made by the Claimant to himself without sanctioning and approval by the BEC as is procedure. The Respondents submitted that arising from this, the Branch Chair wrote to the Claimant demanding an explanation on the use of the money he illegally paid himself but the Claimant chose not to respond. The Respondents submitted that when no response was forthcoming, the 2<sup>nd</sup> Respondent and Treasurer agreed that the BEC ought to meet immediately to give directions on the matter involving loss of funds and that the meeting was thereafter slated for 12<sup>th</sup> August 2019. The Respondents submitted that the Assistant Executive Secretary procedurally summoned the Claimant by way of a letter to appear before the BEC to answer to the charges on 12<sup>th</sup> August 2019. The Respondents submitted that the BEC met on the 12<sup>th</sup> August 2019 and the sole agenda was deliberations on the loss of education fund money in the hands of the Claimant. The Respondents submitted that the Claimant chose not to honour the summons and failed to show up before the BEC without apology. The Respondents submitted the decision to hold the meeting on 12<sup>th</sup> August 2019 was based on the urgency and gravity of the offence and it was prudent to immediately convene with a view to unearthing the truth of the matter. The Respondents submitted that after the meeting was properly convened and notices sent to the members, it was declared on the evening of 9<sup>th</sup> August 2019 that the 12<sup>th</sup> August 2019 was going to be a public holiday to celebrate Eid al-Adha. The Respondents submitted that owing to the fact that majority of the officials had confirmed attendance, the modalities involved in planning and guided by the TSC Circular Number 1/2017 advising that BEC meetings requiring attendance of teachers be held on weekends and during holidays, the meeting went on. The Respondents submitted that upon deliberating on the matter and in the absence of the Claimant, the BEC resolved unanimously that the allegations of fraud against the Claimant had been sufficiently proven on a balance of probabilities and the Committee therefore recommended that the Claimant be suspended on grounds of abuse of office and dishonesty. The BEC further resolved to change Bank signatories owing to the fraud perpetuated by the Claimant and to institute criminal charges against the Claimant for theft of Union funds. The Respondents submitted that the Claimant was promptly informed of the outcome of the deliberations of the meeting of Monday 12<sup>th</sup> August 2019 vide a letter dated 13<sup>th</sup> August 2019. The Respondents submitted that considering that the Claimant had raised reservations on morning of the said meeting, he was given more time and opportunity to offer an explanation for consideration by the BEC failing which appropriate action would be taken. The Respondents submitted that the Claimant yet again, failed to respond to the said letter even after he had proposed via text message that he would be available on Friday 16<sup>th</sup> August 2019 he again failed to show up leaving the Respondents with little alternatives.

The Respondents submitted that instead of responding to the issues raised and explaining the circumstances that led to the loss and/or offering his side of the story to the BEC, the Claimant chose to institute another case being Nakuru ELRC Number 68 of 2019 notwithstanding the fact that there was another case pending hearing and determination being Nakuru ELRC Number 220 of 2018. The Respondents submitted that when the Claimant failed to offer any explanation, the BEC communicated its determination vide a letter dated 19<sup>th</sup> August 2019 wherein it suspended the Claimant from office for dishonesty, abuse of office and failure to obey BEC decisions. The Respondents submitted that it further wrote to the County Directorate of Criminal Investigations vide a letter dated 13<sup>th</sup> August 2019 requesting the DCI to investigate the Claimant on the loss of Union money and that the investigation is still ongoing. The Respondents submitted that as far as they are concerned, the suspension was lawful and procedural and the claimant was granted sufficient time and opportunity to defend himself and offer clarification but he chose not to. The Respondents submitted that the illegalities he committed of stealing a huge amount of money was grave, and the pendency of the court case did not exonerate him from disciplinary action for subsequent wrongs committed. The Respondents submitted that they are entitled in law to subject an errant employee to a disciplinary process and there was no Court order stopping the 1<sup>st</sup> Respondent from instituting disciplinary process where an employee was found to be in the wrong. The Respondents submitted that it is also the norm that a Court of law should not intervene with an employer's disciplinary process if it is established that there exists mechanisms between the employer and the employee that the employee could invoke internally to remedy the dissatisfaction that would otherwise justify the Court's intervention and the employee has exhausted such internal mechanism. The Respondent submitted that in **Republic v County Secretary and Head of Public Service, Bomet County & Another Ex parte Bernard Soweke [2017] eKLR**; this Court held as follows:

*That Courts will sparingly interfere with the entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy or any other human resource function and to interfere the Ex-Parte Applicant must demonstrate that the Respondents are:*

*a. In contravention of the provision of constitution or legislation or*

*b. In breach of the agreement between the parties; or*

*c. In a manner that is manifestly unfair in the circumstances of the case; or d. The internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with and ventilate his case through the employers' internal process.*

The Respondents submitted that in this matter the 1<sup>st</sup> Respondent's discretion to discipline its errant employees ought not to be interfered with as there are sufficient grounds to show cause deserving of a disciplinary hearing. The Respondents submitted that the Claimant instead of following up to ensure he exhausted all the avenues including appeal before the 1<sup>st</sup> Respondent's BEC which options he is yet to exhaust, chose to seek this Court's intervention. The Respondents submitted that this was premature and amounts to abuse of Court process. The Respondents submitted that on a balance of probability there was valid and fair reason to justify the suspension awaiting further investigations by the DCI to determine the next cause of action and further disciplinary hearing.

10. The Respondents submitted that the Claimant was procedurally summoned and given a chance to be heard and his suspension was proper and that the suspension was an interim measure as provided by the Union Constitution upon justifiable grounds being unearthed to on the theft of union funds. The Respondents submitted that upon proper hearings on the disciplinary hearing which is yet to be done, if the Claimant shall be dissatisfied, and he can still be heard on appeal and/or review since all these avenues are still open. The Respondents submitted that the KNUT constitution contains the appropriate procedures that should ordinarily be followed in a disciplinary hearing and it has all the avenues for appeal and thus amounts to a fair process. The Respondents submitted that the Claimant is keen to earn monies yet he ought to have retired a long time ago and as a result of abusing Court processes, the Claimant has unjustly earned monies that were not due to him by virtue of him having retired in January 2019. The Respondents submitted that he has further delayed the determination of the disciplinary hearing against him by virtue of the Court orders requiring that he be paid and be permitted to work.

11. As to whether the Claimant has been paid all his dues and allowances by the Respondents, the Respondents submitted that this issue shall largely be answered by this Court's finding on the two issues above. It was submitted that first, if the Court finds that the Claimant ought to have retired upon attaining the retirement age of sixty (60) years in January 2019 as the 1<sup>st</sup> Respondent's statutory instruments provide, then the Claimant shall have been over paid and earned much more than was due to him and secondly, if this Court finds that the Claimant's suspension was proper this Court shall then be called upon to determine whether the claims for allowances for the period he has been on suspension are merited and thus payable to the Claimant despite his having not performed any duties. The Respondents submitted that it is worth noting that allowances are ordinarily paid for work done and accordingly, if the Claimant was properly on suspension and/or retired, he then cannot justify allowances yet he did not discharge any responsibilities by virtue of such suspension. The Respondents submitted that they have complied with the Court orders that have been issued in respect of this matter all along. The Respondents submissions were that the Claimant's medical cover, his basic salaries and allowances due to him have always been paid by the 1<sup>st</sup> Respondent however, the issues that have been the bone of contention between the Claimant and the Respondents have been on the amount due and owing if any. The Respondents submitted that this disagreement has largely been based on erroneous tabulations and concealment of material facts by the Claimant.

The Respondents submitted that the Claimant has been paid all his dues and there is no outstanding payment as per the computation factoring in all the circumstances surrounding this matter. The Respondents submitted that the Claimant despite being aware that certain allowances and claims previously entitled to him and other Union officials in execution of their duties were suspended has not mentioned this fact. It was submitted that it is not in dispute that owing to the financial challenges experienced by the 1<sup>st</sup> Respondent in the recent past, various cost cutting measures were put in place by the BEC and among these was the suspension of allowances due to the officials at various levels. The Respondents submitted that the meeting that came up with the resolution to suspend payment of the allowances was held on 27<sup>th</sup> September 2018 and that the Claimant was present at the said meeting suspending claims and allowances payable to Branch officials since the branch was wallowing in debt until such time when the branch stabilized. The Respondents submitted that in view of this, it is clear that the allowances that the Claimant has always pushed to have paid were no longer payable by virtue of the financial struggles the Branch was going through. The Respondents submitted that by virtue of the above suspension of other allowances, the only allowances payable to the 1<sup>st</sup> Respondent's officials are remuneration, BEC and Telephone allowance while the rest of the allowances are paid at the discretion of the BEC for work done and subject to the availability of funds.

12. The Respondents submitted that the Claimant has intentionally mixed up issues in the matters he has filed to cause confusion such that even he himself is not aware what he is claiming. It was submitted that for instance, he seeks re-imburement of monies such as the Burial Benevolent Fund (BBF) which is a personal contribution and done on an individual basis and that further, he had failed to disclose that he had taken loans at the branch and the same was automatically deducted from his salary such that he cannot claim to be paid full gross salary yet he has unfulfilled obligations as well as dishonestly misleading the Court as to the amount of his net salary without factoring in statutory deductions such as PAYE, NSSF and NHIF and medical cover which are remitted directly by the employer. The Respondents submitted that in the event the Court finds the Claimant deserves to be paid anything other than his retirement benefits, the Respondents wish to have that tabulation come from this Court since the parties have failed to agree on what is due.

13. In supplementary submissions filed, the Respondents quoted the Bible in the book of Numbers 8:23-26 where it says *"God spoke to Moses: 'These are your instructions regarding the Levites: At the age of 25 they will join the work force in the Tent of Meeting; at the age of 50 they must retire from the work. They can assist their brothers in the tasks in the Tent of Meeting, but they are not permitted to do the actual work themselves. These are the ground rules for the work of the Levites'*". The Respondents reiterated the contents of their submissions filed on 9<sup>th</sup> July 2020 and urged the Court to deal with the substantive matters in issue and render a final determination on the same. The Respondents submitted that on the various incidences of alleged contempt as prominently listed by the Claimant in his

submissions, the Respondents submit that what is under consideration is not contempt but the issues in the main consolidated suits in Nyeri ELRC Cause No. 31 of 2019. The Respondents submitted that the incidences of contempt culminated in the Claimant filing an application seeking to cite the alleged contemnors on 13<sup>th</sup> November 2019 and a ruling thereon was delivered on 6<sup>th</sup> April 2020 after arguments on the same in 24<sup>th</sup> February 2020 with parties granted leave to file submissions within 14 days each.

14. The Respondents submitted that the finding on contempt was appealed against by the Respondents and the Court of Appeal vide a ruling delivered on 7<sup>th</sup> August 2020 granted stay of execution of the Ruling in **Kenya National Union of Teachers Nakuru Branch & 2 Others v James Mungai Muhia [2020] eKLR**. The Respondents submitted that the Court of Appeal held as follows:

*In the circumstances we order that each respondent deposits Ksh.100, 000 in Court within 14 days from the date of this Ruling, failing which the orders granted herein will be automatically vacated and the respondent will be at liberty to execute. The money will be held in Court pending hearing and determination of the intended appeal. The applicants are therefore granted stay orders as prayed subject to the above condition.*

The Respondents further submitted that they have since complied with the conditions set by the Court of Appeal and accordingly, the incidences of contempt as listed by the Claimant should not form the basis of any determination by this Honorable Court. The Respondents submitted that they amount to nothing more than an attempt by the Claimant to mislead this Court and deviate from the determination and disposal of the real issues. The Respondents submitted that the Claimant's suspension was justified considering the gravity of the offences he committed and that the Claimant was granted sufficient time to respond and the safeguards of a fair hearing as contemplated by law were strictly adhered to the letter. The Respondents submitted that in any event, the Claimant approached this Court prematurely before the determination of the disciplinary proceedings against him after refusing to vacate office upon attaining the mandatory retirement age of sixty years as provided by law as well as the Kenya National Union (KNUT) constitution and backed by judicial decisions. The Respondents cited the case of **Joshua O. Ogalo v Kenya National Union of Teachers (KNUT) & Another [2020] eKLR**. The Respondents submitted that in view of the above, the Claimant's claim is without merit and is frivolous and thus prayed that the claim be dismissed in its entirety with costs to the Respondents.

15. The Court has considered the pleadings, evidence, the law, the authorities cited and the rival submissions for each side in coming to this decision. The Claimant's suit was to be heard on the merits on priority as directed by a Ruling from the Court of Appeal in Nairobi Civil Appeal No. 5 of 2018 where the Court of Appeal on 29<sup>th</sup> April 2019. The Order from the Court of Appeal stated (*inter alia*) that Petition No. 6 of 2018 and ELRC cause No. 220 of 2018 be heard on the merits on priority basis by ELRC Judge sitting in Nyeri. Pending the hearing and determination of the consolidated cases, the Appellant (KNUT) was directed to continue to pay the 2<sup>nd</sup> Respondent (Claimant herein) James Mungai Muhia his emoluments, allowances and medical cover. The order of the Court of Appeal was subject of a number of interlocutory applications which together with the Covid-19 pandemic cumulatively had the effect of delaying the expeditious disposal of the suit as directed by the Court of Appeal. The decision is rendered after the parties complied with directions to file submissions to determine the matter under Rule 21 of the Rules of this Court and in consonance with the respective party's wishes to have the suit disposed of by way of written submissions in as far as the remaining issues were concerned. A reading of the prayers in the memorandum of claim leads to the finding that the matters that are for determination in the suit are

- i. Whether the Claimant's suspension was warranted and lawful in the circumstances;
- ii. Whether due procedure and principles of fair trial were adhered to while suspending the Claimant;
- iii. What are the remedies available to the Claimant; if any and lastly,
- iv. Who should bear the costs of this suit?

18. The Claimant was suspended on the basis of the letter of 19<sup>th</sup> August 2019 which letter was attacked as being unlawful and unfair as it was unwarranted. The letter suspended and then charged the Claimant with 3 offences – dishonesty, failure to obey BEC decisions and abuse of office. The letter of suspension was pursuant to a letter dated Friday 9<sup>th</sup> August 2019 inviting the Claimant to a special branch executive (BEC) meeting on Monday 12<sup>th</sup> August 2019. Monday 12<sup>th</sup> August 2019 was gazetted as a holiday to celebrate Eid-ul-Adha, a feast that commemorates the willingness of Ibrahim (Abraham) to sacrifice his son Issack (Isaac). The Claimant did not attend the meeting precipitating the issuance of the suspension letter which is the subject of this litigation. Suspension of a branch official is provided for in Article III 10 of the KNUT constitution where it is provided that it shall be lawful for the National Executive Council to discipline any member of the Union in any way it may deem necessary either by censure, fine, suspension or expulsion. It is not disputed that the Claimant was elected as a branch executive secretary of KNUT Nakuru Branch for a period of 5 years commencing 11<sup>th</sup> February 2016 and was to tentatively serve till February 2021. The Claimant asserts that his removal from the position vide the suspension aforementioned was without any basis. The Respondents on their part counter that the Claimant was suspended lawfully in adherence with procedure in the Respondents constitution. In the case of **Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology (supra)** Ndolo J. stated thus in regards to fair procedure

*I agree with counsel for the Respondent that internal disciplinary proceedings are non-judicial in nature. However, in order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defense. The employee is also entitled to documents in the possession of the employer which would assist them in preparing their defense. The employee is further entitled to call witness to buttress their defense.*

In the Claimant's case, it is not denied that he did not attend the meeting on Monday 12<sup>th</sup> August 2019 which was a public holiday. His invite was made on 9<sup>th</sup> August 2019 a mere 3 days prior. Nothing is shown to have been so grave as to indicate that a slight delay of 3 or so days would have harmed the operations of the Respondent irreparably if the meeting was not held on 12<sup>th</sup> August 2019 and instead on the dates following. It was not shown that the BEC had to meet on 12<sup>th</sup> August by whatever mean. In my considered view, contrary to the assertions

by the Respondent that the allegations of fraud against the Claimant had been sufficiently proven on a balance of probabilities, all that had remained were mere allegations of impropriety and no more as there was no adherence to the law in the process. The rush to come to a determination of the Claimant's disciplinary case is the cause for the convoluted proceedings before me and other courts. The Court thus returns on this issue that the meeting conducted did not amount to a fair trial in terms of the law or the Respondents much vaunted constitution. It was unfair and unlawful in the circumstances. The second issue is sufficiently covered in the first and the answer is the same. The process did not amount to a fair trial.

17. On the issue of disciplinary process, it is clear an employer has every right to initiate and maintain disciplinary proceedings if not barred by law or a court order. In this case, the Claimant's disciplinary case was subject to a court process. While it is clear the Claimant was not granted sufficient time to respond to allegations made and the safeguards of a fair hearing as contemplated by law were tossed out of the window, the Respondents make a compelling case on the vacation of office upon attaining the mandatory retirement age of sixty years as provided by law as well as the Kenya National Union (KNUT) constitution. I am in agreement with the reasoning and holding by Nduma J. in **Joshua O. Ogalo v Kenya National Union of Teachers (KNUT) & Another** (*supra*) where he upheld the retirement age clause of the KNUT constitution. In my considered view, the Claimant's service at the Respondent came to an end by effluxion of time and the only issue that remains unresolved is the allowances due to the Claimant computation whereof the Respondent urged the court to make a determination on. Payment of salaries and allowances is a human resource function and it is not for the Court to determine how much is due where an employer and employee bicker over salaries. In this case, there has been a computation presented by the Claimant and the counter by the Respondents. It is clear the Respondents owed certain amounts as allowances. No evidence was led to show that the financial situation of the 1<sup>st</sup> Respondent or the 3<sup>rd</sup> Respondent is so dire as to suggest total suspension of allowances by the Union. If this is the case one would wonder then what the Union is doing in operation.

The issue of compliance with Court orders and the findings made by this Court on the contempt proceedings are pending before Court of Appeal and this Court cannot make any comment on the matter as it is pending before a competent Court for determination.

18. On the sums payable the Respondent admits in the letter dated 20<sup>th</sup> November 2019 *Ref: KNUT/NB/ELRC/NYR/ADM/001/2019* that between 2018 and 2019 it owed the Claimant Kshs. 2,149,939/- and a sum of Kshs. 1,913,783.50 has been duly paid and a sum of Kshs. 378,805.80 factoring additional payments is stated to be owed. The Claimant is entitled to this sum together with interest thereon at 14% per annum from the date of judgment till payment in full.

19. Regarding the issue of costs, and on the basis of the determination on costs per Justice Kuloba (Rtd) in **Judicial Hints on Civil Procedure, 2<sup>nd</sup> Edition, (Nairobi) Law Africa) 2011** at page 101 which states as follows:

*The law of costs as it is understood by courts in Kenya, is this, that where a plaintiff comes to enforce a legal right and there has been no misconduct on his part-no omission or neglect, and no vexatious or oppressive conduct is attributed to him, which would induce the court to deprive him of his costs-the court has no discretion and cannot take away the plaintiffs right to costs. If the defendant, however innocently, has infringed a legal right of the plaintiff, the plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct, is entitled to the costs of the suit as a matter of course.*

As the Claimant was partly successful, I would order that the Respondents meet the Claimant's costs on the lower scale which order would be appropriate in the circumstances of this case as I do hereby order.

20. As the Respondent shared a verse from the Book of Numbers, it would be apt to end this Judgment with the reading for the day of the reading of this Judgment which is a passage from the **Book of Ecclesiastes Chapter 2 verse 26 – For to the man who pleases Him God gives wisdom, knowledge and joy; but to the sinner He gives the work of gathering and heaping, only to give to one who pleases God. This also is vanity and striving after wind.**

21. In the final analysis, judgment is entered for the Claimant against the Respondents jointly and severally for:-

- a. Kshs. 378,805.80
- b. interest on the sum in a) above at 14% per annum from the date of judgment till payment in full.
- c. Costs of the suit on the lower scale.

It is so ordered.

**Dated and delivered at Nyeri this 12<sup>th</sup> day of October 2020**

**Nzioki wa Makau**

**JUDGE**