



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT MERU

JUDICIAL REVIEW APPLICATION NO. 4 OF 2020

IN THE MATTER OF AN APPLICATION BY CAXTON MIUNGI FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF ARTICLES 20, 21, 22(1), 27, 28, 29, 47, 50, AND 239(3) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SUSPENSION OF CAXTON MIUNGI AS THE EXECUTIVE SECRETARY, KNUT MERU CENTRAL BRANCH

AND

IN THE MATTER OF THE KENYA NATIONAL UNION OF TEACHERS CONSTITUTION RULES AND REGULATIONS, 2015

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF THE LAW REFORM ACT. CAP 26 LAWS OF KENYA

REPUBLIC.....APPLICANT VERSUS

WILSON SOSSION, SECRETARY GENERAL KNUT.....1ST RESPONDENT

THE KENYA NATIONAL UNION OF TEACHERS.....2ND RESPONDENT

THE KENYA NATIONAL UNION OF

TEACHERS, MERU BRANCH3RD RESPONDENT

AND

VALENTINO MURIUNGA.....INTERESTED PARTY

CAXTON MIUNGI.....EX PARTE APPLICANT

RULING

1. What is before me is the main Notice of Motion application dated 24th August 2020, to wit, the Judicial Review Application proper. Through it, the *Ex Parte* Applicant Mr. Caxton Miungi seeks orders of *certiorari* and prohibition directed against the 1st, 2nd and 3rd Respondent as well as the Interested Party Mr. Valentino Muriunga. The orders are mainly:-

(a) That an order of *certiorari* do issue to remove in to this Honourable Court for purposes of being quashed the decision of the 1st Respondent contained in the letter dated 21st July 2020 to suspend or remove the *Ex Parte* Applicant from his position as the Executive Secretary of the 3rd Respondent.

(b) That an order of Prohibition do issue prohibiting the Respondents from effecting or implementing the decision of the 1st Respondent contained in the letter dated 21st July 2020 to suspend or remove the *Ex Parte* Applicant from his position as the Executive Secretary of the 3rd Respondent.

(c) That the costs be borne by the Respondents.

2. The 1st Respondent filed a Replying Affidavit in which he stated that he is the Secretary General of Kenya National Union of Teachers which is the 2nd Respondent herein. He stated that as the Secretary General of the 2nd Respondent he was aware that the Union is a self-governing Trade Union whose members subscribe to and are regulated by the KNUT constitution through decisions made by organs established by it. He deponed that the Respondents do not dispute the fact that the *Ex Parte* Applicant served as the Executive Secretary of the Kenya National Union of Teachers (KNUT), Meru Central Branch for the past 9 years. He stated that the *Ex Parte* Applicant was suspended vide a letter dated 21st July 2020 for unprofessional conduct as a result of holding a meeting on 10th and 11th June 2020 in Nyeri with other Branch Executive Secretaries which meeting was not authorized and collectively wrote a damaging memorandum to the Teachers Service Commission (TSC). He stated that before the *Ex Parte* Applicant was suspended, a virtual special steering committee meeting was convened on 13th July 2020 for purposes of deliberating the conduct of the 13 Executive Secretaries who held a meeting on 10th and 11th June 2020 in Nyeri and collectively wrote a damaging memorandum to Teachers Service Commission contrary to and in breach of Article XIV(5) of the Union constitution. He stated that the members present at the said meeting unanimously resolved that the 13 Branch Executive Secretaries who participated in the aforementioned meeting of 10th and 11th June 2020 in Nyeri be suspended with immediate effect until the Annual Delegates Conference renders a decision on their conduct. He stated that he issued the suspension letter to the *Ex Parte* Applicant in his capacity as the Secretary General of the 2nd Respondent, which letter sets out the grounds thereof. He stated that it is therefore utterly malicious on the part of the *Ex Parte* Applicant to insinuate that the 1st Respondent acted arbitrarily whilst the decision was arrived at during a meeting, which was attended by the current National Officials. He stated that the said conduct amounts to unprofessional conduct by virtue of the provisions of Article XIV(5) of the 2nd Respondent's Constitution which specifically states that it is unprofessional for any member of the Union to indulge in damaging personalities whether in Newspapers, correspondences or otherwise, or to give publicity to any statement detrimental to the interest of the Union. He stated further that the said memorandum breached the provisions of Article X(A), (8) by addressing issues from a branch level without being sanctioned by the National Executive Council through publishing views and correspondences that were detrimental to the Union as whole. He stated that pursuant to the Union's Constitution, Branch Secretaries have no right or mandate to directly write to the Teachers Service Commission concerning issues and or matters in the said Memorandum. He stated that contrary to allegations, the *Ex Parte* Applicant was duly served with the suspension letter via registered post in adherence to measures that were put in place to curb the spread of Covid-19. The 1st Respondent stated that by virtue of the provisions of Article IX(C) (7) of the Union's Constitution, the National Executive Council has power to suspend or dismiss or replace any officer of the Union for negligence of duty, dishonesty, incompetency, or for failure to obey its decisions or for other reasons it may deem fit and important in the interest of the Union subject to the approval of the Annual Delegates' Conference which procedure was followed. He stated that he believes it to be true that when the decision of suspending an official is by the National Executive Committee as opposed to one by the Branch Executive Council there is no requirement that the same shall be by a two-thirds majority decision. He stated that Article X(E)(5) of the KNUT constitution provides that when the Branch Executive Secretary is absent, the Branch Assistant Secretary acts on behalf of Branch Executive Secretary and while doing so enjoys the privileges of the Branch Secretary, and it is on the said basis that the 1st Respondent wrote to the Interested Party to take over the office pending disciplinary procedures that are to be conducted. The 1st Respondent deponed that as a result of assumption of office by the Interested Party as the Acting Executive Secretary, it became necessary to change the Bank Signatories to ensure smooth operation of the affairs of the Branch during the subsistence of the *Ex Parte* Applicant's suspension. He stated that he is fully aware that for any changes to be made with regards to the position held by the *Ex Parte* Applicant, there has to be formal communication to the Registrar of Trade Unions, an action which has not been undertaken by either of the Respondents herein. He stated that he was aware that the *Ex Parte* Applicant and the other Executive Secretaries will at the opportune time be invited to a hearing by an impartial body or disciplinary committee which will deliberate of the violations committed by the *Ex Parte* Applicant where he will be fully informed of allegations against him and supplied with the relevant materials to enable him make his representation. He stated that indeed the National Executive Council has constituted a Disciplinary committee to deal with the matters of indiscipline and as a result, two of the attendees of the meeting held in Nyeri on 11th July 2020 have since apologized for the professional misconduct, insubordination and indiscipline exhibited at the said meeting. He stated that the Disciplinary Committee has since met and is deliberating the way forward with regards to the suspension of the aforementioned 13 Executive Secretaries. The 1st Respondent stated that the Disciplinary process is still in ongoing and no final decisions have been arrived at. He stated that on 3rd September 2020 the National Executive Council held a virtual meeting wherein it ratified the decision of the steering committee to suspend the Branch Executive Secretaries and that the decision to suspend the *Ex parte* Applicant and the appointment of the interested party thereof was done in good faith and in the interest of the entire union. He stated that without prejudice to the foregoing, the application herein has been prematurely filed before this Court as plans to take the *Ex Parte* Applicant through internal disciplinary procedure and convene a Special Delegates Conference for purposes of discussing the conduct of the 13 Branch Executive Secretaries among other issues are under way as such, there is no decision that is ripe for exercise of Judicial Review powers of this Honorable court. He stated that flowing from the above it is clear that the decision to suspend the *Ex Parte* Applicant is lawful and the Respondents ought to be allowed to carry out the internal disciplinary procedures wherein the *Ex Parte* Applicant will be accorded a fair hearing and sufficient time and material to make his representation and taking into account all the foregoing averments, it is clear that the *Ex Parte* Applicant has not been terminated and or dismissed but rather suspended which action kick starts the disciplinary process. He stated that having underscored above that the application as filed is premature, this Honorable Court should be cautious not to interfere with an ongoing disciplinary process, which is the case in this matter. The 1st Respondent thus sought that the judicial review application be dismissed in its entirety with costs for reasons that the same was filed prematurely.

3.

4. The 3rd Respondent asserts that the purported suspension of the Branch Executive Secretary by the 1st Respondent caught them by surprise and was totally unexpected. The 3rd Respondent maintained that the said suspension was unilateral, unprocedural and illegal as the same was made without reference to the 3rd Respondent. The 3rd Respondent asserts it has not received any complaints regarding its Executive Secretary's performance of his duties in the exercise of the mandate conferred on him by the membership. The 3rd Respondent stated that it has confidence in the work carried out by the Executive Secretary and the branch has never been called upon to deliberate on his conduct in accordance with the provisions of the KNUT constitution. The 3rd Respondent maintained that the procedure for removal of the Executive Secretary of a branch is spelt out in the KNUT constitution and the purported ouster by the 1st Respondent was illegal and actuated by ill-will. The 3rd Respondent asserts that the appointment of the Interested Party as an acting Executive Secretary of the 3rd Respondent was illegal in view of the provisions of the KNUT constitution. It was stated that the 3rd Respondent was never consulted on the appointment of the Interested Party and he cannot assume the duties purportedly assigned to him by the 1st Respondent. The 3rd Respondent asserts that the 1st Respondent's illegal acts are inimical to the well-being of the 3rd Respondent and the same ought to be quashed. The 3rd Respondent asserted that the meeting purportedly held on 3rd September 2020 was manifestly illegal as most of the delegates said to have been in attendance were merely handpicked by the 1st Respondent and do not appear in the register or records held by the Registrar of Trade Unions. The 3rd Respondent stated that it believed that the suspension of the Executive Secretary is indefensible and prayed that the same be set aside to enable the 3rd Respondent proceed with its activities.

5. The *Ex Parte* Applicant submitted that the procedure to suspend him was not followed as per the Kenya National Union of Teachers Constitution, Rules and Regulations 2015. He submitted that Article X(C)(5)(L) of the KNUT constitution, Rules and Regulations 2015 which govern the office of the Executive Secretary states that it is the Branch Executive Council that has the mandate to undertake action against any indiscipline and offences. He submitted that from the circumstances of this case, it is quite evident that the procedure to suspend the *Ex parte* Applicant was unprocedural as at no point did the 3rd Respondent's Branch Executive Council sit to adjudicate over his alleged professional misconduct and indiscipline as required under the governing rules and regulations a fact that the 1st and 2nd Respondents have not denied. He submitted that further, no voting was done prior to his suspension from office as required under Article X(d)(5) where suspension of a Branch officer of the union should be done by a two thirds majority decision of all members entitled to vote at the Branch Executive Committee. More so, the *Ex-parte* Applicant was not accorded a chance to be heard by the Branch Executive Council prior to his suspension thus being automatically denied the right of appeal to the Branch General meeting. The *Ex parte* Applicant submitted that Judicial Review proceedings are *sui generis* proceedings concerned with procedural decision making process as opposed to merits of the case. He cited the decision by Mrima J. case of **Republic v Migori County Government & Another Ex parte Nyangi John Juma [2018] eKLR** and submitted that

Judicial Review is concerned with the decision-making process not with the merits of the decision itself; the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision makers took into account relevant matters or did take into account irrelevant matters. The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decisions."

The *Ex parte* Applicant urged the Court to hold and find that the Respondents having not followed the procedures provided for in the Kenya National Union of Teachers Constitution, Rules and Regulations 2015 the decision of the 1st Respondent to suspend the *Ex parte* Applicant is amenable to Judicial Review proceedings and the same cannot be allowed to stand.

6. The 1st and 2nd Respondents in submissions filled submitted that the key issues for determination in this matter can be summarized into the following:-

- a) Whether the suspension of the *Ex Parte* Applicant was carried out in accordance with the relevant regulations herein.
- b) Whether the application herein is premature

7. The 1st and 2nd Respondents submitted that the *Ex parte* Applicant is under obligation as a member of the 2nd Respondent to uphold the Union values, objectives and its constitution and to comply with the requirements provided therein. The 1st and 2nd Respondents submitted that the suspension of the *Ex Parte* Applicant was as a result of breach of the provisions of the KNUT constitution particularly Article 14(5) and Article X(A)7 of the which provides that it shall be considered unprofessional for any member of the Union to indulge in damaging personalities whether in Newspaper, correspondences or otherwise. or to give publicity to any statement determined to the interest of the Union, or a fellow member; and Article X(A)7 which provides that no branch shall take action on any subject which commits the Union as a whole, without the sanction of the National Executive Council (NEC) and no branch shall publish views, or deal with any matter in a way that is detrimental to the Union as a whole. The 1st and 2nd Respondents submitted that the Union's Constitution donates the power to suspend a member or an official of the Union for negligence of duty, dishonesty, and incompetency or for other reasons deemed fit and in the interest of the Union to two organs of the Union namely; the National Executive Council and Branch Executive Council which fact the *Ex Parte* Applicant seemingly admits in their submissions. The 1st and 2nd Respondents submitted that the *Ex parte* Applicant had misapprehended the provisions of the 2nd Respondent's constitution as to the role of NEC in suspension of officials at the branch level. The 1st and 2nd Respondents submitted that suspension in this context is not a disciplinary punishment but rather set to pave way for the disciplinary process. The 2 Respondents cited the case of **Evan Rees and Others vs. Richard Alfred Crane [1994] 2 WLR** cited in the case of **Nancy Makokha Baraza v Judicial Service Commission & 9 Others [2012] eKLR** where the Privy Council dealing with the procedure for removal of a judge in Trinidad and Tobago citing several cases stated as follows:

"In most types of investigation there is in early stages a point at which action of some sort must be taken and must be taken firmly in order to set the wheels of investigation in motion. Natural justice will seldom if ever at that stage demand that the investigator should act judicially in the sense of having to hear both sides. No one's livelihood or reputation at that stage is in danger. But the further the damaging someone's reputation or to inflicting financial loss on someone the more necessary it becomes to act judicially.

and the greater the importance of observing the maxim audi alteram partem ...It is clear from the English and Commonwealth decisions which have been cited that there are many situations in which natural justice does not require that a person must be told of the

chance adequately to deal with the complaints later. that no penalty or serious damage to reputation is inflicted by proceeding to the next stage without such preliminary notice, that the statutory scheme properly construed excludes such a right to know and to reply at the earlier stage.....Where an act or proposal is only the first step in a sequence of measures which may culminate in a decision detrimental to a person's interests, the courts will generally decline to accede to that person's submission that he is entitled to be heard in opposition to this initial act, particularly if he is entitled to be heard at a later stage.....

There are no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case. the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth. Accordingly, much assistance [cannot be derived] from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case”.

The 1st and 2nd Respondents submitted that the power of the National Executive Council to suspend an official or a member of the union and which was relied on in the instant case, the same interpretation ensues such that suspension paves way for the disciplinary process where the suspended person shall be allowed to defend themselves. The 1st and 2nd Respondent submitted that indeed, in a bid to ensure that the *Ex Parte* Applicant is afforded a hearing, the National Executive Council has constituted a Disciplinary committee to deal with the indiscipline of the *Ex parte* Applicant which committee has since met and is deliberating the way forward with regards to the suspension of the *Ex Parte* Applicant and the other Executive Secretaries suspended at the same time as the *Ex parte* Applicant. The 1st and 2nd Respondents submitted that to date no changes have been to the Register of the officials of the 2nd Respondent at the Registrar of Trade Unions and that the Interested party herein is in an acting capacity. For that reason, they submit that the *Ex parte* Applicant has not been removed and or terminated from office, he has only been suspended to pave way for the disciplinary process. The 1st and 2nd Respondents submitted that in suspending the *Ex Parte* Applicant they followed the procedures provided for in Kenya National Union of Teachers' Rules and Regulations 2015 to the letter and did not breach the rules of natural justice. As to whether the application herein was premature, the 1st and 2nd Respondents cited the case of **Kebeso David v Kenyatta University & 3 Others [2017] eKLR**. The 1st and 2nd Respondents submitted that the Court should be cautious before not to interfere with internal disciplinary processes of employers and institutions unless the process is unlawful and outrightly flawed and such interference is limited to correcting wrong procedural internal mechanisms. The 1st and 2nd Respondents cited the case of **Republic v County Secretary and Head of Public Service, Bomet County & Another Ex parte Bernard Sowek [2017] eKLR** and urged the Court to disallow the application with costs for being premature and unmerited.

8. In submissions filed, the 3rd Respondent submitted that it is not in dispute that when the 1st Respondent purported to suspend the *Ex-parte* Applicant vide the letter that gave rise to the proceedings herein the *ex-parte* Applicant was serving as the duly elected executive-secretary of the 3rd Respondent in accordance with the constitution that governs the affairs of the Kenya National Union of Teachers. The 3rd Respondent submitted it readily concedes the Application before the Court as the suspension of its executive secretary was done contrary to the said constitution. The 3rd Respondent cited the Court of Appeal decision in **Municipal Council of Mombasa v Republic & Umoja Consultants Limited [2002] eKLR** and submitted that the court will be called upon to address the following questions in determining whether the applicant's suspension is amenable to judicial review; How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? The 3rd Respondent submitted that the above questions must be answered in the negative. The 3rd Respondent submitted that it is established under Article X of the 2nd Respondent's constitution. The 3rd Respondent submitted that the election and removal of officials of a branch is governed by the regulations set out thereunder and the branch executive council is the body mandated to suspend an officer of a branch and thereafter recommend his/her reinstatement or dismissal to the branch general meeting. It submitted that an appeal against the decision of a branch general meeting lies to the National Executive Council of the Union. The 3rd Respondent submitted that the decision by the National Executive Council of the Union is final. It submitted that it is, therefore, inconceivable that the National Executive Council of the Union would handle the issue of the suspension of a branch official at the first instance. The 3rd Respondent submitted that the NEC has an appellate role only in the suspension and dismissal of officials of a branch. The 3rd Respondent submitted the NEC exercised powers that it did not have in suspending the applicant and that the exercise of power was without jurisdiction and ought to be quashed. The 3rd Respondent submitted that it is categorical that it has never received any complaint regarding the *Ex Parte* Applicant's performance of his duties as its Executive secretary. Naturally, the 3rd Respondent would be expected to receive all complaints touching on the *Ex Parte* Applicant's discharge of his duties. If any such complaint had been received the same would have been handled in accordance with the dictates of the constitution. The 3rd Respondent further submits that the appointment of the interested party as the acting executive secretary of the 3rd Respondent was done in violation of the constitution of the Union. The 3rd Respondent submitted that the executive council of the 3rd Respondent holds the power to appoint one of its members to act in place of a suspended office bearer pending the decision of the branch general meeting on the status of the suspended officer. The 3rd Respondent submitted that power has not been exercised by the 3rd Respondent and the 1st Respondent's appointment of the interested party remains illegal and unenforceable. The 3rd Respondent submitted that in view of the foregoing the Court should find that the 3rd Respondent was sidelined in the making of the impugned decision by the 1st and 2nd Respondents. The 3rd Respondent submitted that it was forced to defend these proceedings and is entitled to a refund of its costs and prayed that the *Ex parte* Applicant be reinstated unconditionally to enable the branch continue to serve its members in accordance with the Union's constitution.

9. The Court has considered the pleadings and affidavits filed, the law, the evidence adduced in support and opposition as well as the submissions of parties to come to the decision. This is a judicial review matter which is *sui generis*. It amply clear that it is not for debate that this Court is not concerned with whether or not Mr. Caxton Miungi was guilty of any misconduct or the like as alleged by the 1st and 2nd Respondents. The Court is only concerned with the process leading to the making of the decision by the 1st Respondent to remove the *Ex parte* Applicant. The questions that must be asked are as follows:-

- a. How was the decision arrived at?
- b. Did those who made the decision have the power, or put another way, the jurisdiction to make it?
- c. Was the person affected by the decision heard before the decision was made?
- d. In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters?

These are the questions this Court in dealing with this matter raised by way of judicial review is required to answer. This Court is not required to delve into the merits of the decision itself such as whether or not there was sufficient evidence to support the decision made by the 1st Respondent. That is not the province of judicial review and I have no way of determining those questions in a judicial review.

10. The KNUT constitution provides in Article X that any branch officer of the union may be suspended from his/her office by a two thirds majority decision of all members entitled to attend and vote at the Branch Executive Committee (BEC). The BEC is comprised of the Chairman, Vice Chairman, Executive Secretary, Assistant Executive Secretary, Treasurer, Assistant Treasurer and Woman Representative, who shall form the members of the Branch Steering Committee, Post Primary Representative(s), Early Childhood Educators Representatives, Persons with Disabilities Representative(s), Kenya Secondary Schools Heads Association (KESSHA) and Kenya Primary Schools Heads Association (KEPSHA) representative(s) as members of the BEC.

11. There is no evidence adduced by the 1st Respondent to show that the BEC as detailed in the KNUT constitution met as provided for under the KNUT constitution to deliberate on the removal of the *Ex Parte* Applicant from his position as Branch Executive Secretary by a vote of two thirds of the BEC. There is also no evidence that the *Ex parte* Applicant was heard before the purported ouster. As to whether the decision maker had the power or jurisdiction to make the decision, it is clear from the KNUT constitution that the 1st Respondent has no such powers under the KNUT constitution and it is therefore even of no use to delve into whether the 1st Respondent took into consideration any factors he ought not have since he did not have the jurisdiction to make any decision regarding the ouster of a branch official. The long and short of the foregoing is that the purported ouster of the *Ex Parte* Applicant is therefore illegal, null and void for all intents and purposes as the 1st Respondent has no capacity under the KNUT constitution to undertake the removal or replacement of any branch officials of the Union.

12. In the final analysis the *Ex Parte* Applicant is entitled to the following reliefs:-

- a. An order of *certiorari* to remove the decision of the 1st Respondent which is against the KNUT constitution and bring it before the Honourable Court for quashing as I hereby do, for being manifestly illegal, null and void.
- b. An order of prohibition directed against the 1st, 2nd and 3rd Respondent from allowing the Interested Party from assuming the duties of Branch Executive Secretary of the 3rd Respondent as the position is held by the *Ex Parte* Applicant who was duly elected and lawfully holds said position.
- c. The *Ex Parte* Applicant and the 3rd Respondent are entitled to the costs of the suit to be paid by the 1st Respondent and 2nd Respondents jointly and severally as it was the Respondents who orchestrated without input of the 3rd Respondent in the attempt at removal of the *Ex Parte* Applicant from office.

It is so ordered.

Dated and delivered at Nyeri this 4th day of November 2020

Nzioki wa Makau

JUDGE