



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1018 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

BEATRICE CHERUTO POCHORA.....CLAIMANT

VERSUS

KENYA COUNTY GOVERNMENT WORKERS UNION.....1ST RESPONDENT

KENYA COUNTY GOVERNMENT WORKERS UNION

(NAIROBI CITY COUNTY BRANCH).....2ND RESPONDENT

THE REGISTRAR OF TRADE UNIONS.....3RD RESPONDENT

SAMWEL MUGERU WAMBUI.....4TH RESPONDENT

HUSSEIN WAFULA.....5TH RESPONDENT

BENSON OLIANG'A ORIARO.....6TH RESPONDENT

FRANCIS NJOROGE GACHUKIA.....7TH RESPONDENT

MONICA WANGARI.....8TH RESPONDENT

ROSE WANDIA KARIUKI.....9TH RESPONDENT

PERIS WANGUI.....10TH RESPONDENT

COLLINS NGOITOI.....11TH RESPONDENT

NAIROBI COUNTY LABOUR OFFICER.....12TH RESPONDENT

JUDGMENT

The Claimants dissatisfied with the conduct and outcome of the election of officials of the Kenya County Government Workers Union (Nairobi City County Branch) in which she contested for the position of Branch Assistant Women Leader filed a Memorandum of Claim on 31st May 2016. She seeks the following reliefs: -

a) A permanent injunction to restrain the 3rd Respondent Registrar of trade unions and/or her agents and or servants and or representatives from accepting form Q or form F from the accepting form Q and or Form F from the 1st Respondent and or registering the 4th to 11th Respondents as officials of the 2nd Respondent on the basis of purported branch elections held by Nairobi City Branch on 5th May 2016 and the 4th to 11th Respondents be restrained from assuming office and or conducting and or discharging any duties.

b) The purported elections of the 2nd Respondent's officials held by Nairobi City Branch on 5th May 2016 be cancelled and or nullified and an order for elections for the 2nd Respondent Branch be issued.

- c) An order be issued allowing union members at the branch level to vote for Women Representative candidates.
- d) Costs of this cause.
- e) Interest of the cause at court rates.

The 1st, 2nd, 4th to 11th Respondent filed their Response to the Memorandum of Claim on 3rd July 2018 together with a Notice of Preliminary Objection. The 3rd Respondent filed her Reply to the Memorandum of Claim on 12th July 2016. The 5th to 10th and the 12th Respondents neither entered appearance nor filed a Reply to the Memorandum of Claim.

On 18th July 2018 the Court directed that the matter proceeds by way of written submissions and the issues in the Preliminary Objection be included in the submissions.

Claimant's case

The Claimant avers that the 1st Respondent through its General Secretary issued a Notice of Branch elections of all County Branches including the 2nd Respondent on 16th April 2016 for elections to take place between 30th March 2016 and 30th June 2016 on a date to be determined by the 2nd Respondent who by law was supposed to issue a notice for branch elections between 18th April 2016 and 2nd May 2016.

The Claimant avers that the 2nd Respondent is a Branch of the 1st Respondent that is duly Registered and has its officials as contained in the extract dated 5th February 2016 as the only branch of the 1st Respondent within Nairobi County. That in accordance with the current extract, the Branch Secretary is Festus Nagari who pursuant to the General Secretary's Notice of 16th April 2016 was supposed to give notice for branch elections.

The Claimant avers that contrary to the provisions of the union constitution, the branch election notice was issued by Benson Olianga Oriaro who issued an undated notice of elections Ref No. KCGWU/NRCC/VOL-4/16 in his capacity as the Branch Secretary purporting it to be a Notice of election of the 2nd Respondent Branch. She avers that in the undated notice the Branch Secretary indicated that the elections for *'this category were to be for staff serving on salary scale 18-12 as others with higher salary scale be attended by our unidentified so called sister branch'*. She avers that the so called sister branch does not exist.

The Claimant avers that the Chairman and the Branch Secretary are not fit to hold positions in the 2nd Respondent as they are masquerading as officials of an unregistered branch. She avers that no Branch Annual General Meeting (Branch Congress) of the 2nd Respondent pursuant to the provisions of Article 5 (5.4) (1) (a) and (b) of the Union Constitution has been held since 2013 and no proposal or resolutions have ever been passed by the members of the 2nd Respondent to create new branches within Nairobi County.

She contends that she was eligible and therefore offered herself for election for post of Branch Assistant Women leader of the 2nd Respondent branch by presenting the requisite documents. She avers that although her name appeared as Number 4 on the ballot paper during the nominations her name appeared as number 1 on the ballot during the elections. According to the Claimant this was deliberate so that the voters whom she had already campaigned to and advised to vote for her as the 4th candidate on ballot paper could be misled to vote for another candidate. She avers that she was never issued with a certificate of nominations required under Article 5 (6) (g) of the Union's Constitution.

She further avers that the 2nd Respondent's Branch Secretary did not issue a notice for the branch congress whose only agenda was to be elections. She therefore alleges that the 2nd Respondent never held any elections on 5th May 2016 or any other date and the officials who were purportedly elected during the elections on 5th May 2016 were not validly elected officials of the 2nd Respondent.

She avers that the Respondent's Branch elections were irregular and contrary to the provisions of Article 5.4 (d) of the Union's Constitution as no election notice was issued by the Branch Secretary of the 2nd Respondent. She further avers that the presiding officer did not use the Branch Members register containing names and addresses of the members entitled to vote and instead he used the employer's list of check off system on deduction of union dues.

She further avers that presiding officers allowed people to vote more than once and that voters were freely ferried from one election centre to another by candidates thus opening a window for rigging by the incumbent candidates as confirmed in Circular 2 dated 21st April 2016.

She contends that contrary to the provisions of Article 5 (6) (h) of the Union Constitution the verification of the Register of voters was illegally done by the members of the 2nd Respondent working in the Human Resource Department of Nairobi City County and that the General Secretary did not provide the returning officer with the names and addresses of the members of the 2nd Respondent entitled to vote. In addition, contrary to provisions of Article 7 (2.3) (v) of the Union's Constitution the Branch Secretary of the 2nd Respondent did not keep a comprehensive and up to date register of all employees and union members at the branch level. Hence, no register was presented to the presiding officer by the general secretary to vet voters. She further avers that the vetting of the voter's list was done by persons who were not from the Ministry of Labour contrary to Article 5.6(h) of the Constitution.

She contends that on or about 18th May 2016 she objected to the sham election to the Registrar of Trade Unions and urged her not to register the new branch officials.

1st, 2nd, 4th – 11th Respondent's case

The 1st, 2nd, 4th – 11th Respondents filed a Notice of Preliminary Objection raising the followings grounds of objection:

1. The forum presented in law in relation to the orders being sought herein ought to be vide an appeal to the Registrar of Trade Unions under section 30 of the Labour Relations Act.
2. The orders sought are spent.
3. The claim is a waste of precious judicial time.

The 1st, 2nd, 4th – 11th Respondents admit that on 25th November 2015 the Registrar of Trade Unions, the 3rd Respondent herein, issued a circular directing that trade unions conduct elections. However, an injunction was issued against the 1st and 2nd Respondents in Petition 1 of 2016, barring them from holding elections.

They aver that subject to the resolution passed by the National Executive Committee on 16th April 2016 under MIN No. NEC/3/2016 as read with Article 5 (5.2) (2) (e) (f) and (g) of the 1st Respondent Union's constitution and a meeting held on 3rd May 2016, the 1st and 2nd Respondents were not precluded from a change of branch name which was in the best interest of its members.

They aver that pursuant to a branch congress meeting held on 5th April 2016 vide letter reference No. KCGWU/NRCC/VOL-4/16 an election notice was given on branch elections by Benson Olianga Oriaro, the 6th Respondent herein, who was the Branch Secretary at that moment in time. They aver that the 6th Respondent has been a duly elected official of the 1st and 2nd Respondent from 2006 with the letter dated 18th September 2006 indicating a change of officers being acknowledge and registered by the 3rd Respondent. They aver that the Claimant's assertion that the Branch Chairman and Branch Secretary were masquerading as branch officials is misleading.

They aver that after devolution interim branches were formed in Nairobi. They aver that the previous 175 local authority branches remained intact until the 1st Respondent's General Secretary by a letter dated 4th October 2016, dissolve all the 175 branches in accordance with Article 3(a)(i) and Article 5 (5.2) (2) (e) of the Union's Constitution.

They aver that Circular 2 dated 21st April 2016 ref No. KCGWU/NB/C/1/2006 did not annul the entire election process. They aver that Circular 2 erroneously states that Festus Nagari was not the Secretary to Nairobi City County Branch and that he was the Nairobi Staff Branch Chairman as evidenced in various documents. They further aver that the branch elections were supervised by the Sub-County Labour Officer and the elections were conducted in a free, fair and transparent manner as stated in the Sub-County Labour Officer's report dated 6th May 2016.

They aver that contrary to the Claimant's allegations, the elections were held in strict conformity with the 1st Respondent's Constitution, Article 41 of the Constitution and Section 34 of the Labour Relations Act.

They aver that the 3rd Respondent herein already registered the new branch officials and the prayers sought in the Memorandum of claim are spent and have been overtaken by events thus rendering the same nugatory.

3rd Respondent's case

The 3rd Respondent avers that the nominations and elections were to be conducted by all trade unions, employers' organisations and federations' officials concerned with organising union elections which the 3rd Respondent did not take part in. Consequently, the 3rd Respondent having not been present during the nominations she cannot comment on whether the claimant was issued with a certificate or not.

She avers that the conduct of the election was left to the officials in charge of conducting elections. She admits that the Claimant filed an objection to the election on 25th May 2016, 12 days after the election results were registered. According to her the issues raised in the objection related to the issues that took place on the election day. She reiterated that she was not present at the elections.

She avers that she is not in a position to agree or disagree with the Claimant's allegations since the 3rd respondent was not present during the nominations and elections of the branch officials and only the officials who handled the nominations and elections on that day can discuss the matter.

Claimant's Submissions

The Claimant submitted that the notice issued by the General Secretary on 16th April 2016 did not contain the 2nd Respondent's name as a branch that was to undertake an election. Further, that the elections were conducted by virtue of the undated notice issued by Nairobi City Branch and not Nairobi City County Branch. She submitted that the 3rd Respondent registered the officials of the Nairobi City Branch/ Nairobi Branch as the officials of the 2nd Respondent but she acted in excess of her jurisdiction thus her decision was null and void

The Claimant relied on the decision in *Robert Masese & 2 Others V The Tailors & Textile Workers Union [2013] eKLR* where the Court held:

“...manner in which the union elections were held is not shown. No notice of the same was produced. It is just the results that are exhibited with the extract from the Registrar of Trade Unions. The manner in which the elections were carried out is therefore clouded in mystery and therefore cannot be authentic. I therefore find that no proper elections were held on 26th June 2011 as alleged.”

She submitted that there was evidence that voters were freely ferried from one election centre to another and that this position was confirmed in Circular 2 dated 21st April 2016. In addition, that the voters slips were never stamped to avoid double voting.

She argued that the registration of the officials purportedly elected in the branch congress of Nairobi Branch dated 5th April 2016 as officials of the 2nd Respondent was illegal, unlawful and unconstitutional for reason that the 2nd Respondent did not issue any election notice or conduct any elections on 5th May 2016, that if there were elections, then they were elections of the 1st Respondent and had nothing to do with the 2nd Respondent.

She submitted that she was not issued with the nomination certificate as required by the union constitution. She relied on the decision in **Philip Mutua Misi and Another V Joshua Kimeu & 3 Others [2017] eKLR** the Court held:

“Section 34 of the Labour Relations Act, 2007 is clear that elections of trade union officials be conducted in accordance with the union’s constitution. In that regard, the court returns that the resolutions of the union’s National Executive Board and as were conveyed were final in that regard.

Accordingly, the court returns that the variation of the elections date and the presiding officer in contravention of the union’s National Executive Board resolutions went to the foundation of holding credible branch elections. The same amounted to irreparable irregularity which rendered the elections unfair as the appointed date and presiding authority were incompetent and invalid. Considering that finding, the court will not make further inquiry into the validity and propriety of the elections in issue as the elections and the results thereof were null and void ab initio.”

She submitted that the 2nd Respondent did not give election nomination certificates. Further, the 2nd Respondent did not issue an election notice hence the election was not in respect of the 2nd Respondent and that the notice issued by the 6th Respondent who is the 2nd Respondent’s Chairman was disowned by the 2nd Respondent’s Branch Secretary.

She submitted that the General Secretary did not provide the returning officer with the names and addresses of the members of the 2nd Respondent entitled to vote and that the 2nd Respondent did not keep a comprehensive register of its union members at the branch level. She relied on the decision in **John Mwaniki Makenge and 7 Others V Secretary General of the Union of Kenya Civil Servants & Another [2016] eKLR**.

She submitted that the vetting of the voter’s list was done by persons who were not from the Ministry of Labour. She submitted that pursuant to the provisions of Article 41 of the Constitution and Section 34 of the Labour Relations Act the Claimant being a union member is entitled to participate and contest in a free and fair union election and she has a right to free, verifiable and fair elections under the Constitution.

1st, 2nd, 4th and 11th Respondents’ Written Submissions

The 1st, 2nd, 4th and 11th Respondent’s submitted that the Claimant herein proceeded to file a response to their Memorandum of Response dated 12th July 2018 without the leave of court and as such the reply should be expunged from the record. They relied on the decisions in **David Sugut & another v Mercela Cheptoo Chuma [2016]eKLR** and **Seth Ambusini Panyako v Independent Electoral & Boundaries Commission & 2 others [2017] eKLR**. They submitted that the court did not give any directions to the Claimant to file a reply to the Memorandum of Reply.

They submitted that the notice for the election was issued on 12th April 2016 which fell within the notice period of 18th April 2016 and 2nd May 2016. Further, that the Registrar considered the provisions of the existing constitution of trade union and correctly found that the elections were held in strict conformity to the 1st Respondent’s constitution and were free, fair and transparent in accordance with Article 41 of the Constitution and section 34 of the Labour Relations Act.

They submitted that the branch elections were supervised by the Sub-County Labour Officer and were free and fair as stated in the letter dated 6th May 2016. They submitted that the 3rd Respondent already registered the New Branch Officials when Form Q and Form S were received on 9th May 2016 and hence the claim has been overtaken by events. They further argued that pursuant to section 30 of the Labour Relations Act any person aggrieved by the decision of the Registrar of Trade Unions in the exercise of the administrative roles given under the Labour Relations Act can only challenge the said decision by way of an appeal to the Employment and Labour Relations Court. They relied on the decisions in **Franck Esevwe & 6 others (being proposers and promoters of Universities Service Workers Union) v Registrar of Trade Unions [2018] eKLR** and **Nicky Njuguna & 3 Others v Registrar of Trade Unions & Another [2015] eKLR**.

They submitted that the Branch elections used the Nairobi County payroll register as requested by the Branch Secretary. They submitted that the decision of the Registrar to register branch officials still stands as she did not appeal against the decision. They relied on the decision in Union of **Management staff (Kenya) v Registrar if Trade Unions [2018] eKLR**..

They submitted that the claimant having offered herself for election for the post of branch assistant women leader of the 2nd Respondent’s

Branch was duly nominated and her name appeared on the ballot paper. In addition, that the Certificate of Nomination dated 3rd May 2016 was also presented to the returning officer in accordance with article 5(6)(g) of the 1st Respondent's Constitution.

They submitted that the claim does not have any basis in law as it fails to establish a factual error in the decision of the Registrar.

3rd Respondent's Submissions

The 3rd Respondent submitted that the elections took place on 5th May 2016 and Form Q was received by the 3rd Respondent on 9th May 2016. Consequently, the change of officers was registered by the 3rd Respondent on 9th May 2016. She therefore argued that the Claimant ought to have filed an appeal as envisaged in rule 8 (1), (3) and (4) of the Employment and Labour Relations Court (Procedure) Rules as read with section 30 of the Employment Act. Therefore, the matter is time barred as no application was lodged against the Respondents within the timelines within 30 days. She relied on the decision in *National Union of water & Sewerage Employees v Kenya County Government Workers Union & 2 Others v Attorney General & 6 Others [2014] eKLR*.

She further submitted that she did not take an active role in the elections carried out in the specific branches.

Determination

The Claim herein mainly challenges the 2nd Respondent's branch elections that were conducted on 5th May 2016 which the Claimant avers were irregular and contrary to the provisions of Article 5.4 (d) of the Union's Constitution. The Claimant avers that there were several irregularities as no election notice was issued by the 2nd Respondent, the verification of the voters register was illegally done and that the claimant was not issued with a nomination certificate amongst other allegations.

The main issue for consideration is whether the elections were free and fair pursuant to the union's constitution and whether the Claimant's reply to the 1st, 2nd, 4th – 11th Respondent's Memorandum of Reply should be struck out for being filed without leave of the court. However, the 1st, 2nd, 4th – 11th Respondents filed a Notice of Preliminary Objection on grounds that the orders sought herein ought to be vide an appeal to the Registrar of Trade Unions under section 30 of the Labour Relations Court.

The Preliminary Objection shall be considered and dependent on the finding on the Preliminary Objection the claim shall be upheld or dismissed.

The 3rd Respondent herein issued a circular to all registered trade unions, employers' organisations and federations requiring them to carry out elections of all officials at Branch and National level by 30th March 2016 and 30th June 2016 respectively. The 1st Respondent through the General Secretary issued a Notice of Branch elections in his letter dated 16th April 2016 while the 6th Respondent herein, issued branch Election Notice vide the letter referenced KCGWU/NRCC/VOL-4/16 stating that pursuant to Article 5(6) of the Constitution, the branch union elections would be held on 5th May 2016.

Consequently, the Branch elections were held on the 5th May 2016 and in a letter dated 6th May 2016 from the Sub-County Labour Officer, addressed to the 3rd Respondent, he confirmed that indeed the elections took place and forwarded the names of the elected persons. Pursuant to Section 35 (2) of the Labour Relations Act the Notice of Change of officials, Form Q, was submitted to the Registrar of Trade Unions, the 3rd Respondent herein. The 3rd Respondent thereafter registered the Notice of change on 13th May 2016.

The Claimant filed her Claim with this Court on 31st May 2016 disputing the 2nd Respondent's branch elections. The Claim was therefore brought 25 days after the branch elections were conducted and 18 days after the Registrar of Trade Unions had registered the change of officials. The filing of this claim is what has resulted to the Preliminary Objection. The contentious issue is whether the Claimant ought to have filed an appeal pursuant to Section 30 of the Labour Relations Act or the claim as she did.

Section 30 of the Labour Relations Act provides that any person aggrieved by a decision of the Registrar made under the Act may appeal to the Employment and Labour Relations Court against that decision within thirty days of the decision. The Registrar already registered the notice of change as stated in her letter dated 13th May 2016. This therefore constitutes a decision of the Registrar which was dependent on the outcome of the elections. Section 34 (4) of the Labour Relations Act provides that any dispute arising out of elections of officials may be referred to this Court. The Claimant indeed had the option of filing a suit under section 34(4) of the Labour Relations Act. However the filing under this section was misguided since the Registrar had already registered the change of officials at that time.

The registration of change of officials by the Registrar is a decision by the Registrar and the resultant action is the filing of an appeal. Rule 2 of the Employment and Labour Relations Court (Procedure) Rules 2016 defines an appeal as

An appeal made to the Court by a party against an order, decision or proceedings under any written law and includes appeals from the Cabinet Secretary, Director of the Work Injury Benefits Authority, Registrar of Trade Unions, subordinate courts and tribunals.

In *Clay Odari & 2 Others v Kenya Petroleum Oil Workers Union & 8 Others [2018] eKLR* Rika J, held:

“Section 30 of the Act refers to decisions made by the Registrar under the Act as a whole, rather than under specific Sections. Such decisions are part of circumstances contemplated by Section 34 of the Act. At the heart of the dispute is the electoral process conducted by the 2nd Respondent, and change registered by the 3rd Respondent. These are matters arising from or connected to

elections held by the 2nd Respondent. They involve a decision made by the Registrar. The dispute may be referred to the Industrial Court, only in the form of an Appeal, under Section 30 of the Act. Section 34, must be read together with Section 30. Otherwise Section 30, which allows Persons aggrieved by decisions of the Registrar made under the Act as a whole, to prefer Appeal against such decisions within 30 days of the decisions being made, would not make sense. Notice of Change of Officials is submitted to the Registrar in form Q, under Section 35 of the Labour Relations Act. The Registrar is required to consider various issues under Subsections [3], [4] and [5], before making her decision on registration. Once a decision is made, it becomes appealable under Section 30 of the Act. It is no longer an internal electoral dispute involving the Union, its Members and aspiring Officials, which can be dealt with under Section 34, by direct engagement of the Court through a Claim; it must be brought as an Appeal against the decision of the Registrar, under Section 30. ”

In distinguishing the decisions relied upon by the Claimant with the present cause, those decisions are in respect of disputes relating to elections under Section 34 of the Labour Relations Court Act as opposed to decisions of the Registrar of Trade Unions registering a change of officials which would result in an appeal as provided under Section 30 of the Labour Relations Act.

The prayers sought by the Claimant as at the date of filing the suit had been overtaken by events for the fact that the 3rd Respondent had on 13th May 2016 registered the change of officers of the 2nd Respondent. Consequently, the 2nd Respondent's officials had already assumed office as at the time of filing the suit. Hence, The Claimant should have filed an appeal as stipulated under Section 30 of the Labour Relations Act and in compliance with Rule 8(1) of the Employment and Labour Relations Court (Procedure) Rules 2016. The Court therefore finds that the prayers sought ought to have been made against the decision of the 3rd Respondent by way of an appeal filed in this Court.

The preliminary objection succeeds with the result that the claim is therefore be dismissed. There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE