



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

(Before Hon. Lady Justice Maureen Onyango)

PETITION NO. 83 OF 2017

**IN THE MATTER OF ARTICLES 2(1), 3(1), 10, 19, 20, 21, 22(1) AND (2), 23, 73, 77, 99(2), 102, 103, AND 260 OF THE
CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ARTICLE OF THE CONSTITUTION OF KENYA 2010 THAT BARS FULL TIME STATE OFFICERS
FROM ENGAGING IN OTHER GAINFUL EMPLOYMENT**

AND

**IN THE MATTER OF ARTICLE 99(2) OF THE CONSTITUTION OF KENYA 2010 THAT ALSO DISQUALIFIES A PERSON
FROM BEING ELECTED AS A MEMBER OF PARLIAMENT IF THE PERSON IS ALSO A PUBLIC SERVANT**

AND

**IN THE MATTER OF THE LABOUR RELATIONS ACT, 2007, NO PERSON IS ELIGIBLE TO VOTE IN A UNION
ELECTIONS UNLESS HE IS EMPLOYED IN THE SECTOR FOR WHICH THE TRADE UNION IS
REGISTERED**

AND

**IN THE MATTER OF THE KENYA NATIONAL UNION OF TEACHERS CONSTITUTION || H 11 III (9) ON MEMBERSHIP
AND HOW FULL-TIME ELECTED OFFICIALS CEASES TO BE MEMBERS**

AND

**IN THE MATTER OF THE KENYA NATIONAL UNION OF TEACHERS CONSTITUTION ARTICLE VI (SUB ARTICLE 5)
ON THE DESIGNATION AND DUTIES OF NATIONAL OFFICIALS AND THE SECRETARY GENERAL WHO ALSO IS THE
CHIEF EXECUTIVE**

OFFICER

AND

**IN THE MATTER OF HON. WILSON SOSSION HOLDING THE POSITION OF A NOMINATED MEMBER OF
PARLIAMENT AS A STATE OFFICER AS DEFINED UNDER ARTICLE 260**

AND

**IN THE MATTER OF HON. WILSON SOSSION, AS AN HONORARY MEMBER AS DEFINED BY KENYA NATIONAL
UNION OF TEACHERS CONSTITUTION WORKING FOR KENYA NATIONAL UNION OF TEACHERS AS GENERAL
SECRETARY**

AND

IN THE MATTER OF SECTION 26(1) AND (2) OF THE LEADERSHIP AND INTEGRITY ACT NO. 19 OF 2012 ON
GUIDANCE ON GAINFUL EMPLOYMENT OF STATE OFFICERS

AND

IN THE MATTER OF SECTION 2 (SUBSECTIONS 12(A)(c) RESTRICTING'S OF PUBLIC OFFICERS IN A POLITICAL
PARTY IN THE POLITICAL PARTIES ACT NO 11 OF 2011

BETWEEN

PARTICK NJUGUNA.....PETITIONER

VERSUS

WILSON SOSSION.....1ST RESPONDENT

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

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

SPEAKER OF THE NATIONAL ASSEMBLY.....4TH RESPONDENT

AS CONSOLIDATED WITH

PETITION NO. 28 OF 2018

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOM UNDER ARTICLES 77, 95 AND
260 OF THE CONSTITUTION

AND

IN THE MATTER OF THE LEADERSHIP AND INTEGRITY ACT NO. 49 OF 2012

AND

IN THE MATTER OF THE LABOUR RELATIONS ACT NO. 14 OF 2007

BETWEEN

KENNETH N. WAHWAI BANDE.....1ST PETITIONER

JAMES KINGU NG'ANG'A.....2ND PETITIONER

GLADYS ANDAMBI ALEMA.....3RD PETITIONER

LUCAS OLUOCH.....4TH PETITIONER

ELLY WAFULA.....5TH PETITIONER

ELIJAH MARUGA MURITHI.....6TH PETITIONER

HELLEN WANJA NDERITU.....7TH PETITIONER

VERSUS

WILSON SOSSION.....1ST RESPONDENT

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

JUDGMENT

of Trade Unions and the Speaker of the National Assembly.

The gravamen of the first petition No. 83 of 2018 is that the 1st respondent Wilson Sossion, who is the General Secretary of the 2nd respondent the Kenya National Union of Teachers, having been re-elected to that position on 4th March 2016 for a five-year term, was nominated to the National Assembly as Member of Parliament in August 2017. According to the petitioner, this was in contravention of Articles 260, 77 and 99(2) of the Constitution 2010. The petitioner further avers that the nomination of the 1st respondent as Member of Parliament contravenes Section 33 of the Labour Relations Act as read together with Articles III(9) and VI (5) of the 2nd respondent's Constitution. That under Section 12(1)(c) of the Political Parties Act of 2011, the 1st respondent is deemed to have resigned from the position of Secretary General/Chief Executive Officer of the 2nd respondent.

The petitioner prays for the following orders –

- a) A declaration be and is hereby issued that the 1st respondent is unconstitutionally and illegally holding the position of Secretary General of KNUT.
- b) A declaration be and is hereby issued that the 1st respondent is unlawfully holding the two full time jobs.
- c) The 1st respondent be ordered to vacate the office of Secretary General of KNUT forthwith.
- d) The 2nd respondent be ordered to organize and conduct elections of the position of Secretary General with immediate effect.
- e) The respondents be ordered to pay costs of this petition and interest thereon.
- f) Such other orders as the Court shall deem just.

The second petition, No. 26 of 2018 is filed by Kenneth N. Wahwai Bande (1st Petitioner), James Kingu Ng'ang'a (2nd Petitioner), Gladys Andambi Alema (3rd Petitioner), Lucas Oluoch (4th Petitioner), Elly Wafula (5th Petitioner), Elijah Maruga Murithi (6th Petitioner) and Hellen Wanja Nderitu (7th Petitioner) against Wilson Sossion as 1st respondent and Kenya National Union of Teachers (KNUT) as 2nd respondent. The petition is anchored on Articles 77, 95 and 260 of the Constitution, the Leadership and Integrity Act, 2012 and the Labour Relations Act.

The petitioners who are members of the 2nd respondent aver that the 1st respondent contravened Article 77(1) of the Constitution by accepting nomination as member of the National Assembly of Orange Democratic Movement (ODM) while still holding the office of the Secretary General of the 2nd respondent. They aver that by holding two full time jobs, the 1st respondent is incapable of adequately representing their interests under the KNUT Constitution, the Recognition Agreement with the Teachers Service Commission dated 16th May 1968 and the Collective Bargaining Agreement (CBA) dated 25th October 2016.

The petitioners pray for the following orders –

1. A declaration that the 1st Respondent being a Nominated Member of Parliament and a state officer, is not supposed to hold any other public office and is barred from participating in any other gainful employment.
2. A Declaration that the 1st Respondent, being a nominated Member of Parliament and therefore a state officer is not eligible to hold the office of Secretary General/Chief Executive Officer of the 2nd Respondent.
3. A Declaration that a person who holds a State Office other than that of Member of Parliament is not eligible for election in any trade union.
4. A Declaration that the 1st Respondent should be held accountable for holding the position of Secretary General/Chief Executive Officer for the 2nd Respondent and should be surcharged on account of earning taxpayer's money for the time he has been a nominated Member of Parliament.
5. An order directed to the 1st Respondent restraining him from assuming duties as Secretary General/Chief Executive Officer for the 2nd Respondent and an order restraining the 2nd Respondent from remitting remuneration to the 1st Respondent.
6. Costs of the petition.

The petitioners further aver that the 2nd respondent is guilty of aiding an act that is unconstitutional and illegal by allowing the 1st respondent to hold two full time jobs, thereby greatly jeopardising the interests of the union and its members.

In the supplementary affidavit sworn by KENNETH WAHWAI BANDE, the 1st petitioner on 13th June 2019 he deposes that the 1st respondent has been sacked by TUC-K that nominated him as Member of Parliament. Further, that Education International (EIRAF) also revoked the 1st respondent's position as President of EIRAF.

Further, that in a classical show of conflict of interest the 1st respondent issued a directive to Teachers to abscond Competency-Based-Curriculum (CBC) trainings. That after wasting time, the 1st respondent on 6th June 2019 agreed to hold talks with the Cabinet Secretary (CS) Ministry of Education with regard to CBC as reported in newspapers.

That the 1st Respondent is so aloof, overwhelmed and conflicted that he has been unable and/or unwilling to address the unique concerns of female members of KNUT as demanded of his office. As such, the top brass of women leaders in KNUT have registered Kenya Women Teachers' Association (KEWOTA) whose membership is growing rapidly, and which has been welcomed with open arms by TSC. That KEWOTA has also been warmly received by the Ministry of Education, which has promised to work with KEWOTA for the benefit of female teachers in Kenya, including amending the relevant laws to enable KEWOTA sit on Boards of government agencies.

That in his usual defeatist nature, the 1st Respondent is threatening to kick out members of KEWOTA who have freely exercised their Constitutional right to association, instead of welcoming them for dialogue in order to understand and resolve their grievances within the available mechanisms in KNUT.

The 1st petitioner further deposes in the affidavit that the 1st Respondent, on his own accord and presumably to clear his conscience, has on both print and electronic media declared that his holding of both jobs as KNUT Secretary General and Member of Parliament compromises his effectiveness and overall efficiency. That the 1st Respondent allegedly turned down the ODM nomination as MP because, in his own words "...he would not be able to effectively represent the interest of workers due to a busy schedule as the Secretary General KNUT, Trade Union Congress of Kenya (TUC-K) which proposed his nomination - as well as President of EIRAF..."

That the 1st respondent further went on to say quite unequivocally that "... there were several 'emerging issues' and that after considering the burden of work this meant, I consulted the party and asked them to give it to another person."

He deposes that the petitioners were surprised to learn only a few weeks later that the 1st Respondent had decided to violate the very Constitution which he had earlier sought to uphold, and taken the oath of office as Member of Parliament.

Response of the 1st Respondent

The 1st respondent filed a replying affidavit sworn on 20th April 2018 in which he states that he was re-elected as Secretary General of the Kenya National Union of Teachers, the 2nd respondent on 4th March 2016 following his service to the 2nd respondent with distinction. That he was nominated by Orange Democratic Movement (ODM) and subsequently sworn in as a Member of Parliament.

That at the Annual Delegates Conference (ADC) held between 13th and 14th December 2017 at Wild Waters Conference Centre in Mombasa, the 2nd respondents' delegates in a unanimous decision resolved to adopt and affirm his nomination as Member of Parliament representing interest of workers. That the ADC is the supreme decision-making body of the 2nd respondent whose decision is binding on all members.

The 1st respondent further deposes that only the 1st to 6th petitioners are members of the 2nd respondent while the 7th is not and has no *locus standi* to file the petition or to challenge his position. That no member has challenged the decision of the ADC and the petition is an afterthought, mischievous and an abuse of court process.

He further deposes that the position of Secretary General of the 2nd respondent does not fall within the category of state officer and he is not disqualified from being nominated as Member of Parliament under Article 99(2) of the Constitution. That his nomination to represent special interests of workers in the National Assembly is in furtherance of Articles 1, 10, 94 and 95 of the Constitution and does not conflict with, but is in furtherance of his position as General Secretary of the 2nd respondent.

That he has been able to agitate and push for matters affecting all workers in Parliament while at the same time effectively discharging his duties as Secretary General of the 2nd respondent as the two positions are not mutually exclusive. He deposes that the law allows a Secretary General of a union to be employed in a sector other than that which the trade union draws members while at the same time his position as Secretary General is not a position of employment but is elective. That he did not sign a letter of appointment or an employment contract upon his election as Secretary General.

In his further affidavit sworn on 2nd July 2019, in response to the supplementary affidavit of KENNETH WAHWAI BANDE of 13th June 2019, the 1st respondent clarifies that he was not nominated to Parliament by TUC-K but by ODM, that the information on E1 relied upon in the said affidavit was erroneous and has since been corrected with his clearance to vie for a seat during EI's upcoming 8th World Congress. That EI's General Secretary Emeritus has positively commented on the position of the 1st respondent thus –

"Furthermore, my view being a member of a national, regional or local parliament, is not in itself, by definition, an obstacle to membership of a governing body of EI. When a candidate to an EI governing structure holds a parliamentary position with the consent of his/her own organization, and that organization meets EI conditions for membership (being an independent and democratic union) on what basis would someone outside the candidate's national organization argue that there is a conflict of interest?"

In Kenya, like in some other countries, a number of special seats in Parliament are reserved for representative of the trade union movement. One of those seats has been held by Wilson Sossion for the last two years, while he continued and continues to serve as KNUT General Secretary. Sossion's acceptance of a seat in Parliament was not immediately welcomed by all KNUT members. But internal discussion resulted in the union's decision to support their Secretary General. KNUT has all the democratic tools to act in

the event of a conflict of interest. No such conflict has arisen in these two years. On the contrary, it should be recognized in this case that Sossion has been able to use his influence as a parliamentarian to advance the goals KNUT and, by extension, those of EL.”

He further deposes that the newspaper articles relied upon by BANDE on CBA and KEWOTA was by the 2nd respondent and its ADC, that the averments on the 1st respondent's position on KEWOTA is untrue and misleading, that the newspaper reports alluded to by Mr. BANDE are opinions of journalists and have little or no probative value and that there is no conflict in the role of the 1st respondent as nominated Member of Parliament and as Secretary General as alleged by Mr. Bande in his affidavit.

Response of the 2nd Respondent

The 2nd respondent responded to the petition through the affidavit of WYCLIFFE OMUCHEYI, the National Chairman of KNUT, sworn on 20th April 2018 and the supplementary affidavit sworn on 2nd July 2019 in which he adopts the position in the 1st respondent's replying affidavit and supplementary affidavit of even dates.

Response of the 3rd Respondent

The 3rd respondent, the Registrar of Trade Unions filed grounds of opposition in both petitions No. 83 of 2017 and 26 of 2018 in which it states as follows–

1. That the orders sought ought not issue as the petition is frivolous, vexatious and an abuse to the due process of this Court and should therefore be dismissed with costs.
2. That the grounds set out in support of the petition do not raise any Constitutional issue either for enforcement of fundamental rights or interpretation of the Constitution as against the 3rd respondent.
3. The petitioner has not demonstrated to this court how his rights have been violated as against the 3rd respondent.
4. The Petitioner has not demonstrated how the 3rd respondent has allegedly been brought into the suit.
5. That the applicant has no cause of action left as against the 3rd respondent.

In Petition 26 of 2018, the 3rd respondent raises the following grounds of opposition –

1. That the grounds set out in support of the petition do not raise any constitutional issue either for enforcement of fundamental rights or interpretation of the Constitution as against the Registrar of Trade Unions.
2. That the petitioners have not demonstrated to the court how their rights have been violated as against the Registrar of Trade Unions.
3. That the Petition No. 26 of 2018 has no cause of action as against the Registrar of Trade Unions.

Although it was represented in court on several occasions, the 3rd respondent did not file submissions.

Response of the 4th Respondent

The 4th respondent filed grounds of opposition in which it raises the following –

1. That the High Court does not have the requisite jurisdiction under Article 165 of the Constitution of Kenya 2010 or under any statute, to issue any of the orders sought by the Petitioners in the Petition.
2. That any questions and disputes relating to the validity of the 1st Respondent's nomination is under the jurisdiction of the Independent Electoral and Boundaries Commission as provided under Article 88(4) of the Constitution or addressed through an election petition.
3. That section 42 of the Leadership and Integrity Act No. 12 of 2012 gives the channel and procedure to follow to lodge a complaint against a State Officer. Pursuant to Section 42(1) of the Act, a person who alleges that a State Officer has committed a breach of the Code, may lodge a complaint with the relevant public entity and the public entity shall register and inquire into the Complaint.
4. That it is not in dispute that Members of Parliament are state officers, and in as much as Article 77(1) of the Constitution of Kenya proscribes full time State officers from participating in any other gainful employment, Members of Parliament are not full-time state officers as alleged by the Petitioners.
5. That the Court is not the correct avenue where the Petitioner should seek redress, rather, the Petitioner should have lodged a complaint with the Committee of Powers and Privileges of the National Assembly which is the relevant Committee responsible for the ethics of Members of Parliament. Once the dispute is referred to the Committee of Powers and Privileges of the National

Assembly, an investigation may be commenced in accordance with the law. Article 229 of the Constitution further provides that every person has a right to petition Parliament to consider any matter within its authority.

6. That the Petition is premature since under section 43 of the Leadership and Integrity Act, the matter will only be referred to court if, after the investigations are conducted and in the opinion of that investigating entity civil or criminal proceedings ought to be preferred against that officer.

7. That the Petition as against the 4th Respondent herein is frivolous, it is an outright abuse of the court

By a ruling delivered on 31st July 2018 following an application by the 1st respondent, the two petitions No. 83 of 2017 and 26 of 2018 were consolidated. The parties argued the two petitions by way of written submissions which were highlighted in court.

Petitioner's Submissions

The petitioner in Petition No. 83 of 2017 did not attend court for hearing of the petition nor file any written submissions.

The petitioners in Petition 26 of 2018 filed submissions in which they opine that the 1st respondent as Secretary General/Chief Executive Officer of the 2nd respondent is considered to be a full-time employee of the 2nd respondent by virtue of Article 6(5) of the KNUT Constitution which sets out the roles of the Secretary General as –

- i. Issuing Notices of all conferences and meetings;
- ii. Preparing the Agenda of all the meetings;
- iii. Attending all Annual Delegates Conferences and Special Conferences;
- iv. Attending all meetings of the National Executive Committee;
- v. Attending all meetings of other Executive Committees;
- vi. Recording minutes and all other duties prescribed to him by the National Executive Council;
- vii. Chief Executive Officer of the Union; and
- viii. Chief Spokesman of the Union.

That following his nomination and swearing in as Member of Parliament the 1st respondent's roles as specified in Article 95(1) of the Constitution of Kenya 2010 are as follows –

- a) Representing the people of the constituencies and special interests in the National Assembly.**
- b) Deliberating on and resolving issues of concern to the people.**
- c) Enacting legislation**
- d) Determining the allocation of National revenue between the levels of government**
- e) Appropriating funds for expenditure by the National government and other national State organs; and**
- f) Exercising oversight over National revenue and its expenditure**
- g) Reviewing the conduct in office of the President, the Deputy President and other State officers**
- h) Initiating the process of removing them from office; and exercises oversight of State organs.**
- i) Tire National Assembly approves declarations of war and extensions of states of emergency.**

They submit that based on the responsibilities of the 1st respondent as a Member of Parliament, he is a full-time state officer of the National Assembly. The petitioners rely on the decision in *Robert Nyabuto Nyabwocha -V- Ronald Kiprotich Tonui and Another (2016) eKLR* where Ndolo J. stated –

“In my view, looking at the roles and functions assigned to Members of Parliament, they cannot be said to be part time State Officers. I therefore find that a Member of Parliament is a full time State Officer.”

It is submitted that as a state officer the 1st respondent is expressly prohibited by law from holding office of Secretary General of KNUT.

That by accepting the nomination as Member of Parliament the 1st respondent acted illegally and is thus not eligible to hold the position of Secretary General as well.

The petitioners submit that they are prejudiced as the 1st respondent is partisan and cannot objectively represent the entire membership of KNUT which consists of persons with divergent political opinions.

In the supplementary submissions the petitioners submit that the doctrine of exhaustion raised by the 4th respondent, The Speaker of the National Assembly is only applicable in Judicial Review applications relying on the decision in ***Okiya Omtata Okiiti –V- Commission General, KRA and 2 Others (2018)***.

On the definition of gainful employment as provided in Article 77(1) of the Constitution the petitioners rely on the decision in Election Petition of ***John Okello Nagafwa -V- IEBC and 2 Others (2013) eKLR***. The petitioners submit that the 1st respondent's engagement as Secretary General of KNUT is inherently incompatible with his duties as Member of Parliament and impairs his judgment as well as creating a conflict of interest. To buttress their position they cite the case of ***Felix Kiprono Matagei -V- The Attorney General and 3 Others (2016) eKLR***.

While highlighting the submissions on behalf of the petitioners, Learned Counsel, Ms Akelo submitted that the petitioners had established the violation of Articles 77(1) and 260 as well as Section 26(1) of the Leadership and Integrity Act. That they have established that the 1st respondent is an ODM nominated Member of Parliament as well as Secretary General of KNUT. Ms. Akelo relied on the case of ***Robert Nyabuto*** in which Ndolo J. held that the position of Assistant National Treasurer is incompatible with the position of Member of Parliament which is a full-time job. That the Judge barred him from contesting the position as long as he is a Member of Parliament.

She submitted that the Constitution 2010 had heralded a new dawn in the management of public affairs, one of them being the manner in which state officers should conduct themselves vis-à-vis political matters.

Ms Akelo further relied on the case of ***John Okelo Nagafwa*** in which the court defined the elements of gainful employment in three main elements being inherent incompatibility; impairment of judgment of a state officer and conflict of interest. She submitted that both positions held by the 1st respondent are very demanding and it is impossible to discharge both successfully. She gave the example of CBC submitting that the 1st petitioner in his supplementary affidavit demonstrated that the 1st respondent on behalf of the 2nd respondent refused to hold talks with the CS Education on behalf of the Government. She further cited the averment in the affidavit of the 1st petitioner that the 1st respondent ordered the boycott of training, a decision that she submitted was political.

On the issue of prejudice to the respondents should the court find in favour of the petitioners, Ms. Akelo submitted that the resolution of the 2nd respondent's ADC cannot overrule the provisions of the Constitution. That the ADC cannot sanitise an illegality.

On the argument by the respondents that the petition was filed late in the day, Ms. Akelo submitted that there is no limitation period in matters of violation of the Constitution. On the 1st respondent's argument that he went to Parliament to represent workers, Ms Akelo submitted that the 1st respondent is not the only member of the labour movement who can be nominated to represent workers in Parliament.

Submissions of the Respondents

The 1st respondent submits that he was nominated under Articles 90 and 97(1)(c) of the Constitution to represent the rights of workers. Article 90 provides that –

90. Allocation of party list seats.

(1) Elections for the seats in Parliament provided for under Articles 97(1)(c) and 98(1)(b), (c) and (d), and for the members of county assemblies under 177(1)(b) and (c), shall be on the basis of proportional representation by use of party lists.

(2) The Independent Electoral and Boundaries Commission shall be responsible for the conduct and supervision of elections for seats provided for under clause (1) and shall ensure that—

(a) each political party participating in a general election nominates and submits a list of all the persons who would stand elected if the party were to be entitled to all the seats provided for under clause (1), within the time prescribed by national legislation;

(b) except in the case of the seats provided for under Article 98(1)(b), each party list comprises the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed; and

(c) except in the case of county assembly seats, each party list reflects the regional and ethnic diversity of the people of Kenya.

(3) The seats referred to in clause (1) shall be allocated to political parties in proportion to the total number of seats won by candidates of the political party at the general election.

Article 97(1)(c) provides that –

97. Membership of the National Assembly.

1) The National Assembly consists of—

- (a) two hundred and ninety members, each elected by the registered voters of single member constituencies;**
- (b) forty-seven women, each elected by the registered voters of the counties, each county constituting a single member constituency;**
- (c) twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with Article 90, to represent special interests including the youth, persons with disabilities and workers; and**
- (d) ...**

[Emphasis added]

It is the 1st respondent's position that his nomination by Gazette Notice No. 8319 is in tandem with his position as Secretary General of the 2nd respondent.

It is further the 1st respondent's position that Article 75 of the Constitution envisages that a state officer can hold other positions as it provides that –

75. Conduct of State officers.

(1) A State officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids—

- (a) any conflict between personal interests and public or official duties;**
- (b) compromising any public or official interest in favour of a personal interest; or**
- (c) demeaning the office the officer holds.**

It is argued that Article 77(1) only crystallises where a person holds a full-time state office and is in gainful employment. That Section 26(1) and (2) of the Leadership and Integrity Act 2012 defines “*gainful employment*” as –

26. Gainful employment.

(1) Subject to subsection (2), a State officer who is serving on a full-time basis shall not participate in any other gainful employment.

(2) In this section, “gainful employment” means work that a person can pursue and perform for money or other form of compensation or remuneration which is inherently incompatible with the responsibilities of the State office or which results in the impairment of the judgement of the State officer in the execution of the functions of the State office or results in a conflict of interest in terms of section 16.

It is the position of the 1st respondent that from the provisions of Article 75(1) and 77(1) read together with Section 26 of the Leadership and Integrity Act, a Member of Parliament, even if presumed to be a full time state officer, is not barred from engaging in other gainful employment except where it is “**inherently incompatible with the responsibilities of the state officer or which results in the impairment of the judgment of the state officer in execution of the functions of the state office or results in a conflict of interest in terms of Section 16 of the Leadership and Integrity Act.**” That the onus is on the petitioners to demonstrate that the 1st respondent's position as Secretary General of the 2nd respondent is –

- a) inherently incompatible with his responsibility as a nominated Member of Parliament or;
- b) will impair his judgment in execution of the functions of his office as a Member of the National Assembly or
- c) will result in a conflict of interest in terms of Section 26 of the Act.

The 1st respondent relied on the case of *John Okelo Nagafwa V The Independent Electoral & Boundaries Commission & 2 Others [2013] eKLR*, in which the High Court (Tuiyot J.) accepted the following proposition by Lenaola J (as he then was) in *Nairobi HCC Petition No. 354 of 2012 Samuel M. Nganga -vs- The Minister for Justice, National cohesion & Constitutional Affairs and Another [2013] eKLR*;

“Nowhere else in the Constitution, so far as I know, is the term “full-time state officer” used. Article 250(5) for example provides that members of Commissions created by Article 248 “may serve on a part-time basis” and this obviously is the opposite of “full-time basis”. Members of those Commissions are also State officers within the meaning assigned to them above. The import of those provisions is that not all the persons defined as State officers are expected to work on a full-time basis and the next question would be whether Members of Parliament and Members of a County Assembly are also in the category expected to work on a full time basis.”

Tuiyott J. in **John Okelo Nagafwa v. Independent Electoral & Boundaries Commission (IEBC) and 2 Others**, was considering the objections to the appearance of Hon. Senator James Orengo, Senior Counsel who represented one of the parties in the election court. After considering the Leadership and Integrity Act, 2012 and the Standing Orders of the Senate Tuiyot J. rendered that a Senator, who is a Member of Parliament, acting for a party in a case before the court was not on full-time employment. He held as follows;

“It seems that even if a member of Senate was to be involved in other business of the House (e.g. Committees), Parliamentary business may not engage a Member fully from Monday to Friday, 8.00 am to 5.00 pm. In respect to non-Parliamentary business, this court was unable to find any regulation governing the work hours. The Petitioner has not persuaded this Court that Hon. Orengo has used up public time in preparing for and participating in this Election Petition. No evidence has been shown to this court to demonstrate that Counsel’s conduct this far is inherently incompatible or fundamentally in conflict with his role as a Member of Senate.”

Both the 2nd respondent and the 4th respondents agree with the position of the 1st respondent and add that it would be prudent to demystify whether Members of Parliament are full time State Officers.

The 4th respondent referred to the case of **Regine Butt –V- Haroon Butt and Another (2015) eKLR** where Muriithi J. stated as follows–

“It appears from the provisions of Articles 75 (1) and 77(1) of the Constitution and section 26 of the Leadership and Integrity Act that a Member of Parliament, even if presumed to be a full-time state officer, is not barred from engaging in other gainful employment except where it is “inherently incompatible with the responsibilities of the State Office or which results in the impairment of the judgment of the state officer in execution of the functions of the State Office or results in a conflict of interest in terms of section 16” of the Leadership and Integrity Act. It is therefore upon the party objecting to the engagement of an MP as counsel in a court case to demonstrate that the exceptions exist and not on the party proposing to engage the MP to demonstrate that they do not exist.”

The 4th respondent further submitted that the hours of meetings for the National Assembly are entirely different as can be discerned from Standing Order No. 30 which provides as follows;

“30. Hours of meeting

(1) Unless the Speaker, for the convenience of the House otherwise directs, the House shall meet at 9.30 a.m. on Wednesday and at 2.30 p.m. on Tuesday, Wednesday, and Thursday, but more than one sitting may be directed during the same day.”

That what a Member of Parliament is required to do is to attend the Sittings of the House and its Committees. That Article 103(1)(b) of the Constitution requires a Member of Parliament not to be absent from eight sittings of the House during any session of Parliament without permission from the Speaker. Similarly, the Standing Order No. 187 of the National Assembly Standing Orders (4th Edition) requires a Member not to fail to attend four consecutive sittings of a Committee without permission from the Chairperson of the Committee or the Speaker. The said provisions state as follows; -

Article 103(1)(b) of the Constitution of Kenya, 2010 –

103. Vacation of office of Member of Parliament.

(1) The office of a member of Parliament becomes vacant—

(a) if the member dies;

(b) if, during any session of Parliament, the member is absent from eight sittings of the relevant House without permission, in writing, from the Speaker, and is unable to offer a satisfactory explanation for the absence to the relevant Committee.”

Standing Order No. 187 of the National Assembly Standing Orders (4th Edition)

187. Failure to attend meetings

(1) If a Member fails to attend four consecutive sittings of a Committee without the written permission of the Chairperson of the Committee, or the permission of the Speaker if the Member is the Chairperson, the Chairperson or the Speaker, as the case may be shall notify the Committee of the failure. ”

The 4th respondent further relied on the decision in **Samuel Muigai Ng'ang'a -V- Minister for Justice, National Cohesion and Constitutional Affairs and Another** where Lenaola J. (as he then was) after considering the existing law stated –

“The third question is a corollary to the second and to address the issue, one must read Article 77(1) of the Constitution holistically.”

Lenaola J. further quoted excerpts from the **Book Constitutional and Administrative Law, 8th Edition** by Hilaire Barnett at page 477 where, reference is made to a Committee in England established to “*examine current concerns about standards of conduct of all holders of public office, including arrangements relating to financial and commercial activities, and to make recommendations to ensure the highest standards of probity in public life*”.

The Committee was chaired by Lord Nolan and with regard to Members of Parliament, in its first Report in 1995, Barnett wrote as follows:

“The Nolan Report recorded that the 1995 Register of Members Interests suggested that 26 Members had entered into agreements with public relations or lobbying firms. A further 142 members had consultancies 'with other types of company or with trade associations'. The 168 members between them held a total of 356 consultancies. When ministers and the speaker are excluded from the analysis, almost 30 per cent of Members of Parliament held some form of consultancy agreement. In relation to associations with trades unions, a total of 184 members had sponsorship agreements, 27 had paid consultancies, and a further ten received some form of financial assistance from trade unions. Accordingly, the committee concluded that almost 70 per cent of Members of Parliament (excluding Ministers and the Speaker) had some form of financial relationship with outside bodies and added that;

“... a Parliament composed entirely of full time professional politicians would not serve the best interests of democracy. The House needs if possible to contain people with a wide range of current experience which can contribute to its expertise.”

The committee was also concerned that a ban on outside financial interests would act as a deterrent to people who would otherwise stand for election to Parliament. The committee recommended, therefore, that Members of Parliament should continue to have the right to engage in outside employment.

Having reviewed the early resolutions of the House, and the later resolution of 1947, and the rules regulating the registration of members' interests, the committee found that the Register had worked unsatisfactorily. The committee invited the House of Commons to review the statement of principle which governed the registration of interests. ”

Later at page 487, the Committee stated as follows;

“The purpose of Parliamentary privilege (which is enjoyed by both Houses of Parliament), both collective and individual, is to protect the independence and integrity of Parliament from outside influence and interference. To protect the separation of powers, between the judiciary and parliament, the Courts may rule on the existence and scope of privilege, but once a matter is deemed to be within parliamentary privilege, the matter is left to Parliament to determine.

The collective privileges include the right to determine its own composition and procedure, and to discipline its Members (but note the Parliamentary Standards Act 2009) individual privileges include freedom from arrest for civil matters for forty days before and after a parliamentary session, and most importantly, freedom of speech in proceedings in parliament which is protected under Article IX of the Bill of Rights 1689.

Members of Parliament have always been permitted to have employment outside Parliament and to enter into contracts for services with outside bodies. In recent years, the issue of the financial interests of both Members of Parliament and Members of the House of Lords has caused damage to the integrity of Parliament. Most recently with the abuse of MPs expenses and allowances, Parliament finally agreed to establish an independent body and Commissioner to regulate MPs' pay and expenses, under the Parliamentary Standards Act 2009, as amended by the Constitutional Reform and Governance Act 2010.”

It is submitted that the above conclusion is reminiscent of the Kenyan situation. The Respondents referred to the publication **Constitutional and Administrative Law, 4th Edition** by Pollad, Parpworth and Hughes, Oxford university Press, at page 219, where it is stated thus;

“Most MPs do not live solely on their parliamentary salaries and other expense allowances-the cost of maintaining more than one house (London and the constituency) and of paying for research and other secretarial staff over and above that covered by allowance means that other income has to be found, either from employment, professional earnings or sponsorship. It is known that a certain few members do live very frugally in bed and breakfast accommodation and exist only on their parliamentary salaries, but this does not appeal to many. The fact that our MPs are not full-time legislators explains some of the oddities of parliamentary procedure - why, for example, the real business of Parliament does not get under way until the afternoon when it may be assumed lawyer members will have finished the day in Court. The outside pay of MPs, however, raises another issue; can their independence be compromised by the sources of their outside earnings”

The 4th Respondent submitted that as a matter of common knowledge, Members of Parliament in Kenya were and are known for their engagement in all manner of ventures. The 4th respondent further submitted that there are many cases of members of parliament who for five years would only make technical appearances in Parliament and spend the rest of their time elsewhere.

The 4th respondent submitted that there is no law, save the Standing Orders of Parliament to regulate when members should be engaged in

Parliamentary business. In the Standing Orders, 2008, a day is defined in Order No. 2, which states thus;

"Sitting day means subject only to the special definition of "day" in Standing Order 146 (Definition of a day), any day on which the house sits"

Standing Order No. 20 then defines hours of meetings (under part VIII -Sittings and Adjournments of the House) as follows;

Unless the speaker, for the convenience of the House otherwise directs; the House shall meet at 9.00 a.m. on Wednesday and Thursday, but more than one sitting may be directed during the day".

The 4th Respondent relied on Article 126(1) of the Constitution provides as follows;

A sitting of either House may be held at any place within Kenya and may commence at any time that the House appoints.

On the Union's Constitution, the 2nd respondent submits that Article XVIII of the 2nd Respondent Constitution provides circumstances under which an official of the union vacates office as follows:

"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."

It submits that the 1st Respondent has not at any time vacated office of Secretary General of the 2nd Respondent, and thus remains the constitutional and legal office bearer of that position. Further, that the 1st Respondent has not attained the age of sixty; has not resigned in writing; has not died; and has not been removed by a vote at the ADC or Special Conference.

It is submitted that the Annual Delegates Conference (ADC) is the supreme decision-making organ of the 2nd Respondent as per Article VII (A) (2) of the 2nd Respondent's Constitution. Resolutions and decisions of the ADC are binding on all members unless otherwise overruled in an ADC. Article VII(A)(2) of the 2nd Respondent Constitution provides:

"The Annual Delegates' Conference shall be the supreme authority of the Union and its decisions shall be final and binding on all members."

That neither the Petitioners nor any other member of the 2nd respondent has challenged the decision of the ADC, nor appealed that decision in the manner set out in the 2nd Respondent's Constitution. That in the subsequent ADC of the year 2018, the members still affirmed the resolution passed and ratified in the ADC of 2017.

To buttress its position the 2nd respondent refers to Article 99(2) of the Constitution which provides –

(2) A person is disqualified from being elected a member of Parliament if the person—

(a) is a State officer or other public officer, other than a member of Parliament;

(b) has, at any time within the five years immediately preceding the date of election, held office as a member of the Independent Electoral and Boundaries Commission;

(c) has not been a citizen of Kenya for at least the ten years immediately preceding the date of election;

(d) is a member of a county assembly;

(e) is of unsound mind;

(f) is an undischarged bankrupt;

(g) is subject to a sentence of imprisonment of at least six months, as at the date of registration as a candidate, or at the date of election; or

(h) is found, in accordance with any law, to have misused or abused a State office or public office or in any way to have contravened Chapter Six.

The 2nd Respondent submitted that Article 99(2) of the Constitution does not bar the 1st Respondent from holding both the position of member of Parliament and Secretary General/CEO of the 2nd Respondent.

Analysis and Determination

Having considered the pleadings, submissions and authorities on record, the following issues arise for determination –

- (i) Whether the constitution prohibits the 1st respondent from contemporaneously holding the office of nominated Member of Parliament and Secretary General of the 2nd respondent.
- (ii) Whether the petitioners have been prejudiced by the 1st respondent holding both positions.
- (iii) Whether this court is the correct avenue for the petitioners to seek redress and whether the petition is premature.
- (iv) Whether the petitioners are entitled to the orders sought.

The thrust of the arguments by the petitioners is that the 1st respondent is holding two full time jobs and that the same is unconstitutional under Articles 77 and 260 of the Constitution as well as Section 26(1) of the Leadership and Integrity Act. Their position is that the 1st respondent became ineligible to hold the position of Secretary General upon accepting the nomination by Orange Democratic Party to become a Member of Parliament.

The Respondents on the contrary argue that the position of a Member of Parliament is not a full time state office and further that the petitioners have not proved that there is a conflict between the position of Secretary General/CEO of the 2nd Respondent and Member of Parliament as envisaged in Article 77 as read with section 26 of the Leadership and Integrity Act. Article 77 of the Constitution and Section 26 of the Leadership and Integrity Act are reproduced below-

Article 77 of the Constitution of Kenya, 2010 –

77. Restriction on activities of State officers.

(1) A full-time State officer shall not participate in any other gainful employment.

(2) Any appointed State officer shall not hold office in a political party.

(3) A retired State officer who is receiving a pension from public funds shall not hold more than two concurrent remunerative positions as chairperson, director or employee of—

(a) a company owned or controlled by the State; or

(b) a State organ.

(4) A retired State officer shall not receive remuneration from public funds other than as contemplated in clause (3).

Section 26 of the Leadership and Integrity Act

26. Gainful employment.

(3) Subject to subsection (2), a State officer who is serving on a full-time basis shall not participate in any other gainful employment.

(4) In this section, “gainful employment” means work that a person can pursue and perform for money or other form of compensation or remuneration which is inherently incompatible with the responsibilities of the State office or which results in the impairment of the judgement of the State officer in the execution of the functions of the State office or results in a conflict of interest in terms of section 16.

The Respondents further argue that Article 75 of the Constitution permits members of Parliament to hold other jobs provided there is no conflict or compromise between their position as member of Parliament and the other position held. Article 75 provides that-

75. Conduct of State officers.

(2) A State officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids—

(a) any conflict between personal interests and public or official duties;

(b) compromising any public or official interest in favour of a personal interest; or

(c) demeaning the office the officer holds.

Article 260 of the Constitution defines “state office” to include the office of a Member of Parliament and “state officer” as a person holding a

state office.

A reading of Articles 75 and 77 of the Constitution and section 26 of the Leadership and Integrity, as well as the definition of state officer in Article 260 in my opinion do not bar a holder of the position of a member of Parliament from holding the position of secretary general of a trade union. The said provisions in my understanding make two separate propositions. The first is that a state officer should not place himself in a position of conflict as provided in Article 75(1) as read with Section 26 of the Leadership and Integrity Act. The second is that a full time state officer cannot be engaged in any other gainful employment as provided in Article 77(2). My understanding therefore is that the petitioners must prove, either, that the 1st Respondent is a full time state officer and therefore cannot be engaged in any other gainful employment, or that holding the two positions of a member of Parliament and the position of secretary general of a trade union would create a conflict as defined in Article 75(2) of the Constitution and section 26 of the Leadership and Integrity Act.

The issue whether a Member of Parliament is a full time state officer and whether such a member can hold another position is not novel. There are several decisions where the courts have decided these twin issues. In the case of **Regine Butt –V- Haroon Butt and Another (2015) eKLR** Muriithi J. while considering the questions stated as follows–

“It appears from the provisions of Articles 75 (1) and 77(1) of the Constitution and section 26 of the Leadership and Integrity Act that a Member of Parliament, even if presumed to be a full-time state officer, is not barred from engaging in other gainful employment except where it is “inherently incompatible with the responsibilities of the State Office or which results in the impairment of the judgment of the state officer in execution of the functions of the State Office or results in a conflict of interest in terms of section 16” of the Leadership and Integrity Act. It is therefore upon the party objecting to the engagement of an MP as counsel in a court case to demonstrate that the exceptions exist and not on the party proposing to engage the MP to demonstrate that they do not exist.”

Again in **Nairobi HCC Petition No. 354 of 2012 Samuel M. Nganga -vs- The Minister for Justice, National cohesion & Constitutional Affairs and Another [2013] eKLR**; Lenaola J (as he then was) decided as follows:

“Nowhere else in the Constitution, so far as I know, is the term “full-time state officer” used. Article 250(5) for example provides that members of Commissions created by Article 248 “may serve on a part-time basis” and this obviously is the opposite of “full-time basis”. Members of those Commissions are also State officers within the meaning assigned to them above. The import of those provisions is that not all the persons defined as State officers are expected to work on a full-time basis and the next question would be whether Members of Parliament and Members of a County Assembly are also in the category expected to work on a full time basis.”

Further, in the case of **John Okelo Nagafwa V The Independent Electoral & Boundaries Commission & 2 Others [2013] eKLR**, in which Tuiyot J. while accepting the proposition by Lenaola J (as he then was) in **Nairobi HCC Petition No. 354 of 2012 Samuel M. Nganga -vs- The Minister for Justice, National cohesion & Constitutional Affairs and Another [2013] eKLR**; went on to hold that even if a Member of Parliament is deemed to be a full-time State Officer, he could still engage in gainful employment, if the gainful employment does not result in the impairment of the judgment of the State Office or in a conflict of interest under Section 16. Tuiyot J. further stated as follows –

“Evidently, the work of a Member of the Senate involves both Parliamentary and non-Parliamentary business. The workhours for Parliamentary business are regulated by the Standing Orders of the House. This Court has looked up those Standing Orders and in particular Standing Order 30.1 which provides:-

“(i) unless the Speaker for the convenience of the Senate otherwise directs, the Senate shall meet at 9.00 a.m on Wednesday and at 2.30 p.m on Tuesday, Wednesday and Thursday, but more than one sitting may be directed during the same day.”

It seems that even if a Member of Senate was to be involved in other business of the House (e.g. Committees), Parliamentary business may not engage a Member fully from Monday to Friday, 8.00 a.m. to 5.00 p.m. In respect to non- Parliamentary business, this Court was unable to find any regulation governing the work-hours.

The Petitioner has not persuaded this Court that Hon Orengo has used up public time in preparing for and participating in this Election Petition. No evidence has been shown to this Court to demonstrate that Counsel’s conduct this far is inherently incompatible or fundamentally in conflict with his role as a Member of The Senate.”

From the foregoing, it is clear that Article 260 of the Constitution which defines a state officer, as read with Sections 26(1) and (2) of the Leadership and Integrity Act alone would not bar a Member of Parliament from holding other office unless there is a conflict as expressly set out in Section 26(2) of the Leadership and Integrity Act. It is further clear that a Member of Parliament is not barred from holding other gainful employment as was determined in the case of **John Nagagwa Okelo -V- IEBC** and in **Samuel M. Ng’ang’a** case. The court was explicit in **Ng’ang’a case** that “not all the persons defined as state officers are expected to work on a full time basis.”

The petitioners relied heavily on the decision of Ndolo J. in **Robert Nyabuto Nyabwocha** in buttressing their position that the 1st respondent was not qualified to hold both his position as nominated Member of Parliament and Secretary General of the 2nd respondent at the same time. In her the decision Ndolo J. stated –

“In my view, looking at the roles and functions assigned to Members of Parliament, they cannot be said to be part time state officers. I therefore find that a Member of Parliament is a full-time state officer.”

The petitioners argue that the 1st respondent is thus prohibited from holding the office of Secretary General of KNUT as he is a full-time

state officer.

I think the two cases can be distinguished. In the case of **Robert Nyabuto Nyabwocha**, the position in the union for consideration by the court was that of Assistant National Treasurer which the Judge found to be a fulltime job. The Judge was clear that –

“... A plain reading of the (KUPPET) Union Constitution reveals that the position of Assistant National Treasurer is a full time job. It seems to me therefore that this position is clearly incompatible with the office of Member of Parliament which is also a fulltime job.”

The Labour Relations Act treats the position of Secretary General differently from that of Treasurer. Section 31 of the Labour Relations Act provides as follows –

31. Officials

(1) The officials of a trade union or employers’ organisation shall be persons who are, or have been, engaged or employed in the sector for which the trade union or employers’ organisation is registered.

(2) No person shall be an official of more than one trade union or employer’s organisation.

(3) An official of a trade union may also be an official of a federation of trade unions to which the trade union is affiliated.

(4) Notwithstanding the provisions of subsection (1) –

(a) the general secretary of a trade union or the chief executive or association secretary of an employers’ organisation may be a person not engaged or employed in the sector concerned;

(b) a person may be an official of more than one employer’s organisation; and

(c) the Registrar may, on application by a trade union or employers’ organisation, permit any other office to be filled by a person not engaged or employed in the sector concerned.

(5) No person who has been convicted of a criminal offence involving fraud or dishonesty shall be an official of a trade union or employer’s organisation.

[Emphasis added]

In my understanding the words **“the general secretary of a trade union may be a person not engaged or employed in the sector concerned”** means that a general secretary’s position may be held by a person who is not in the full time employment of the Union.

The Act however provides as follows in the respect of the position of Treasurer –

42. Treasurer to render accounts

(1) In this section, “official” means the treasurer of a trade union, employers’ organisation or federation and every other official responsible for the accounts of a trade union, employers’ organisation or federation for collecting, disbursing, keeping in custody or controlling its funds or moneys.

From a reading of the two provisions above, it is clear that the position of Secretary General as compared to the Treasurer’s position, is not expected to be employed in a different sector as opposed to the position of Secretary General.

Further, in the case of **Robert Nyabuto Nyabwocha**, the court was dealing with an official of a union who wanted to vie for a Parliamentary position while in the instant petition the 1st Respondent was nominated to represent the special interests of workers. A person vying for elective position would first have to take time off to campaign, and would need to expend a lot of time and large sums of money in the campaigns, a situation that would likely conflict with the position of Treasurer who is the custodian of trade union funds.

Further, as an elected Member of Parliament, there would be responsibilities to the constituents which may well distract a Treasurer of a trade union from his job of safeguarding its funds and other assets. On the other hand, the 1st respondent is a nominated Member of Parliament who did not have to campaign for his position and does not have a constituency. He would therefore easily be able to handle both the role of a Member of Parliament as set out in Article 95(1) of the Constitution as well as his responsibilities as Secretary General and CEO of a trade union. Further, the 2nd respondent had ratified his nomination as Member of Parliament. The petitioners did not object to the decision of the ADC to ratify the nomination of the 1st respondent as member of Parliament. Further, the nomination of the 1st Petitioner was to represent the special interest of workers.

I thus find that the circumstances in the case of **Robert Nyabuto Nyabwocha** are not similar and is distinguishable from this petition and is therefore not applicable to this petition.

The other issue for determination is whether the court is divested of jurisdiction under the doctrine of exhaustion of remedies.

The 4th respondent submitted that the petition which seeks the removal of a Member of Parliament, is premature and contradicts the doctrine of exhaustion as the petitioners have not exhausted all the available remedies provided by statute. The 4th respondent referred to Section 42 and 43 of the **Leadership and Integrity Act** which provides for the channel and procedure for lodging complaints against state officers. It is submitted that the question of the validity of the 1st respondent's nomination is under the jurisdiction of the Independent Electoral and Boundaries Commission as provided under Article 88(4)(e) of the Constitution. It is further submitted by the 4th respondent that Section 62 of the Labour Relations Act provides for disputes to be lodged the Minister for the time being in charge of Labour matters. The 4th respondent submits that all these avenues have not been exhausted by the petitioners relying on the decision in the case of **Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Other [2015]eKLR** where the Court of Appeal Stated –

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”

The 4th Respondent further relied on section 42 and 43 of the Leadership and Integrity Act on procedure for filing complaint against a public officer, Article 88(4) of the Constitution and Section 62 of the Labour Relations Act.

The petitioners' response to this is that the doctrine of exhaustion only applies in judicial review matters, that the decision of KNUT ADC cannot supersede the Constitution and that there is no timeline for raising constitutional issues.

Though I may not agree with all the arguments of the petitioners, I think that this is an issue that should have been raised by the 4th Respondent as a preliminary point at the very outset of the suit to enable the parties address the court exhaustively on the subject, as it is a question on jurisdiction. I further think that even if it had been raised, it would not have succeeded as that line of argument would mean that the petitioners would have to file several complaints in different fora as opposed to by filing this petition as they did, where all the issues are addressed together in one suit. It is my opinion that it prudent to choose one forum where resources would be used effectively and efficiently applied as against a forum that would require multiple suits to be filed in different fora.

I would thus dismiss the arguments on jurisdiction as raised by the 4th Respondent.

On the issue whether the petitioners have been prejudiced, the petitioners made several allegations in the supplementary affidavit of KENNETH WAHWAI BANDE sworn on 13th June 2019 and in the supplementary submissions. The evidence adduced is largely based on newspaper articles which do not specifically refer to the petitioners and which as pointed out by the 1st respondent, constitute opinions of the writers, with little or no probative value. The petitioners further did not explain why they did not prefer an appeal against the decision of the ADC to ratify the nomination of the 1st respondent.

Based on what is on record, the petitioners have not satisfied the court on the prejudice they will or have suffered as a result of the 1st respondent holding the two positions of a nominated Member of Parliament and Secretary General/CEO of the 2nd respondent. The matters referred to in the supplementary affidavit of KENNETH WAHWAI BANDE sworn on 13th June 2019 do not disclose any prejudice to the petitioners.

The final issue is whether the petitioners are entitled to the orders sought.

The Petitioner in Petition No. 83 of 2017 did not attend court to prosecute the petition. Petition No. 83 of 2017 is thus dismissed for want of prosecution.

As for Petition No. 26 of 2018, having found that the petitioners have not proved that the 1st respondent is unconstitutionally and illegally holding the position of Secretary General/CEO of KNUT or that he is unlawfully holding two full time jobs, and having further found that they have not proved violation of their constitutional rights or prejudice suffered by them due to the 1st Respondent holding the two positions of Secretary General/CEO of KNUT and Nominated Member of Parliament, I find that the petitioners do not merit the prayers sought in the petition. The result that the petition is dismissed.

Each party shall bear their costs.

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

MAUREEN ONYANGO

JUDGE