



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

AT NAIROBI

CAUSE 1630 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

JANE A. LITUNYA.....1ST APPLICANT/CLAIMANT
MARK AMBITHO.....2ND APPLICANT/CLAIMANT
LILIAN C. BETT.....3RD APPLICANT/CLAIMANT
ROSE A. OKELLO.....4TH APPLICANT/CLAIMANT

VERSUS

JANE ARENDE.....1ST RESPONDENT
MWERO CHONDO.....2ND RESPONDENT
SAMUEL A. OPIYO.....3RD RESPONDENT
MARGARET WAHOME.....4TH RESPONDENT
EMILY NGAIRA.....5TH RESPONDENT
MARY LUCY A. JUMA.....6TH RESPONDENT
SALOME MAINA.....7TH RESPONDENT
SARA N. MBUTHIA.....8TH RESPONDENT
PETER S. PARDIYO.....9TH RESPONDENT
FRANCINE INDECHE MASAVIRU.....10TH RESPONDENT
PATRICK JUMA TWANG (LABOUR OFFICER).....11TH RESPONDENT
THE REGISTRAR OF TRADE UNIONS.....12TH RESPONDENT

RULING

Before this Court is the Application dated 20th December 2018 where Applicants seek the following Orders-

- a. Spent.
- b. That leave be granted to extend the time allowing the parties dissatisfied with the elections to file their petition.

- c. That pending the hearing and determination of this Application, an order of interim injunction be issued to restrain the 1st to 10th Respondents from purporting to act as national officials of the Kenya Union of Pre-Primary Education Teachers (KUNOPPET), from physically occupying the physical location of the national KUNOPPET offices, from handling any finances on behalf of KUNOPPET, from making press releases or social media pronouncements on behalf of the union or in any other way conducting business on behalf of the union.
- d. That the purported officials that is Jane Arende, Mwero Chondo, Samwel A. Opiyo, Margaret Wahome, Emily Ngaira, Mary Lucky A. Juma, Salome Maina, Sara N. Mbuthia, Peter S. Pardiyo and Francine Indech Masaviru be restrained from acting as bona fide officials of the union.
- e. That an order be issued restraining the purported Jane Arende, Mwero Chondo, Samwel A. Opiyo, Margaret Wahome, Emily Ngaira, Mary Lucky A. Juma, Salome Maina, Sara N. Mbuthia, Peter S. Pardiyo and Francine Indech Masaviru from acting as the bona fide signatories in the Union's bank account, KCB Acc. No. 1143084446.
- f. That the Court be pleased to make an order that the initial officials of Kenya Union of Pre-Primary Education Teachers (KUNOPPET) registered at the Registrar of Trade Unions continue to hold office until further orders of this Court.
- g. That a report of the purported election showing the people who participated in the said elections, the proposers and the seconders of those who were elected and the number of votes cast to be produced to the Claimants herein by the registrar of Trade Union.
- h. That costs of this Application be in the Cause.

The Application is based on the grounds set out therein and in the Affidavit of Jane Atieno Litunya. They are that Mr. Samuel Antony Opiyo secretly wrote a letter communicating that the national executive would hold elections on 19th March 2016. Minutes of the meeting or signatures of the participants were not attached.

He received applications from the 2nd, 4th, 5th, 7th, 8th, 9th and 10th Respondents for various positions without, engaging the national executive council as required by the KUNOPPET Constitution and kept the venue a secret. It is averred that the Respondents had not paid membership fees and neither did they pay the Application fees. The six of the applicants were declared unopposed.

The Petitioner raised an objection to the Registrar of Trade unions on 22nd March 2017 but there was no response. The Petitioner wrote another letter on 8th April 2016 requesting to have valid evidence of forgeries and misconduct in the elections. They received a photocopied letter on 17th April 2016. This was 2 days before the expiry of the 30 days within which they were to file an election petition.

The 3rd Respondent opposed the Application vide his Affidavit sworn on 5th February 2019. He contends that he is the Secretary General of KUNOPPET. He further contends that the Application is a sham as it has been instituted by improper parties and cannot stand before Court.

He avers that the Application is time barred hence this Court lacks jurisdiction. Further, that the Statement of Claim has not been signed as required by Rule 6(a) of the Employment and Labour Relations Court Procedure Rules 2016.

He is of the position that Rule 16(1) and (3) of the Employment and Labour Relations Court Procedure Relations 2016 cited by the applicants is not applicable for the application. As such, the Application is frivolous and incompetent. He further posits that the matter ought to have been instituted as an appeal from the decision of the Registrar of Trade Unions.

He contends that there are minutes duly signed by Mark Ambitho, the then Union's national chairman. He further contends that there is no legal provision requiring that there be a committee to oversee the union's election.

The 4th Applicant filed an Affidavit in response to the Application contending that the 2nd Applicant obtained her ID number from her husband in 2018 on the pretext that it was filing the Union's annual returns. She only came to know of her joinder to this suit on 16th January 2019, through the 3rd Respondent.

She contends that the signatures to the pleadings are a forgery as she never signed any of those documents or authorized the institution of the suit on her behalf. It is her averment that the forgery is currently under police investigation under OB Number 10/25/01/19.

She further contends that she did not have any issues with the elections of 19th March 2016. As such, she has no intention of suing anyone. She urged this Court to expunge the documents containing her signature from its records.

In opposition to the Application, the 12th Respondent swore a Replying Affidavit on 8th February 2019. She avers that vide the letter dated 25th November 2015, directions were issued to all trade unions, employer organizations and federations to hold their general elections. As a result, KUNOPPET held a National Executive Council meeting on 22nd February where it was resolved and she was notified that elections would be held on 19th March 2016 at Connection Restaurant in Mlolongo.

The elections were held and were supervised by the 11th Respondent. However, the 1st, 2nd and 3rd Applicants objected to the registration of the elected persons. Consequently, on 23rd March 2016, the 12th Respondent made inquiries from the presiding officer as regards the issues raised. She received another letter from the Applicant requesting a meeting to produce valid evidence concerning what they term a "sham election". However, no evidence was attached to the letter. She responded to the objection on 13th April 2016.

The Affiant avers that pursuant to the impugned elections, the 12th Respondent registered the Notice of Change of Officers on 14th April 2016. She avers that six months thereafter, the Applicants requested for certain documents which were issued to them.

The Affiant further avers that she received a complaint from the Commission of Administrative Justice made on behalf of Mark Ambitho to which she responded to vide her letter dated 7th March 2017.

It is her position the Claimants have failed to lodge an appeal against her decision as required by section 30 of the Labour Relations Act. She further posits that the Applicant ought to have filed a miscellaneous application seeking extension of time. As such, the issue to file the subject matter and the issue of this election are improperly before this Court.

The 2nd Applicant filed a rejoinder to the 3rd Respondent and the 4th Applicant's replying affidavits. He contended that the 4th Applicant had been compromised and that they would proceed with the suit without her being joined as a party. In response to the issues of technicality raised by the 3rd Respondent, he urged this Court to apply Article 159(2)(d) of the Constitution in determining the Application.

The Affiant avers that since Lilian C. Bett made averments that she never sent her apologies for the meeting of 12th February 2019, then the 3rd Respondent misled the 12th Respondent into believing that the union had resolved to hold the election on 19th March 2016.

He avers that the 12th Respondent should not base her defence that the matter was filed out of time, upon her wrongdoing as she failed to heed the Claimant's request for documents within time.

The Application was disposed of by way of written submissions. The Claimants filed their submissions on 30th September 2019, the 11th and 12th on 16th August 2019 while the 3rd Respondent his on 14th August 2019.

The Claimants submitted that the elections were null and void because they violated the provisions of the Union's Constitution, section 33 and 35 (2) of the Labour Relations Act.

The 12th and 13th Respondents submitted that the right procedure to be followed was as set out in section 30 of the Labour Relations Act. As such, the Claimants ought to have sought leave to file an appeal out of time. It is their further submissions that the Claimants have not explained the period for delay and as such the failure to file the appeal 3 years after the cause of action arose amounts to inordinate delay.

The 3rd Respondent submits that this Court lacks jurisdiction because the Claimants failed to lodge the matter in the right manner, that is, through a miscellaneous civil application. He also submits that the Claimants should not be granted the orders sought as they have not explained the inordinate delay.

Analysis and Determination

Having considered the pleadings, affidavits of parties and submissions, I find that the following are issues for termination –

- a. Whether the Application is properly before this Court.
- b. Whether the Applicants should be granted leave to file their petition out of time.
- c. Whether the Claimants are entitled to the orders sought.

Application

The 3rd Respondent submitted that the Application was incompetent before this Court for the reason that the Claimants ought to have sought the leave of this Court through a civil miscellaneous application. However, this Court is guided by article 159(2)(d) of the Constitution which requires Courts to administer justice without undue regard to procedural technicalities.

As such, this Court cannot dismiss the Application for being improperly before court as it is now trite law that Courts cannot use technicality of procedure to strike out suits. I find the 3rd Respondent's contention that the suit is incompetent because Claim has not been signed immaterial, as the same is dated and the verifying affidavit sworn to support it has been signed and dated.

Leave

Section 30 of the Labour Relations Act provides that any person aggrieved by a decision of the Registrar made under this Act, may appeal to the Industrial Court against that decision within 30 days of the decision. The 12th Respondent registered the Notice of Change of Officers on 14th April 2016 despite the objection of the Claimants to not have the impugned union officials registered, vide the letter received on 22nd March 2016. As such, the Claimants ought to have lodged an appeal against the decision within 30 days from 14th April 2016 but failed to do so.

The Claimants aver that they requested the registrar to issue them with a report of the election, the names of the nominees, their proposers and seconders and the number of votes cast in their favour but the same did not bear fruit.

Vide the 2nd Claimant's letter of 4th May 2016 to the 12th Respondent, she was informed that the Claimants had instructed a lawyer to institute proceedings on their behalf. On 3rd October 2016, the Claimant's advocate wrote the 12th Respondent requesting for the following-

- a. A copy of the list of KUNOPPET members submitted by the Union.
- b. Notice of intention to hold elections (or the written instructions/directions by your office to the Union to hold elections).
- c. Abstract of all the officials elected including their seconders, proposers and signatures of those who took part in the elections.
- d. Details of the physical address of KUNOPPET.

It appears that the same were not issued because the Claimants lodged a complaint with the Commission on Administrative Justice regarding the same, on 2nd February 2017. The Commission responded to the complaint on 21st March 2017 informing the Claimants as follows-

“Following your inquiry letter to the Registrar of Trade Unions dated 2nd February 2017, we hereby wish to inform you that we have received a response from the Registrar indicating as follows-

- a. That you were personally advised to obtain the list of KUNOPPET members as was contained in request No. 1 of your letter dated 3rd October 2016 from the presiding officer who was labor officer in the Department of Labour as the list was presented to the office during elections.*
- b. That the Registrar issued instructions that you be provided with the documents you had requested in No. 2, 3 and 4 of your request.*
- c. That you were supplied with copies of the intention to hold the elections by both the Registrar and the Union according to your request (copies enclosed).*
- d. That you never applied to be supplied with a copy of the extract as requested in No. 3.) which was chargeable at Kshs.500 even after being advised on the procedure and the requisite charges thereof.*
- e. That in regards to the issue of the physical address of KUNOPPET offices, you were personally informed that the address had not changed and remained the same as when you were the Chairman of the Union.*
- f. That the Registrar of Trade Unions had no legal requirement to call for the minutes of Executive Members meeting which called for elections under the provisions of section 34(2)(b) of the Labour Relations Act as a notice of election sufficed. This meant that the Office of the Registrar of Trade Union did not have the minutes and the list of attendances a fact which was known to you as a past chair.”*

Based on this response, the Claimant wrote to the Registrar on July 31st 2017 requesting for information in the manner directed by the Commission. However, it seems the same was not issued as the Claimants wrote to Commissioner Saadia A. Mohamed on 14th February 2018, informing her that they were yet to get the information that they had requested for.

The Court of Appeal in **Mwangi vs. Kenya Airways [2003] KLR** outlined the factors which the Courts should consider when exercising their discretion to extend time to file an appeal out of time. They include-

- a. The period of delay.
- b. The reason for the delay.
- c. The arguability of the appeal.
- d. The degree of prejudice which could be suffered by the Respondent if the extension is granted.
- e. The importance of compliance with time limits to the particular litigation or issue; and
- f. The effect if any on the administration of justice or public interest if any is involved.

I find the delay inordinate. Under section 30 of the Labour Relations Act, anyone aggrieved by the decision of the Registrar ought to file an appeal in this Court. 30 days lapsed on 14th May 2016, following registration on 14th April 2016. What they were objecting to was the registration of the respondents as union officials. They did not need the documents they sought from the Registrar to file an appeal against the registration.

From the pleadings and evidence adduced in this Court, it is clear that the Claimants were challenging the actions of the registrar throughout the registration process as well as the Registrar's decision to register the impugned officials. As such, their remedy lies in the appeal of that decision.

This was the opinion of the Court in *Clay Odari & 2 Others vs. Kenya Petroleum Oil Workers Union & 8 Others* [2018] eKLR where the Court was of the following opinion-

“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.

If there is no decision made by the Registrar, the Claimants could file a direct challenge to the electoral process, as they did in Cause Number 93 of 2016. In other words, a distinction must be made between disputes implicating the decision of the Registrar, and disputes involving Trade Unions’ elections without the intervention of the Registrar. The Claimants were within their right to approach the Court directly in Cause Number 93 of 2016, since they were not challenging any decision taken by the Registrar. Section 34 allowed them direct access to the Court. Once the electoral process was completed with the registration of results by the Registrar, the only access to the Court would be, in the respectful view of the Court, through Section 30 as read together with Section 34. An Appeal, rather than a Claim, ought to have been filed, seeking reversal of the electoral process and registration of Officials.”

The leave sought herein is to extend the time allowing the parties dissatisfied with the elections to file their petition is denied. Since a petition is not the correct mode for contesting the decision of the Registrar, the leave will serve no purpose. What they should have sought is leave to appeal against the decision of the Registrar. Even if they had sought the correct orders, the delay is inordinate and no valid explanation has been given by the applicants. For these reasons, the leave is declined.

Reliefs Sought

Having denied the Claimants, the leave to file their petition as prayed, it would be untenable to grant the orders sought. As such, this Court declines to grant orders 3 to 7. Each party to bear their own cost.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF NOVEMBER 2019

MAUREEN ONYANGO

JUDGE