



1. Zachary Binyanya (1<sup>st</sup> Petitioner), Silas Mugambi Karimba (2<sup>nd</sup> Petitioner) and Daniel N. Ndungu (3<sup>rd</sup> Petitioner) were all elected as office-bearers of the Union of Kenya Civil Servants on 27 October 2016 for 5-year terms each.

2. On 17 September 2019, Tom Mboya Odege (2<sup>nd</sup> Respondent) and acting as the Secretary-General of the Union (1<sup>st</sup> Respondent) issued notices to the 3 Petitioners asking them to hand over their offices with the Union of Kenya Civil Servants (the Union) allegedly because they had become ineligible to continue holding their offices because they had retired from the public service.

3. The Secretary-General cited the provisions of Articles 4 and 7(4) of the Union Constitution for his action.

4. The Petitioners were taken aback and they formally objected to the decision by the Secretary-General.

5. The Secretary-General did not respond to the objection by the Petitioners and on 1 October 2019, they instituted these proceedings in Court seeking urgent interdicts against removal/reinstatement into their respective offices.

6. The Court granted orders *ex-parte* reinstating the Petitioners to their positions pending the *inter-partes* hearing of the application.

7. When served with the application and *ex-parte* orders, the Respondents, instead of filing grounds of opposition/replying affidavit opted to file an application seeking orders setting aside the *ex-parte* orders.

8. The Court deprecates this practice as it not only consumes precious judicial time but also adds to the cost of litigation upon the parties. It should not be lost to the Respondent that the purpose of an *inter-partes* hearing is to ascertain whether *ex-parte* orders ought to be confirmed or vacated.

9. In this respect, the Court echoes the words of Nduma J in *Dr Sammy Kandie Ng'ochoch v AAR Health Care Holdings Ltd* (2017) eKLR that

This Court has in the recent past decried the common practice by litigants faced with *ex-parte* interim orders to file a counter application instead of responding to the initial application so that it can be heard and disposed of inter partes expeditiously. This practice has made courts to deal with numerous applications hence compromising proper management and use of court's time.

10. In order to save on judicial time and escalation of costs, the Court consequently directed that the Respondents' application would be deemed as grounds of opposition to the Petitioners' application.

11. The Court took oral submissions on 17 October 2019.

12. The Petitioners contentions were in brief first, that by dint of section 31(1) of the Labour Relations Act, they were eligible to continue holding their positions despite having left the public service, the area of operation of the 1<sup>st</sup> Respondent.

13. The section permits any person who had or was employed in a sector within which a trade union operated to serve as an official of the union.

14. Second, the Petitioners asserted that pursuant to Article 12 of the Union's Constitution, they could only be removed from their offices on disciplinary grounds and after being afforded an opportunity to be heard but subject to a determination by the National Executive Board and ratification by the Advisory Council.

15. The Petitioners asserted that their removal from office was not on account of any disciplinary reasons and that in any case they had not been subjected to any disciplinary or removal process either before the National Executive Board or Advisory Council.

16. Towards this end, it was urged that the action of the Secretary-General was not only unilateral but arbitrary.

17. Lastly, it was urged that the provisions of Article 4 and 7(4) of the Union's Constitution applied only in relation to eligibility to stand for office and that once elected, an official was entitled to serve a term of 5 years, and that Article 11 of the Union's Constitution did not envisage vacation of office unless there was violation in terms of Article 12(1)(i) to (iv).

18. In sum, the Petitioners were contending that it was unlawful for the Respondents to purport to oust them from the offices they had been elected to on the ground that they had ceased to serve in the public service.

19. For the Respondents, the view was taken that since the Petitioners had retired from the public service in 2018/2019, they were holding their office(s) illegally as they no longer worked within the sector represented by the Union.

20. The Respondents in this respect asserted that the Petitioners membership of the Union ceased upon their retirement from the public service, and the continued holding of their respective offices became legally untenable.

21. To demonstrate that the Petitioners membership had ceased, the Respondents argued that because they were no longer on a payroll, monthly subscriptions could not be deducted as required by Article 4(2) of the Union's constitution.

22. The Respondents further contended that based on a *direction* by the Registrar of Trade Unions in 2005, the Petitioners could not continue

to hold office after retirement from public service.

## Evaluation

23. It is germane to set out the provisions of the Union's constitution cited by the Respondents in purporting to remove the Petitioners from office.

24. Article 4 provides

### 4 Eligibility for Membership

(1) Membership of the Union shall be open to employees in the public service of the Government of the Republic of Kenya, commonly known as "Public Servants" and whose remuneration is derived directly from estimates voted for by the Parliament of Kenya (*provide - sic*) or from the Consolidated Fund of the Government of Kenya.

(2) Every member shall pay such amounts of prescribed monthly subscriptions as may from time to time be determined by the National Delegates Conference or Special Delegates Conference;-

(a) through the check-off system; or

(b) by cash in advance annually at a rate to be determined by a National Delegates Conference.

(3) Upon admission to membership of the Union, a member shall be bound by this Constitution, the Rules, the General Standing Orders and resolutions and decisions of the organs of the Union.

(4) Any subscriptions or other donations paid to the Union shall not be refundable except where such subscriptions was made in error and the final decision to that effect shall be made by the National Executive Board.

25. Article 7, on the other hand, provides for *Establishment of Offices and Elections of National Officials*. Article 7(4) provides as set out as hereunder

(4) A person shall not be eligible for election as a National Official if that person:-

(a) is not a public servant;

(b) is not a member of the Union;

(c) is not proficient in English and Kiswahili languages;

(d) owes the Union any amounts being arrears of unpaid subscriptions or owes the union any other amount which is due to the Union and remains unpaid;

(e) has not been a member of the Union for at least the last two years immediately preceding the date of the election despite having been employed in the Public Service for two or more years, and was otherwise eligible for membership during the time;

(f) has not been in employment in the public service for at least the last six months.

26. The Court has keenly perused the provisions set out in the preceding paragraphs and cited by the Secretary-General in directing the Petitioners to hand over their offices.

27. The provisions (on *membership* and *establishment* of offices) do not expressly require or call upon a national official such as the Petitioners to automatically vacate office upon retirement from the public service.

28. It is the view of the Court, and it is debatable whether the provisions on *eligibility for membership* and *establishment of offices* would apply on the question of vacation of office by a national official upon leaving the public service in circumstances where the official qualified for general membership and was eligible for election as an official in the first place.

29. The Court has also looked at the general architecture of the Union's constitution. Decisions are expected to be made by certain organs. The Secretary-General and/or the Respondents did not exhibit any material to show that any of the organs made a determination that the Petitioners should vacate office upon retiring from the public service.

30. Lastly, section 31(1) of the Labour Relations Act permits persons who previously served in a sector a trade union operates in to hold office in a trade union.

31. The Petitioners were required to establish a *prima facie* case.

32. The Court finds that they have established a *prima facie* case because there was no evidence that the organs of the Union deliberated on their vacation of office, or that the eligibility clauses in the Union Constitution rendered them incompetent to continue serving as national officials upon retirement from the public service or lastly, that the provisions of section 31(1) of the Labour Relations Act did not apply to the Union.

### **Conclusion and Orders**

33. Arising from the foregoing, the Court confirms and allows proposed orders 3, 4 and 6 in the motion dated 30 September 2019 pending the hearing and determination of the Petition.

34. For clarity, the Court finds no merit in the Respondent's counter-application which was deemed as grounds of opposition/reply to the Petitioners' application.

35. Costs in the cause.

**Delivered, dated and signed in Nairobi on this 8<sup>th</sup> day of November 2019.**

**Radido Stephen**

**Judge**

**Appearances**

For Petitioners Mr. Kirwa instructed by Mwakio Kirwa & Co. Advocates

For Respondents Mr. Jaoko instructed by Nchoe, Jaoko & Co. Advocates

Interested Party served but did not participate

Court Assistant Lindsey