



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

PETITION NUMBER 12 OF 2017

IN THE MATTER OF THE NATIONAL ELECTIONS OF THE UNION OF KENYA CIVIL SERVANTS HELD ON 27<sup>TH</sup> OCTOBER 2016;

**AND**

IN THE MATTER ALLEGED VIOLATION OF RIGHTS AND FREEDOMS IN ARTICLES 24, 27,36,41,47, AND 50[1[OF THE CONSTITUTION OF KENYA;

**AND**

IN THE MATTER OF THE LABOUR RELATIONS ACT NUMBER 14 OF 2007 AND THE UNION OF KENYA CIVIL SERVANTS' CONSTITUTION

**BETWEEN**

NOAH ROTICH.....PETITIONER

LEAH ROTICH.....PETITIONER

JANE MBUGUA.....PETITIONER

FATMA SHIROZY.....PETITIONER

LESUPER HENRY.....PETITIONER

ERIC ABONGO.....PETITIONER

CHARLES GONDOSIO.....PETITIONER

**VERSUS**

UNION OF KENYA CIVIL SERVANTS.. RESPONDENTS

REGISTRAR OF TRADE UNIONS..... RESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

*Mwakio, Kirwa & Company Advocates for the Petitioners [except Petitioner Number 3]*

*3<sup>rd</sup> Petitioner, Jane Mbugua, in Person*

*Rakoro & Company Advocates for the 1<sup>st</sup> Respondent*

## JUDGMENT

### **Background**

1. Union of Kenya Civil Servants [U.K.C.S], held its national elections on 27<sup>th</sup> October 2016, at Nyali International Beach Hotel, in the Coastal Resort City of Mombasa, Kenya. The Petitioners participated in the exercise, as electors and candidates. They were not satisfied with the process and outcome. They filed Petition Number 5 of 2016 at the Employment and Labour Relations Court at Kericho, on 18<sup>th</sup> November 2016. They later sought to amend their Petition, in an Application dated 20<sup>th</sup> March 2017.
2. There were other Petitions relating to the subject matter, initiated by an assemblage of Interested Parties, at the Employment and Labour Relations Court, at Nairobi. On 13<sup>th</sup> December 2016, the Principal Judge of this Court, sitting at Nairobi, directed all related Petitions are placed before him on 8<sup>th</sup> February 2017, for directions.
3. There were various Applications filed by the Parties before directions could issue, including one Application seeking to have the Principal Judge recuse himself. Directions eventually issued on 12<sup>th</sup> July 2017. It was agreed by the Parties that the Petition initiated at Kericho, and transferred to Nairobi, is further transferred to Mombasa for hearing and disposal. The Petition was received and registered at the Court in Mombasa, as Petition Number 12 of 2017.
4. There were no other related files, forwarded to this Court for consideration and determination, as directions issued on 13<sup>th</sup> December 2016 by the Principal Judge, suggested there would be.
5. The Petition came up for mention at the Court in Mombasa, on 27<sup>th</sup> July 2017. It was agreed by the Parties, *inter alia*:-
  - i. The Petition shall be considered and determined on the strength of Parties' Submissions.
  - ii. Pending Applications are collapsed and joined to the main Petition.
  - iii. Petitioners to file and serve their Submissions within 14 days.
  - iv. Respondents to do so within 14 days of service.
6. Parties, with a few exceptions, confirmed filing of their Submissions on 10<sup>th</sup> November 2017.
7. The Petitioners state elections of 27<sup>th</sup> October 2016 were held in contravention of the U.K.C.S's Constitution, the Labour Relations Act 2007 and the Constitution of Kenya. They pray, in main, for the following Orders:-
  - a. Declaration that the elections held on 27<sup>th</sup> October 2016 are null and void.
  - b. Declaration that registration by the 2<sup>nd</sup> Respondent, of Officials elected during the exercise, is null and void.
  - c. Declaration that 2<sup>nd</sup> Respondent violated the Law in her conduct of irregularly registering amendment to the Union Constitution.
  - d. A permanent injunction restraining the 1<sup>st</sup> Respondent from implementing the proposed amended Constitution.
  - e. Fresh elections are conducted by the Independent Electoral and Boundaries Commission [I.E.B.C] and the 2<sup>nd</sup> Respondent.
  - f. The 2<sup>nd</sup> Respondent, in consultation with the Parties, oversees the formation of a caretaker committee comprising only Members of the U.K.C.S.
  - g. Costs of the Petition.
8. Filed with the Petition is an Application by way of Notice of Motion, seeking among other orders, an interim order nullifying the elections of 27<sup>th</sup> October 2016, and restraining the 2<sup>nd</sup> Respondent from registering elected Officials.
9. There are interim orders given *ex parte*, in favour of the Petitioners on 21<sup>st</sup> November 2016 by the Court at Kericho, in terms above. It is doubtful that any elections, of whatever nature, can be nullified in the interim. While restraint upon the 2<sup>nd</sup> Respondent on registration of elected Officials appears to this Court practicable and proper, an interim order nullifying elections does not appear to be so. Nullification is a substantive remedy, which should issue only upon full consideration of the Petition.

10. The Respondents made an Application on 2<sup>nd</sup> December 2016, seeking reversal of interim nullification. The matter was transferred to Nairobi, and eventually to Mombasa before this Application was heard.

11. In the meantime the Petitioners had made their own Application, seeking to have the Petition retransferred to Kericho. They also made an Application dated 20<sup>th</sup> March 2017, to include all the prayers shown at paragraph 7 of this Judgment. These Applications too, had not been heard, at the time of transfer to Mombasa.

12. These are some of the Applications the Court has found on the record, and which Parties agreed, would be collapsed and dealt with the Petition.

13. The Application for recusal of the Principal Judge has been overtaken by events, and shall be treated as such, the Petition having been transferred from Nairobi to Mombasa. So too, has the Application by the Petitioners, seeking retransfer to Kericho.

14. The interim order nullifying the elections of 27<sup>th</sup> October 2016, issued under Rule 17 of the Employment and Labour Relations Court [Procedure] Rules 2016. Even assuming that elections can be nullified *ex parte*, and in the interim, Rule 17 [4] states an *ex parte* injunction may be granted only once, for not more than 14 days, and shall not be extended thereafter, except once by consent of the Parties, or by order of the Court for a period not exceeding 14 days.

15. There is no order by consent of the Parties, or by the Court, extending interim order given in favour of the Petitioners, on 21<sup>st</sup> November 2016. The order lapsed and was not extended. In effect, the Application by the Respondents dated 2<sup>nd</sup> December 2016, seeking setting aside of the order of 21<sup>st</sup> November 2016, has similarly been overtaken by events. It shall be treated as such. The Application by the Petitioners for amendment of the Petition, dated 20<sup>th</sup> March 2017, merely introduced additional prayers which clarify the original Petition, and which do not prejudice the Respondents, and is allowed.

### **The Petition**

16. The Petitioners principally rely of the Affidavits of the 1<sup>st</sup> Petitioner Noah Rotich, sworn on 16<sup>th</sup> November 2016, on 9<sup>th</sup> December 2016 and on 20<sup>th</sup> March 2017.

17. They state that the 1<sup>st</sup> Respondent held its national elections on 27<sup>th</sup> October 2016 at Nyali Beach Hotel, Mombasa. Noah unsuccessfully stood for the position of National Chairman.

18. A new Delegates' List was issued upon Members, in the morning of 27<sup>th</sup> October 2016. 68 new Delegates were added. The incumbents were involved in malpractices.

19. The number of Delegates who participates in national elections is given under the Union Constitution. Members had received lists before 27<sup>th</sup> October 2016, clearly explaining the number of Delegates to participate in the exercise, from each region. Additional Delegates were introduced to the list by the incumbents, with the intention of giving incumbents undue advantage.

20. The total number of votes for the Trustees exceeded the total number of Delegates, by 3. The 1<sup>st</sup> Petitioner states also, that 235 Voters participated in the election of Trustees, against a number of 104, required under the Union Constitution. Meru Central Branch Assistant Secretary Moses Mworira, was not eligible to vote under the Union Constitution, but voted. Tom Odege is not a Civil Servant, and was not eligible to vote, but voted.

21. Incumbent National Officials, whose terms had expired, and whose Offices were declared vacant, were included as Delegates and voted. The Union Constitution bars such inclusion and voting.

22. Contestants were locked out of the election process. They were not familiar with what was taking place. There were no secret booths to safeguard secrecy of voting. The layout of the voting area did not facilitate secret balloting. All agents were able to see which Delegate voted for respective Candidates.

23. The Petitioners complained to the 2<sup>nd</sup> Respondent about the malpractices, in their letter dated 28<sup>th</sup> October 2016. They asked the 2<sup>nd</sup> Respondent to set aside the exercise, in vain.

24. In a Further Affidavit sworn on 9<sup>th</sup> December 2016, the 1<sup>st</sup> Petitioner states that I.E.B.C failed to conduct elections on 27<sup>th</sup> October 2016 because the 1<sup>st</sup> Respondent did not provide I.E.B.C with accurate Members' Lists from across the Branches. The 1<sup>st</sup> Respondent went ahead to conduct Branch Elections presided over by the Labour Commissioner. The Labour Commissioner did not demand for accurate list of Branch Members, contrary to the Union Constitution.

25. The National Executive Board of the 1<sup>st</sup> Respondent has no powers to amend the Union Constitution, to interfere with Delegates Branch representation. The resolution of the Board of 6<sup>th</sup> September 2016 purporting to amend the Constitution, was not valid. The 1<sup>st</sup> Petitioner protested against this resolution to the Secretary-General, pointing out Article 30 of the Union Constitution, which mandates the role of altering the Union Constitution to Delegates' Conference of Special National Delegates' Conference.

26. Based on the formula provided by the Union Constitution, Branch Delegates ought to have numbered 104, not 190 adopted by the 1<sup>st</sup> Respondent and its Incumbents.

27. The National Executive Board was aware Membership of the Union had declined from 73,000 to 43,000, but failed to adjust the Delegates' Lists as required under the Union Constitution. At least 70 Delegates were added to the final list of Voters, giving undue advantage to the Incumbents. Nairobi Central was entitled to have 4 Delegates. 6 participated in the exercise. The Petitioners state that the Incumbent Secretary-General, Tom Odege has a penchant for manipulating and inflating Delegates' Lists to his advantage. He was found to have inflated Delegates' Lists in previous elections as shown in ***Industrial Court of Kenya at Nairobi, Cause Number 1104 of 2011 between Zakayo Chepkonga & 8 others v. Tom Odege & Another*** [exhibit 4 of the 1<sup>st</sup> Petitioner's Further Affidavit]

28. The Membership lists, presented by the 1<sup>st</sup> Respondent in its reply to the Petition, are not authentic Membership by-products. Authentic by-products include GOK IPPD Seal, Employer Vote, Members' and Monthly contributions. The Petitioners submit any list presented without validation features, should be rejected. The Union Constitution did not permit proxy voting. Moses Mworira is alleged to have been a proxy Delegate. He is an example of over 68 other illegal Delegates

29. The Petitioners submit that their associational rights and freedoms under the Union Constitution, the Labour Relations Act and the Constitution of Kenya, have been violated by the Respondents. The Respondents gave themselves unfair advantage by dint of incumbency, contrary to the Labour Relations Act 2007.

30. National Officials should not have been part of the Delegates, after their positions were declared vacant. Article 15 of the Union Constitution regulates composition of Delegates. 14 incumbents ceased being Delegates once their positions were declared vacant. They should not have voted.

31. The Petitioners submit that the 2<sup>nd</sup> Respondent only filed a Replying Affidavit. This was filed out of time, without the leave of the Court. The Petitioners pray the Court to strike out the Affidavit of the 2<sup>nd</sup> Respondent.

### **3<sup>rd</sup> Petitioner**

32. 3<sup>rd</sup> Petitioner indicated she wished to act in Person. She does not seem to have filed any Affidavit in support of the Petition, separate from the Affidavit relied upon by the Co-Petitioners. She filed her Submissions on 7<sup>th</sup> August 2017.

33. Her Submissions mirror those of her Co-Petitioners. The legal and factual argumentation is not dissimilar to that of her Co-Petitioners. It is not necessary to evaluate 3<sup>rd</sup> Petitioner's position, separately from that of her Co-Petitioners. Her position is a rehash of the position taken by other Petitioners.

### **1<sup>st</sup> Respondent's Position**

34. The 1<sup>st</sup> Respondent filed a Memorandum of Response, a Witness Statement by its Secretary-General Tom Mboya Odege, and a Replying Affidavit sworn by the same gentleman, on 2<sup>nd</sup> December 2016. These responses were received by the Court on 5<sup>th</sup> December 2016.

35. The Secretary-General states that the 1<sup>st</sup> Petitioner is hell-bent on ensuring he must ascend to the leadership of the Union, at all costs. He has opposed every activity of the Union, including amendment of the Union Constitution.

36. Odege was elected alongside others, for a period of 5 years, on 12<sup>th</sup> September 2011. The 2<sup>nd</sup> Respondent issued directions for holding of elections at the end of 5 years. In preparation for elections, the Union amended its Constitution. The Amended Constitution was registered by the 2<sup>nd</sup> Respondent on 19<sup>th</sup> November 2015.

37. The 1<sup>st</sup> Petitioner filed Petition Number 94 of 2015 at the Employment and Labour Relations Court, Kericho, challenging amendment and registration of the Union Constitution. He obtained an *ex parte* order, setting aside 2<sup>nd</sup> Respondent's registration of the amended Constitution.

38. The 2<sup>nd</sup> Respondent directed the 1<sup>st</sup> Respondent to hold its elections under its old Constitution. Branch elections, were set for 11<sup>th</sup> March 2016. Some Members filed Cause Number 390 of 2016 to stop Branch elections.

39. The Court subsequently stayed the directive of the 2<sup>nd</sup> Respondent requiring elections to be held under the old Union Constitution. Under Cause Number 1987 of 2015 [all Causes in the Employment and Labour Relations Court] the Court ordered the Union to consult and set a date for conduct of elections. Parties agreed in Cause Number 336 of 2015, to have elections conducted under the amended Constitution. The consent order is dated 17<sup>th</sup> August 2016.

40. The National Executive Board set Branch elections for 28<sup>th</sup> September 2016, and National elections for 27<sup>th</sup> October 2016. The I.E.B.C was to oversee the exercise and wrote to the 1<sup>st</sup> Respondent, giving a budget of Kshs. 2.9 million, to oversee the exercise. I.E.B.C wrote subsequently stating it needed 30 days to oversee elections. The 1<sup>st</sup> Respondent sought the intervention of the Ministry of Labour, who directed the elections go on as scheduled. The I.E.B.C later revised its budget to Kshs. 7.6 million, compelling the 1<sup>st</sup> Respondent to opt out of its engagement with I.E.B.C and resort to the Labour Commissioner.

41. It was agreed in a meeting of the National Executive Board held on 6<sup>th</sup> September 2016 that the list of Delegates to be used during the elections, would be the list adopted during the Mid-Term Delegates Conference of 12<sup>th</sup> November 2015. The 1<sup>st</sup> Petitioner chaired the meeting of the National Executive Board of 6<sup>th</sup> September 2016, where this consensus was made. 232 Delegates attended the Mid-Term

Conference. It was agreed 47 County Secretaries be reduced from this number, leaving a total of 185 eligible delegates.

42. In a subsequent meeting of the National Executive Board held on 3<sup>rd</sup> October 2016, the number of Delegates was revised from 185 to 198. It was pointed out that the number of Members absent during the Mid-Term Conference, had not been considered, in coming up with a list of 185 Delegates. The 1<sup>st</sup> Petitioner attended the meeting, but did not sit through. He was ushered out for infuriating Members, and was immediately suspended.

43. The 1<sup>st</sup> Petitioner and his Colleagues contested and lost the elections. They raised objection on the list of Delegates. These objections were found to have no merit by the 2<sup>nd</sup> Respondent. The Delegates' List used was consensual. The 1<sup>st</sup> Petitioner was part of the meeting where consensus was reached.

44. The list supplied to the Returning Officer contained 190 Delegates. 8 Delegates – 3 from Mbeere, 2 from Uasin Gishu and 3 from Meru North, could not attend due to Court actions filed against them, at their respective Branches, challenging the validity of their elections at Branch levels. There were no new Delegates added to the list on 27<sup>th</sup> October 2016 as alleged by the Petitioners.

45. The list of Delegates was based on Article 14 and 15 of the Union Constitution. Any Incumbent defending his position, is a Member of the Delegates' Conference, and is allowed to vote. The Union Constitution does not bar Incumbents from participating as Delegates.

46. Moses Mworira is the Meru Central Branch Assistant Secretary. He was sent to replace Mary Mukiri who served as Meru Central Secretary, and who also was, National Young Worker. Mary attended Delegates' Conference by virtue of her national position.

47. Voting was by secret ballot. It was free and fair. The Returning Officer made a Report to the 2<sup>nd</sup> Respondent, affirming this.

48. The names of elected Officials was forwarded to the 2<sup>nd</sup> Respondent through Form Q. Registration was done on 4<sup>th</sup> November 2016.

49. The 1<sup>st</sup> Respondent disputes that the Petition has been presented by all the Parties, who have been named as Petitioners. Lesurper Henry wrote an e-mail disowning his inclusion as a Petitioner. The 1<sup>st</sup> Petitioner has not been authorized by other Petitioners to present this Petition.

#### **2<sup>nd</sup> Respondent's position**

50. The 2<sup>nd</sup> Respondent filed Memorandum of Response, and a Replying Affidavit sworn by 2<sup>nd</sup> Respondent, Registrar of Trade Unions E.N. Gicheha. The Affidavit was sworn on 30<sup>th</sup> January 2017. Filing was done on 8<sup>th</sup> February 2017.

51. The consent order on the mode of hearing was recorded on 27<sup>th</sup> July 2017. The Petitioners did not object to the alleged late filing of 2<sup>nd</sup> Respondent's Affidavit and Response, when the consent order was recorded. It was agreed Parties would rely on what they had placed on record.

52. The Court does not, in the circumstances, accept the Petitioners' invitation to strike out the Affidavit and Response filed by the 2<sup>nd</sup> Respondent.

53. The 2<sup>nd</sup> Respondent concedes the 1<sup>st</sup> Respondent held national elections as outlined in the Petition. The results were forwarded to the 2<sup>nd</sup> Respondent by the 1<sup>st</sup> Respondent, on 31<sup>st</sup> October 2016.

54. Objections on the conduct of the elections were received by the 2<sup>nd</sup> Respondent from some of the 1<sup>st</sup> Respondent's Members, on 28<sup>th</sup> October 2016. The 2<sup>nd</sup> Respondent consulted the Returning Officer and confirmed elections were free and fair.

55. Elected Officials were duly registered by the 2<sup>nd</sup> Respondent on 4<sup>th</sup> November 2016. An order issued by the Court on 22<sup>nd</sup> November 2016 directing the 2<sup>nd</sup> Respondent not to act on registration, was not implementable as registration had already taken place.

56. There was no additional list of delegates in the morning of the ballot. The 2<sup>nd</sup> Respondent emphasizes she discharged her mandate in accordance with the law.

57. There is no order sought against the 2<sup>nd</sup> Respondent. There is no evidence to show the 2<sup>nd</sup> Respondent contravened the law. The Returning Officer is not a Party to the Petition. The 2<sup>nd</sup> Respondent's role was limited to receipt and registration of results. It was the 1<sup>st</sup> Petitioner who forwarded a list of eligible Delegates to the 2<sup>nd</sup> Respondent.

58. The 2<sup>nd</sup> Respondent submits she is ready to comply with the outcome of the Petition. She notes with concern, the assertion by her Co-Respondent, that some Petitioners did not authorize the filing of the Petition in their respective names. She prays the Petition against the 2<sup>nd</sup> Respondent is dismissed with costs to the 2<sup>nd</sup> Respondent.

#### **Issues**

59. The issues, as broadly understood by the Court are:-

- i. Did all the Petitioners authorize the filing of the Petition in their names?
- ii. Were elections to the 1<sup>st</sup> Respondent's national offices, held on 27<sup>th</sup> October 2016 carried out in accordance with the law?
- iii. Should the Court endorse these elections or invalidate them, and give an order for fresh elections?

**The Court Finds:-**

*[i] Authority to the 1<sup>st</sup> Petitioner*

60. It was important for the 1<sup>st</sup> Petitioner to show he was authorized by the Co-Petitioners to file the Petition, and the supportive Documents, and show also, that he had full authority to prosecute the Petition on behalf of his Co-Petitioners.

61. Both the Petition and Affidavits filed in support, at the inception of the Petition on 18<sup>th</sup> November 2016 do not indicate that, the 1<sup>st</sup> Petitioner, Noah Rotich, had the authority of Co-Petitioners to present this Petition.

62. In his Affidavit sworn on 16<sup>th</sup> November 2016, the 1<sup>st</sup> Petitioner does not mention his Co-Petitioners. He writes about himself, and the position he was contesting. He does not state who his Co-Petitioners are, how he relates to them, and how the Petition relates to the others. He does not state he has been authorized to depone on his own behalf, and on behalf of the Co-Petitioners.

63. In the Petition, the Co-Petitioners are merely described as Adults of Sound minds, while the 1<sup>st</sup> Petitioner describes himself as the 1<sup>st</sup> Respondent's National Chairman. He states he brings the Petition in his capacity as the National Chairman. This description is given as of 18<sup>th</sup> November 2016. An extract from the Registrar of Trade Unions as of 27<sup>th</sup> October 2016, shows the National Chairman was John M. Nzau. Section 35[6] of the Labour Relations Act states that, no Person, who is not registered by the Registrar in accordance with this Section, shall act, or purport to act as an Official of a Trade Union, Employers' Organisation, or Federation, or of any Branch.

64. Lesuper Henry, named as 5<sup>th</sup> Petitioner wrote an e-mail on 1<sup>st</sup> December 2016, disowning the Petition. The 1<sup>st</sup> Respondent alludes to 2 Affidavits sworn by some of the Petitioners, including Lesuper, disowning the Petition. The Court has not been able to trace such Affidavits from the record. There is nonetheless, an e-mail from Lesuper Henry, disowning the Petition. This e-mail is attached to the Replying Affidavit of Tom Mboya Odege sworn on 2<sup>nd</sup> December 2016. The 1<sup>st</sup> Petitioner did not contest the position stated by Lesuper, in his Further Affidavit of 9<sup>th</sup> December 2016. He did not file any Affidavit from Lesuper confirming Lesuper had authorized 1<sup>st</sup> Petitioner, to present the Petition.

65. On 27<sup>th</sup> July 2017, when Parties recorded consent on the mode of hearing, there was filed by the Petitioners, a document titled 'Authority to Appear, Plead and Act.' The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Petitioners are said to have authorized 3<sup>rd</sup> Petitioner Jane Mbugua, to appear, plead and act on their behalf. These Petitioners include the 1<sup>st</sup> Petitioner who is alleged elsewhere, to have been authorized by other Petitioners to present this Petition. The document is not signed by Lesuper. Jane Mbugua indicates as mentioned above, that she wished to act in Person. How would Jane act on behalf of her Colleagues, and still act in Person?

66. To confound this issue on authority to act, the Petitioners, with the exception of Lesuper, drew, signed and filed a 'Notice of Intention to Act in Person.' Filing was on the same date, 27<sup>th</sup> July 2017. The effect of this document is that the Law Firm of Mwakio Kirwa & Company Advocates ceased to have instructions from the Petitioners. Yet, this Law Firm continued to appear for the Petitioners, save for Jane Mbugua, subsequent to 27<sup>th</sup> July 2017. Was the 'Notice to Act in Person' reversed, and Mwakio Kirwa & Company issued fresh instructions by the Petitioners, or by some of the Petitioners? The Petition suffers an assortment of significant procedural lapses.

*[ii] Conduct of the elections*

67. The Petitioners complain that elections were not conducted through a secret ballot. They have given an outlay of the voting hall, within Nyali Beach Hotel, where elections were held.

68. A secret ballot does not necessarily have to be voting in an enclosed space. Secrecy is not guaranteed merely by the presence of a voting booth. The absence of a voting booth is not conclusive evidence that secret balloting has not taken place. The requirement for secret balloting is met where a voter's choice is anonymous, forestalling attempts to influence the voter by intimidation, blackmailing and potential vote buying. It was not necessary that Members exercise their freedom of choice, in enclosures. They may as well have voted in the open beach at Nyali Beach Hotel, and done so, secretly. Secrecy is achieved where a voter's choice is anonymous, not necessarily where that choice, is made in a booth.

69. The Petitioners did not present a single Delegate to the Court, to show that Delegate's choice, was not anonymous. It was not shown to the Court that those who voted were denied freedom to anonymously choose, from the alternatives. The Petitioners did not show that other forms of balloting, other than secret balloting, such as: oral voting; public display of votes cast; roll call; raising of hands; or *mlolongo*, were employed. Presenting the Court with architectural outlay of the voting hall, does nothing, in showing the right of secret balloting was violated.

70. On the list of Delegates, there is evidence the 1<sup>st</sup> Petitioner chaired the meeting of the National Executive Board of 6<sup>th</sup> September 2016, where it was resolved the 1<sup>st</sup> Respondent adopts the list of Delegates who were eligible to attend Mid-Term Delegates Conference. That number was 235 Delegates. It was determined 47 County Secretaries be excluded, resulting in a number of 185 eligible Delegates.

71. The number was raised to 198 in a subsequent meeting of the Board in which the 1<sup>st</sup> Petitioner was suspended. Although he did not participate in the meeting to completion, the number added to the original list was 13. 8 Delegates in the end did not participate in the elections, as they were bogged down in Court actions in their Branches. 190 Delegates participated.

72. The returns filed with the Registrar by the Returning Officer show no candidate secured votes beyond the total number of the agreed 190 Delegates. The highest number of votes went to National Organizing Secretary, at 136 of the 190 available Delegates.

73. The Petitioners submit that 235 Delegates voted for 3 Trustees. The Court is not convinced that this is a smoking gun, pointing to the presence of an additional list of Delegates. From the returns filed by the Labour Commissioner, the Trustees garnered 92, 86 and 57 votes respectively. This seems to be 92 out of 190 Delegates, 86 out of 190 Delegates, and 57 out of 190 Delegates. The figures are consistent with what candidates, in other positions garnered. The 1<sup>st</sup> Respondent submits, and the Court accepts, that for the position of Trustees, each Delegate was issued 3 ballots, not 1 ballot, to vote for 3 Trustees. The Trustees were in the end ranked as 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Trustees. It is not unusual therefore that the number of ballots cast for Trustees, exceeded in total, the number of votes cast in other individual positions. Why would additional Delegates in any event, if there were such Delegates, cast their ballots for the position of Trustee only? Were the Petitioners candidates for the position of Trustee? There is no evidence that the Petitioners protested during the exercise, about additional Delegates.

74. The Petitioners do not reveal what votes they garnered against those declared as winners, and how the alleged manipulation of the Delegates' List, affected their votes.

75. The Court has seen nothing in the Union Constitution which bars an Incumbent from being a Delegate, once offices are declared vacant, and such an Incumbent desires reelection. One would have to be a Delegate to be a voter. There are no Candidates from outside the Delegates' Conference. One cannot be a Candidate, without being a Delegate. Incumbents come into the Delegates' Conference as National Officials. Under Article 14 of the Union Constitution, the Delegates' Conference comprises 14 National Officials; 3 Trustees; and Delegates from the Branches/Chapters. These are Incumbents. There is no other set of National Officials, until elections have taken place. Without the Incumbents, there can be no Delegates' Conference. Without the Delegates' Conference there can be no elections. There is no interregnum in the national leadership of the Union during the Delegates' Conference.

76. There was communication between the Respondents on the Delegates' List, before the voting. The 1<sup>st</sup> Petitioner was part of the meeting which came up with a number of 185 Delegates. The additional Delegates, who participated in the exercise, numbered 5, not any other numbers stated by the Petitioners. The participation by the 5 Delegates in the elections has not been shown to have adversely affected the number of votes, garnered by the Petitioners.

77. The participation of Moses Mworira as a Delegate for Meru Central is explained adequately, in 1<sup>st</sup> Respondent's exhibit 'TMO22.' Moses replaced Mary Mukiri, who held the position of National Young Worker, a national office within the ranks of the Union. She was a Delegate by virtue of being a National Official. The Branch nominated Moses, Vice-Secretary to replace Mary who served at Branch level, as the Secretary. There was nothing irregular in the participation of Moses in the Delegates' Conference. He was nominated by his Branch to replace Mary. He did not vote as a proxy; he voted as the duly nominated Delegate of his Branch. The assertion that Tom Odege should not have participated because he is not a Civil Servant, has not been established through the evidence of the Petitioners. Odege appears to the Court to have been the incumbent Secretary-General. He has served with the 1<sup>st</sup> Petitioner, in the Executive Board. His eligibility as a Member and Official was never raised during the various meetings of the Executive Board, some which were chaired by the 1<sup>st</sup> Petitioner. His eligibility should have been contested at the time of nomination as a candidate. The record suggests Odege was first elected in 2011. Members and Officials alike, would not likely have silently watched, as a Non-Civil Servant, led their Trade Union and offered himself for reelection at the end of his first term, in 2016. The Petitioners in any case, have not named Odege as a Respondent, to enable him respond on his eligibility for the Office which he was elected.

78. The question over which version of the Union Constitution, elections should have been conducted was resolved by the Parties through a Consent Order recorded by the Court.

### [iii] Remedies

79. The Petitioners have not shown the Court that the elections held on 27<sup>th</sup> October 2016 suffered substantive breaches of the law, so as to affect the results. As held by the Court in **Industrial Court at Nairobi, Cause Number 1650 of 2011 between Aloise A. Otiende v. Boniface M. Munyao & Another**, the outcome of an election ought not to be invalidated for minor breaches which do not affect the results. Most of the complaints by the Petitioners were not established, while others pointed to minor breaches which had no bearing on the overall results. The 1<sup>st</sup> Petitioner was part of the preparations leading to the elections. His complaints, after losing, appear to be more of sour-graping, than constitutional violations.

80. Section 34 of the Labour Relations Act 2007, as observed by this Court in **Petition Number 7 of 2016, Michael Ochieng Magugu v. The Registrar of Trade Unions & 2 Others** requires Trade Union elections are conducted in accordance with their registered Constitutions. Trade Union Constitutions under subsection 2 [a] of Section 34, shall not contain a provision which discriminates unfairly between Incumbents and other Candidates in elections. The elections of 27<sup>th</sup> October 2016 were conducted in accordance with the registered Constitution of the 1<sup>st</sup> Respondent. There is nothing in the Union Constitution shown to have discriminated unfairly between Incumbents and other Candidates. The 1<sup>st</sup> Petitioner was indeed an Incumbent Chairman, who was defeated by a new Candidate. The power of incumbency does not appear to have been determinative in the elections.

81. Elected candidates were registered by the 2<sup>nd</sup> Respondent on 4<sup>th</sup> November 2016, pursuant to Section 35 of the Labour Relations Act. They are not included in the Petition. The Court has been prayed to declare that these Officials were not validly elected. The Petitioners seek the Court to declare the elected Officials were not validly registered. As held in **Petition Number 7 of 2016**, to grant such declarations would result in condemning the elected and registered Officials of the 1<sup>st</sup> Respondent unheard. There are Officials validly elected and registered.

The prayer for setting up of a caretaker leadership has no foundation in fact or law. These prayers are rejected.

82. There is no basis to restrain the 1<sup>st</sup> Respondent from implementing its new Constitution. Even had the Petitioners established that elections were conducted very badly, what has this to do with implementation of the new Union Constitution? How will the Union function without its duly registered Constitution? The Constitution regulates other affairs of the Union, not just the conduct of elections. The prayer for permanent injunction is declined.

83. Who should have conducted U.K.C.S' national elections? The Union sought the services of the I.E.B.C to oversee the exercise, but was unable to supply the I.E.B.C with proper Delegates' Register, and pay the huge amount of money I.E.B.C demanded. In the end the exercise was conducted by the Commissioner for Labour. The Petitioners pray that should another ballot be conducted, it is overseen by I.E.B.C and the Registrar of Trade Unions.

84. The Court does not think I.E.B.C is suited to engage in trade union elections. Its mandate under Article 88 [4] of the Constitution of Kenya is to conduct or supervise referenda and elections to any elective body, established by the Constitution, and any other elections prescribed by an Act of Parliament. It should not be distracted from its core functions. Trade Unions are private organizations. Their offices are not established by the Constitution of Kenya. The I.E.B.C is an independent Commission under Article 249 of the Constitution, mandated to protect the sovereignty of the people; secure the observance by all State organs of democratic values; and promote constitutionalism. It is allocated funds by Parliament to enable it meet its mandate. Its Commissioners are paid from the Consolidated Fund. It should not be seen to enter into negotiations with private organizations, on conduct of these Organizations' elections, and charge fees for conduct of such elections. I.E.B.C ought to focus on its core mandate, of elections to elective bodies established by the Constitution. The Court has no legal basis to order fresh elections overseen by I.E.B.C.

85. The 2<sup>nd</sup> Respondent, Registrar of Trade Unions likewise, does not conduct trade union elections. As observed by the Court in **Aloise A. Otiende v. Boniface Munyao**, Public Authorities do not exercise control over trade union electoral processes. The role of the Registrar under Section 34 of the Labour Relations Act, is to register elected Officials, and may also issue directions to ensure elections are conducted in accordance with Section 34 of the Act, and in accordance with trade union Constitutions. Trade Unions retain the right to self- regulate. The Court cannot order the 2<sup>nd</sup> Respondent to oversee elections. The law does not allow her to do so.

86. The elections of 27<sup>th</sup> October 2016 were in the end overseen by the Commissioner for Labour. It is a common practice for Trade Unions to enlist the services of the Labour Commissioner. In the case of U.K.C.S, it was not without some degree of trepidation, that the Labour Commissioner was involved. A section of the Union felt that as Civil Servants, Labour Officers delegated to conduct the exercise, would not be independent and impartial. This feeling rhymes and resonates. Ideally, the Labour Commissioner should not have been involved in an electoral exercise involving the Union which represents his Officers. The Court has noted that in Industrial Court at Nairobi, **Cause Number 43 [N] of 2009, between Crispol Nguji Kimani & 24 Others v. Yako Supermarket Limited 7 Another**, a Kitale-based Labour Officer with the uncommon name of Charles Gondosio, testified for the Employees. The 7<sup>th</sup> Petitioner herein is Charles Gondosio. It could be the same person as the Labour Officer in Cause Number 43[N]. The Petitioners did not all appear in Court, and identify themselves. The Court cannot be certain about the designation of Charles Gondosio. If he is the same person, it needs not be emphasized that elections of U.K.C.S should not be conducted by Labour Officers who are possibly Members of the Union, and whose Colleagues are likely to be Candidates or Delegates. The credibility, transparency, accountability and integrity of the process will be questionable, if Labour Officers continue to oversee elections of this particular Union. It has not however, been shown by the Petitioners that as a result of the involvement of the Labour Commissioner, the ballot was not free, credible and fair. The Executive Board settled on the Labour Commissioner following a longstanding practice, in the elections of Trade Unions. What must be asked is whether this practice, is useful to the democratization of Trade Unions.

87. Trade unions in Kenya have to look beyond Public Officers, in conduct of their elections. In certain jurisdictions, trade union elections are conducted by independent persons called Scrutineers. Scrutineers manage the electoral process, and produce a report after the exercise. Scrutineers are usually organizations which specialize in elections, comprised mainly of Accountants and Lawyers. The U.K.C.S. may in the future, consider engaging private organizations or individual Scrutineers, given the misgivings noted by the Court, in the engagement of I.E.B.C, Labour Commissioner or Registrar of Trade Unions, in conduct of the Union's elections.

88. The Petitioners have not established that any of them, had authority from the rest, to present the Petition.

89. Their representation by the Law Firm of Mwakio Kirwa & Company, after they filed 'Notice to act in Person,' is fundamentally flawed.

90. The substantive Petition has no merit. No constitutional rights and freedoms of the Petitioners have been shown to have been violated.

91. On costs, the Court is persuaded the 2 main Petitioners, Noah Rotich and Jane Mbugua, should meet Respondents' costs.

IN SUM, IT IS ORDERED:-

**[a] The Petition is declined.**

**[b] Costs to the Respondents, to be paid by the 1<sup>st</sup> and 3<sup>rd</sup> Petitioners, Noah Rotich and Jane Mbugua.**

Dated and delivered at Mombasa this 23<sup>rd</sup> day of February 2018.

James Rika

Judge