



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO. 11 OF 2018

JOANES OKOTH.....1ST PETITIONER
WILLIAM OPONDO.....2ND PETITIONER
SAMUEL MUNGUTI.....3RD PETITIONER
LIVINGSTONE ABUTA.....4TH PETITIONER
SIMON ISULUTI.....5TH PETITIONER
BALLON MWENI.....6TH PETITIONER
JOHN OYUGI OGALO.....7TH PETITIONER
MOHAMMED MWAMBIRE.....8TH PETITIONER

- VERSUS -

THE REGISTRAR OF TRADE UNIONS.....1ST RESPONDENT
THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

AND

KENYA HOTELS & ALLIED WORKERS UNION...1ST INTERESTED PARTY
DIRECTOR OF PUBLIC PROSECUTION.....2ND INTERESTED PARTY
THE INSPECTOR GENERAL OF POLICE.....3RD INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Friday 11th May, 2018)

RULING

The petitioners filed the petition on 16.02.2018 through Wetaba, Were, & Associates. The petition challenged the elections of the 1st interested party said to have been held on 06.04.2016. The reliefs sought were as follows:

- a) A declaration that the communication dated 04.03.2016 of the union and the subsequent alleged election held at Paris hotel was in contravention of the 1st respondent's directive on communication of venue of the elections making any election so conducted a nullity.
- b) A declaration that the existence of two election dates both lodged with the 1st respondent nullified any election so held before the clarity of the legitimate election date was established or rescinding of one or both dates.
- c) A declaration that the circumstances surrounding the elections of the union warranted the 1st respondent to invoke sections 35 (3) and (4) of the Labour relations Act, 2007.

d) A declaration that the 1st respondent's conduct with regard to conducting of the union election violated Articles 10, 41, 73, and 75 of the Constitution, Articles 3(1) and (2) and 8(2) of the ILO Convention Concerning Freedom of Association and Article 26 of the international Covenant on Civil and Political Rights, 1966 and was an abdication of her statutory role.

e) A declaration that failure by the 1st respondent to make communications on why the various objections as were lodged were never taken into consideration was a violation of Article 47 of the Constitution with Regard to fair administrative action.

f) A conservatory order reinstating status quo of the situation before elections of branch officials of the interested party pending the holding of elections within the next 30 days after granting of this order.

g) A conservatory order reinstating status quo of the situation before elections of the leadership of national officials of the interested party pending the holding of elections within the next 30 days after conclusion of branch elections as envisaged in clause (f) above.

h) A declaration that the position of Acting Secretary General, Acting National Executive Board Members, Acting National Treasurer as registered by the 1st respondent were a violation of the 1st interested party's constitution.

i) A declaration that all resolutions and done by the Acting Secretary General as registered by the 1st interested party are a nullity and the same be nullified.

j) Conservatory orders reinstating status quo as per the 1st respondent's letter dated 28.03.2014.

k) Costs be awarded to the petitioners.

The 1st interested party filed a preliminary objection on 19.03.2013 through Wanjama and Associates and Advocates. The preliminary objection prayed that the suit be struck out and dismissed with costs to be paid forthwith to the 1st interested party as the petitioners have no right of audience and cannot be heard by the Honourable Court on the basis:

a) That the petition is sub judice to cause 2048 of 2013, the same being directly and substantially in issue between, inter alia, the same parties herein and ELRC 2048 of 2013 listed down for hearing on 06.06.2018.

b) That the issues canvassed in support of the said application are statutory barred and in breach of section 30 of the Labour Relations Act, 2007.

The 1st interested party filed the replying affidavit of Wycliffe Sava Mundu in support of the preliminary objection and as annexed on the objection.

Cause No.2048 of 2013 at Nairobi was filed by the 1st and 2nd petitioners and the 1st interested party herein as the claimants and, against, 1st respondent and 16 individuals. The prayers were as follows:

a) A declaration that the purported suspension of the 1st and 2nd claimants was illegal.

b) A declaration that the purported suspension of the 1st and 2nd claimants was without the due process being followed and is null and void.

c) A declaration that the purported National Executive Board meeting held by the respondents on 4th December 2013 is null and void.

d) An order restraining the Registrar of Trade Unions from effectuating the resolutions and Form Q made on 4th December 2013.

e) A declaration that in the event that the registrar of trade unions has effected any changes in the list of union officials pursuant to the decision made by the respondents on 4th December 2013, the same be reversed in compliance with the orders of this court immediately.

f) An order restraining the respondents from interfering with the running of the affairs of the union un-procedurally and unlawfully.

g) Costs of the claim.

h) Any other or further relief that this Honourable Court may deem just and fit to award the claimants in the circumstances.

In the application dated 16.02.2018, the petitioners herein prayed for orders thus:

a) That pending the hearing and determination of this petition the office of the 1st respondent be compelled through this Honourable Court to give a report on the circumstances and issues surrounding the elections of officials at branch and national level touching on the 1st interested party.

b) That pending the hearing and determination of this petition the 2nd and 3rd interested parties be compelled to give an explanation to the petitioners through this Honourable Court on the progress of the Investigations touching on the complaint recorded under KICC OB No. 19/07/01/2014.

c) That pending the hearing and determination of this petition the 1st respondent be compelled to comply with her letter reference No. MI/tu/138/6/05 dated 28th March 2014.

d) That costs be awarded to the petitioner.

The petitioners and the 1st interested party filed submissions on the preliminary objection.

The Court has considered the submissions and the preliminary objection.

The 1st issue for determination is whether the preliminary objection meets the test for such valid objection. It was submitted for the petitioners that the preliminary objection does not pass the test in **Mukhisa Biscuit Manufacturing Co. Ltd –Versus- West End Distributors Ltd (1969)E.A 696** thus, “...is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.” The court has considered the submission. The Court returns that indeed the facts upon which the preliminary objection is based are contested. For example, in the present petition the elections in issue are said to have taken place on or about 04.03.2016 and is arguable or even obvious that the same elections could not have constituted the cause of action in the earlier filed being Cause No.2048 of 2013 at Nairobi (filed long before the elections in issue took place on 04.03.2016).

Further, the 1st interested party relies on section 6 of the Civil Procedure Act thus, “**No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or other court having jurisdiction in Kenya to grant the relief claimed.**” The Court has considered the petition and Cause No.2048 of 2013 at Nairobi. The issues in dispute and reliefs sought are substantially different. The parties are also different. The Court returns that the *sub judice* rule will therefore not apply. The petition appears to question the constitutionality and the lawfulness of the actions or omissions on the part of the respondents. Accordingly the Court returns that the cause of action in the earlier Cause No.2048 of 2013 at Nairobi and the petition are substantially different. Thus the opinion of the Court is that the preliminary objection by invoking the *sub judice* rule fails the test that the point of law raised is correct.

The 2nd issue for determination is whether the petition is time barred in view of section 30 of the Labour Relations Act, 2007. The section states, “**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.**” It is submitted for the 1st interested party that the elections in issue were held on 06.04.2016 and it is contrary to section 30 that the petitioners seek that the Registrar gives her explanations about the elections 2 years thereafter and in contravention of the prescribed procedure. The petitioners deny that they failed to comply with section 30 as cited for 1st interested party. The petitioners further submit that even if it was shown that they failed to comply with section 30 of the Act, only the cause of action and prayers in that regard would collapse while the rest of the claims and reliefs in the petition would have vitality. The petitioners further stated that they were entitled to move the Court under section 34(4) of the Act, Thus, “**Disputes arising from, or connected directly or indirectly to, elections held under this section may be referred to the Industrial Court**”. The Court has considered the submissions and it is the Court’s opinion that where the Registrar has made a decision, then the procedure prescribed under section 30 by way of appeal will apply and referrals to the Court under section 34(4) would not apply. Nevertheless, the Court returns that to the extent that the petitioners deny that they have failed to comply with section 30 of the Labour Relations Act, 2007, the facts in that respect are contested and the preliminary objection would fail the test on undisputed facts. Further, the Court considers that the petition may be share out through amendment so that the cause of action outside an appeal envisaged in section 30 of the Act may be saved and urged as may be appropriate. The preliminary objection as based on that account will also fail. It could be that the parties may seek to consolidate the suits towards efficient and effective use of judicial time in event that they have some shared facts and transactions and the conditions for a case for a valid consolidation are satisfied.

The Court returns that the preliminary objection will fail on all grounds as stated in the notice of preliminary objection.

In conclusion, the preliminary objection filed herein on 19.03.2018 and dated 16.03.2018 is hereby dismissed with costs in the cause. Parties are invited to take directions on further steps in the petition.

Signed, dated and delivered in court at Nairobi this Friday 11th May, 2018.

BYRAM ONGAYA

JUDGE