



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
CAUSE NO. 55 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

BENARD GAVOLE LUYAI.....1ST CLAIMANT
MOURICE ELIMA KARRE.....2ND CLAIMANT
ANN SIMIYU.....3RD CLAIMANT

-Versus-

KENYA NATIONAL UNION OF TEACHERS.....1ST RESPONDENT
JOHN MATIANGI2ND RESPONDENT
KISALI KEFA CHANZU3RD RESPONDENT
JOSEPH N MAKHANU4TH RESPONDENT
WAMBASI CLIDE JOGOO5TH RESPONDENT
WAMBULWA NASHON6TH RESPONDENT
MWANDIJE SIMIYU7TH RESPONDENT
SHILACHILU JOSEPHINE8TH RESPONDENT
ANANDA JACKSON9TH RESPONDENT
SHIKANGA SHADRACK10TH RESPONDENT
WASWA MARTIN11TH RESPONDENT
FATUMA OSUNDWA12TH RESPONDENT
ABDALLAH OLONYI13TH RESPONDENT
JANET WASIKE WANJALA14TH RESPONDENT
REGISTRAR OF TRADE UNIONS15TH RESPONDENT

JUDGMENT

Kenya National Union of Teachers (KNUT) the 1st Respondent is a trade Union registered in Kenya to represent teachers. By notice dated

11th January 2016, KNUT notified its members in Lugari Branch that general elections would be held in Lumakanda Boys High School on 11th February 2016 at 10.00 am. The notice stated that all 11 positions would be declared vacant and that an additional seat for persons with disability had been created. The notice stated that members will be required to identify themselves with their latest payslips and national identity card for clearance to vote.

The three Claimants are all members of KNUT who vied for positions in the elections held on 11th February but lost. The 1st Claimant vied for the position of Assistant Executive Secretary and lost by 506 votes to 644 garnered by the winner, the 2nd Claimant vied for the position of Chairman and lost by 467 to the winner who garnered 544 vote and the 3rd Claimant vied for the position of Women Representative and lost by 303 votes against the winner who garnered 439 votes.

The 2nd Respondent is the National Treasurer of KNUT and was tasked by KNUT to oversee elections in various branches including Lugari Branch. The 3rd to 14th respondents were all candidates in the elections and were elected to various positions as follows:

- 3rd respondent – Chairman
- 4th respondent – Executive Secretary
- 5th respondent – Vice Chairman
- 6th respondent – Vice Secretary
- 7th respondent – Treasurer
- 8th respondent – Vice Treasurer
- 9th respondent – Branch Executive Member (Lugari Area)
- 10th respondent – Branch Executive Member (Matete Area)
- 11th respondent – Branch Executive Committee Member (Likuyani Area)
- 12th respondent – Branch Executive Committee Member (Post Primary)
- 13th respondent – Branch Executive Committee Member (Disabled people)
- 14th respondent – Women Representative

In the Statement of Claim filed on 25th February 2016, the Claimants aver that the elections were conducted in complete disregard of the KNUT Constitution and were marred with massive irregularities, electoral malpractices and the process did not comply with principles of free and fair elections.

The Claimants aver that the 3rd to 14th respondents actively took part in the organization of the elections thereby acting as referees in a game in which they were also players.

That the appointment of polling clerks was contracted by the 3rd respondent and some of the appointed clerks were his students, neighbours and/or village mates.

That the notices for elections were not properly circulated to all voters as required. The notices for the elections were circulated only in areas where the 3rd – 14th respondents had many perceived sympathizers and such notices were not circulated in areas where the claimants were perceived to be strong.

That the notices were authored by the 4th respondent (a contestant in the elections).

That the notices for the elections provided for an identity card and the latest payslip as the requirements for the eligibility by members to participate in voting but the 2nd respondent and the polling clerks changed mind on the day of voting and insisted on the August 2015 pay slip as the requirement for voting. The members and or voters who presented themselves on the voting day with their latest payslips as directed in the notices were therefore turned away and as such unfairly and illegally disenfranchised.

The Claimants pray for the following remedies:

- a) A declaration that the 3rd – 14th respondents were not validly elected for the various positions vied for.
- b) An order nullifying the results for the 1st Respondent's Lugari Branch elections held on 11th February 2016 and directing the

holding of a fresh free and fair election.

c) A permanent order of injunction restraining the 3rd to 14th respondents from assuming office as officials of the 1st respondent's Lugari Branch pursuant to elections held on 11th February 2016.

d) Costs of this cause.

e) Any other further and better relief that this Honourable Court may deem just and fit to grant.

Simultaneously with the Statement of Claim, the Claimants filed a motion under certificate of urgency seeking the following orders:

1. That the application be certified as urgent and service hereof be dispensed with in the first instance and the matter be heard on priority basis.

2. That the Honourable Court be pleased to issue an order of temporary injunction restraining the 15th respondent who is the Registrar of Trade Unions from registering the 3rd to 14th respondents as the duly elected officials of the 1st respondent's Lugari Branch pursuant to elections held on 11th February 2016 pending the hearing and determination of this application *inter partes*.

3. This Honourable Court be and is hereby pleased to issue an order for temporary injunction restraining the 15th respondent who is the Registrar of Trade Unions from registering the 3rd to 14th respondents as the duly elected officials of the 1st respondent's Lugari Branch pursuant to elections held on 11th February 2016 pending the hearing and determination of the instant petition.

4. Costs of the application be provided for.

I heard the motion *ex parte* on 25th February 2016 and issued the following orders:

a. That the application is certified urgent.

b. That the Registrar of Trade Unions is restrained from registering the respondents pending hearing *inter partes* of the application herein.

c. That the application is fixed of hearing *inter partes* on 8th March 2016.

d. That the applicants are directed to serve the respondents on or before close of day on 29th February 2016.

The Respondents filed both replying affidavits of JOSEPH MAKHANU the 4th Respondent and JOHN MATIANGI, the 2nd Respondent both sworn on 4th March 2016. The joint Statement of Response of the 1st and 2nd Respondents was filed on 8th March 2016. There appears to be no Statement of Response for the 3rd to 14th Respondents on record.

The Attorney General entered appearance for the 15th Respondent the Registrar of Trade unions but did not file any other pleadings in response to the Claim and application or participate in the proceedings.

In the replying affidavits the 1st to 14th Respondents aver that the elections were free and fair and there were no irregularities as alleged by the Claimant.

The application was fixed for hearing and adjourned several times. In the interest of time expediency, the court eventually decided that parties proceed with the hearing of the main claim. The case was heard on 30th June and 20th July 2016 when the Claimants presented their case and on 7th September 2016 when the Respondents case was presented. A total of six witnesses testified, with both sides calling three witnesses each. The Claimants were represented by Mr. Nyarotso instructed by Maritim, Omondi & Company Advocates while the Respondents were represented by Mr. Sala instructed by Sing'oei Murkomen and Sigei Advocates.

Claimant's Case

The 1st Claimant **BENARD GAVOLE LUYAI (CW1)** testified that he is a teacher at St Joseph's Lumino Primary School and a member of the 1st Respondent since 1st May 1988, and has been participating in activities of the Respondent such as paying subscriptions, attending meetings and participating in elections. He testified that the union has branches all over the country and he falls under Lugari Branch. He testified that Branches carry out elections every 5 years and the last elections for Lugari Branch were held on 11th February 2016. He voted in the elections and also vied for the position of Branch Executive Secretary.

The Claimant testified that as in past elections the National Office notified members of the elections by notices issued through branch Secretaries on behalf of the National Office. He testified that he is familiar with the KNUT Constitution and it makes provision for national elections and not Branch elections. The requirements for Branch elections are communicated from the national office in Nairobi.

The Claimant testified that elections held on 11th February 2016 were not fair, as they did not meet the threshold, that there were a number of

irregularities and serious malpractices. He testified that he came across the circular from the national office dated 12th January 2016 on the date of voting. The circular directed Branch Secretaries to notify members about elections. Another circular dated 11th January from the Branch office also notified members about elections. He testified that the letter from the Branch Secretary who is the 4th Respondent did not conform with the circular from Head Office. He testified that the circular from Head Office stated that members will use membership cards and payslips for August 2015 for identification for voting while the circular from the Branch Secretary referred to the latest payslip and identity cards. He testified that latest payslips were for January 2016. He testified that on the voting day Mr. Matiangi who was overseeing the elections allowed the use of payslips for the month of August 2015 and members who came with latest payslips including some of his colleagues were turned away. He testified that some people were allowed to use August 2015 payslips while majority were turned away. He testified that while he was campaigning he noticed quite a number of head teachers who did not receive the circulars.

CW1 testified that the other anomaly was information on how persons with disability would be brought to the office as part of Branch officials. He testified that the circular from Head Office instructed that arrangements be made by the Branch Executive Committee and sent to the Secretary General's Office but this was done by the Secretary and Chairman.

CW1 further testified that polling Clerks were appointed by the Chairman who is the 3rd Respondent and that the process was not competitive. He testified that he knew some of the polling clerks who were the Chairman's former students and others were his neighbours.

CW1 testified that on the voting day he demanded to inspect the voters register but was not allowed. He testified that some ballot boxes were in the veranda but others for Branch Executive Committee had been put in the fields. He further testified that before voters entered the polling station the Labour Officer who was the Presiding Officer was taking instructions from Branch Officials. He further testified that some teachers voted more than one time for certain positions depending on where they were coming from.

CW1 denied that all other candidates who lost had conceded defeat as alleged by the respondents and stated that they were dissatisfied and would testify as his witnesses. He further stated that there were no positions that were unopposed as the Respondents had alleged. He testified that the 13th Respondent in the position of disability was opposed by Sheila Makongelo but her name was not on the ballot because she was locked outside the compound where voting was taking place.

CW1 prayed that the elections be nullified and fresh elections be called under proper guidance and supervision as required by the constitution.

Under cross-examination, CW1 testified that he was aware it is the County Labour Officer who conducted the elections but stated it was not clear whom between the County Labour Officer and Mr. Matiangi was conducting and supervising elections. CW1 testified that he complained to Mr. Matiangi about the members who were turned away and the ballot papers placed in the field instead of complaining to the Labour Officer because Mr. Matiangi was conducting himself like the person in charge of the elections on that day. He testified that he complained to the Labour Officer and the National office verbally. He admitted that he had not named the people who were turned away but stated that Sheila was one of the people who had recorded statements that the Claimants filed in court. He stated he was not a Branch Executive Committee member but was aware the Branch Committee did not meet to prepare for the elections because there are no minutes and he learned about the preparations through his friends who were members.

CW1 testified that he was aware the Branch Chairman appointed clerks although that is the role of the Labour Officer. He testified that he did not see any letter appointing any clerk that indicated the appointment was by the Branch Chairman and further stated he was not aware if there were any letters at all. He testified that the Branch Chairman had been a teacher for more than 20 years and it would not be surprising if one or two polling clerks were his former students. He further testified that he would not be surprised if one of his own former students was a polling clerk.

CW1 testified that he did not make any complaint about the Labour Officer taking instructions from Branch officials whose positions had just been declared vacant. On the complaint that some voters were given more than one ballot, CW1 agreed that it is not easy to know which candidate a person will vote for. CW1 testified that he was not aware some of his agents signified their satisfaction with the conduct of elections by signature.

CW1 agreed that the position of the 12th Respondent was unopposed but he was complaining that the whole election process was flawed.

CW1 admitted that Ann Simiyu and Bartholomew who signed witness statements in support of his case had been teaching with him at the same school. He further admitted that 6 out of 11 statements he filed are from teachers in two schools and was aware Lugari had more than 300 schools.

CW1 testified that he witnessed bribery at the voting venue but did not report to the police even though he was aware it is criminal.

CW2 EDWARD MISIGO NGAIRA testified that he is a teacher at Everglade Forest Primary School and lives in Likuyani Sub-County, Kakamega. He testified that he wrote and signed a witness statement, which he wished to rely on as his evidence in chief. Under cross-examination, CW2 testified that he vied for the position of Executive but lost unfairly; becoming number 3 with 87 votes while the winner had about 502 votes and number 2 had over 400 votes. He testified that the clerks were picked by the 3rd and 4th Respondents and he saw three clerks from the locality where the 3rd Respondent comes from. He testified that the clerks were picked without involvement of the Branch Executive. He testified that he was not aware that the role of picking clerks was for the Labour Officer.

CW2 testified that he has vied and lost in elections 3 times since 1991. He testified that he used August 2015 payslip to vote because the day before elections he came across the circular from KNUST dated 12th January 2016 signed by Wilson Sossion from a friend of his through lives in Uasin Gishu. He testified that he saw some voters turned away namely Emmanuel Wangwe, Pius Miyesi, Gladys Wawire and Hellen Mulama but none of them recorded statements. He stated he convened a meeting on 12th February 2016 to complain but did not take minutes.

He testified that at the meeting the National office was represented by the National Treasurer. He testified that he witnessed bribery when Makhanu and Seraphine were given money to buy lunch at Nangiti Primary School but did not capture this in his statement.

CW3 **Batholomew Makongele** testified that he resides at Likuyani Sub-County, Kakamega County and is a teacher at Mary Lusweti Primary School in Likuyani. He testified that he recorded a witness statement, which he wished to be adopted as his statement in chief.

Under cross-examination, he testified that before he moved to his current school he was at Lumino Primary School where he was teaching with the Claimant. He testified that he voted using his June 2015 payslip. He testified that he saw the circular on voting identification on the day of elections. He testified that there was no notice at his school. He testified that there were some members who were turned away and although he does not know them, he saw them complaining and making noise at the gate. He testified that some two voters in front of him on the queue whose names he did not know were issued with two ballot papers and he reported to Mr. Mtiangi who did nothing about it. He testified that he wrote a letter of complaint addressed to the Labour Officer but it was torn on orders of Mr. Mtiangi who was running the show. He testified that he was vying for the position of persons with disability and every candidate was allowed to vie except him. He stated that only one person contesting the post was cleared and was declared unopposed. He testified that his agents Violet Khalefeli and Ken Muruli did not record statements.

CW3 testified that he saw people being offered bread and soda but did not report to the police or to the County Labour Officer. He however did not see anybody being given money.

Respondent's Case

RW1 JOSEPH MAKHANU NAMUWINGULI testified that he is a teacher by profession and had been a union official for 10 years. He testified that he had been in the same Branch for 18 years out of the 31 years that he had been a teacher. He testified that he had authority to represent all the Respondents.

RW1 testified that prior to the elections of February 2016, he was the Branch Executive Secretary and in relation to the elections, his role was to communicate information from the Secretary General. He testified that on 7th January 2016 he received a circular from the Secretary General dated 5th January 2016 reference number KNUT/ELECTION/159/6/2016 giving notice of elections across the country. The circular had an attached schedule, which communicated that there was a new position for persons with disability. The circular directed him to send out a circular early enough and that further instructions would follow.

RW1 testified that he photocopied the circular and sent it to all schools in his Lugari Branch. He testified that the circular he wrote as directed by the Secretary General is dated 11th January 2016 and it contained what the Secretary General directed him to include in the circular.

RW1 testified that he called the Secretary General on 8th January 2016 and was told to inform the members to bring their national identity cards and latest payslip which was going to be clarified in due course. He testified that he sent out the circular as directed and on 14th January 2016 received another circular reference number KNUT/CIRCULAR/122/2/2016 dated 12th January 2016, which communicated administrative matters on booking of public address system, venue and police. The circular also referred to another notice communicated to schools relating to identity cards and payslips and stated that National Executive Committee (NEC) had resolved to use August 2015 payslip. He testified that he copied the circular and circulated it to the schools within the Branch. He further went around branches and informed his colleagues while at the same time clarifying what was in the circulars. He testified that the information was also circulated through the other candidates and on social media as well as the branch Short Message System known as Lugari WITSOFT SMS system, which he sent, to all schools and to the key representatives in the schools where the Claimants also received the message. He referred the Court to the list in which the 1st Claimant is number 172. He testified that he was satisfied teachers had received the information and that is why about 1,100 out of 1700 members turned up to vote with their August 2015 payslips.

RW1 testified that conducting elections is a preserve of the Ministry of Labour and union officials do not play any role as returning officers or conduct elections. He testified that the returning officer was Mr. George Abuto, the County Labour Officer Kakamega and Mr. John Mtiangi, KNUT National Treasurer was present as an observer on behalf of KNUT and to report to the National Office.

RW1 testified that Mr. Mtiangi introduced himself before the elections began. He testified that he was defending his seat as Branch Executive Secretary in the elections. He testified that he took part in the nominations at the gate of Lumakanda Boys High School, the venue for elections on 11th February 2016 at around 11 am. He testified that the Claimants were present during the nominations and were nominated. He testified that the nominations were in his opinion free and fair and he did not witness any complaints.

RW1 testified that after nominations, they went for verification on the register and all candidates together with their agents and seconders were given a form to fill after being verified from the register against identity cards and August 2015 payslips. He testified that the Claimants signed the forms and he was with them in the queue. He testified that after checking the name in the register the name was crossed out in the register before the voter went to queue. A clerk would then sign the payslip and another one would issue ballot papers for Chairman, Vice Chairman and for every other vacant position. He testified that there were agents for various candidates signing documents required for every position and the agents for the Claimants signed every form.

RW1 testified that he was with the 1st Claimant when results were announced after the exercise and it was captured in the KNUT video clips and that there were no claims of bribery. RW1 testified that he did not witness any teacher who was turned away with their August payslip 2015 and only became aware about it when he was served with the Claim. He testified that when results were announced all the agents signed including the Claimants agents and that the 1st Claimant's Chief Agent Adriano Machati signed against the Results.

RW1 testified that he did not recruit any polling clerks, as this was the work of Labour officers. He testified that in his opinion the elections

met the KNUT election regulations which are at Article 20 of the Constitution that provides for a quorum of one-sixth (1/6) of the membership, elections by secret ballot, nominations on the floor on the date of elections, that NEC be represented and that the people to participate are bona fide paid up members only. He testified that the quorum was achieved as about 1150 out of 1700 members turned up while the quorum of one-sixth is 284 members as per register. He testified that the payslip for August 2015 was used to prove membership because that was the month that had all KNUT members and membership after August was not clear because the employer was not deducting union dues from all members across the country.

On cross-examination, RW1 testified that he received a letter from the Head Office dated 5th January 2016, which did not contain requirements for elections. He then called the Secretary General after which he issued notices to all schools. He testified that he received another circular dated 12th January 2016, which came after he had already issued his circular as directed in the circular of 5th January 2016 to all schools. He testified that he photocopied the circular and issued it to the schools. He testified that he was not aware that any Teacher was not aware about the use of August payslip in the elections. He denied that the two notices directed him to hold a NEC Meeting to plan for elections.

RW1 testified that traditionally, it was the mandate of the Branch Secretary to inform police, reserve a venue and book public address system for the elections as provided in the constitution. He testified that he also sent text messages to teachers but did not have proof that the SMS messages were received. He admitted that the list did not contain all the names teachers in the Branch.

RW1 testified that John Matiangi was present during elections as an observer on behalf of NEC but was not in charge of the elections. He did not declare election results for any candidate. He testified that he was not aware of a meeting involving candidates at 3 p.m. He testified that he was not aware of the number of polling clerks as the clerks were appointed by the Labour Officer. He also did not know whether the appointment of clerks was by competitive process or that the majority of the clerks were from his village and the village of the 3rd respondent.

RW1 testified that ballot papers did not have names of candidates as this was to be inserted by the voters. He denied that he was seen bribing candidate or that there were complaints lodged with the Labour officer. He testified that agents for the respective candidates signed some forms after elections including the 1st claimant's Chief Agent.

RW2 ADRIAN MACHETI ALUSIOLA testified that he is a Teacher at Mwamba Primary School and was a proposer and therefore automatically became an agent for the claimant during elections. He testified that there were three circulars dated 5th, 11th and 12th January 2016. The circular dated 11th January 2016 was from Branch Executive Secretary. The requirements for voting were latest payslip and national identify card. He testified that the latest payslip meant a payslip indicating union dues payments, which was for August 2016, as they had not received any other payslip. He testified that the circular dated 12th January 2016 as on the notice board of his school where it was placed by the Head Teacher. He did not see any circular after the circular of 12th January 2016.

He testified that on the voting day, he was at the voting centre the whole day and so was Benard Gavole the 1st claimant. They were both present when results were announced. He signed the commitment deed as an agent. He testified that voting was not conducted by John Matiangi. He testified that the elections were peaceful and he consoled the claimant who had lost the elections and they parted ways very cordially. He testified that the claimant told him that he had accepted the results.

He testified that he was not aware that teachers were turned away as the voting was going on at a distance from the gate on the open veranda and there was a field where people were standing watching as elections went on.

RW3 LUKE BARRISTER MULUNDA adopted his statement dated 20th May 2016. Under cross-examination, he testified that he witnessed the entire voting process as an agent. He testified that he learnt about the elections from three circulars on the staff notice board placed by the Principal. The circulars contained requirements for voting being payslip for August 2015 and national identify card. There was another circular, which referred to the latest payslip from the Secretary General, Mr. Sossion. He testified that there were many events at which the issue of latest payslip was clarified and that the latest payslip was for December 2015. He testified that he was not aware any teacher was turned away because of confusion on payslip.

He testified that he did not know how polling clerks were recruited and that the person in charge of the elections was the Labour Officer. He testified that Mr. Matiangi was present and was introduced as an observer from national office. He testified that results were declared by the Presiding Labour Officer. He testified that he was not aware of a meeting held at the polling station that was chaired by Matiangi. He testified that the voting was done about one hundred metres from the gate and he would not know if any teachers were turned away. He however stated that teachers are radical and had any of them been turned away there would have been chaos.

Preliminary Objection

On 11th October 2016 when the case came up for mention to confirm filing of written submissions, the court's attention was drawn to a notice of preliminary objection filed by the respondents. The preliminary objection was argued on 23rd November 2016 and ruling reserved to be delivered together with the judgment.

The preliminary objection is contained in a motion dated 7th October 2016 and filed under certificate of urgency on 10th October 2016. The motions seeks the striking out of the entire claim on the grounds that the statement of claim was drawn, filed and urged by Mr. Nyarotso John Ikhabi, who did not have a valid practising certificate as at 28th September 2016 and therefore not licenced to practice law and to conduct and prosecute the claim.

Mr. Sala submitted that in line with Section 9 and 34 of the Advocates Act the entire claim was null, void and invalid. He submitted that Mr.

Nyarotso signed the certificate of urgency filed with the claim dated 24th February 2016. He also signed the list of witnesses dated 34th June 2016 as well as the letter dated 14th July 2016. He submitted that the same Mr. Nyarotso had been attending court and prosecuting the claimants' case whenever the matter came up for hearing albeit unlawfully and irregularly and that all the proceedings conducted by him are irregular. He relied on a letter from the Law Society of Kenya dated 28th September 2016 confirming that Mr. Nyarotso had not taken out a practicing certificate for a period of over 3 years and was not licenced to practice law. He submitted that the two letters provided sufficient proof that Mr. Nyarotso was unqualified to practice law or address the court. He submitted that this was not a mere procedural technicality but a mandatory requirement of Section 34 of the Advocates Act.

He submitted that when the preliminary objection as served upon Mr. Nyarotso, it was responded to by one R. O. Omondi who had annexed her practicing certificate, which is not a subject matter of the preliminary objection. He submitted that Mr. Nyarotso cannot hide behind Ms. Omondi to cure the illegalities on his part.

Mr. Nyamweya for the claimant opposed the preliminary objection. He submitted that the question before the court was who drew up the documents filed in court. He submitted that the documents were drawn by Maritim, Omondi and Company Advocates. He submitted that even the certificate of urgency was drawn by the firm of Maritim Omondi and Company Advocates for the claimant and not Mr. Nyarotso. He submitted that the documents are filed by a firm of advocates. He submitted that no material had been placed before the court to show that none of the persons in the firm had no practicing certificate.

Mr. Nyamweya further submitted that the Supreme Court has rendered itself on the issue of Section 34 of the Advocates Act stating that the court cannot nullify documents because that would be punishing the litigants. He submitted that regarding the person who appears in court to prosecute the case, there is a *lacuna*. He submitted that the Supreme Court stated that in cases like this one, the parties should be given an opportunity to look for another lawyer.

He urged the court to determine the case on the merits.

Determination

There are several issues for determination in this case. The first is whether the entire suit should be dismissed for reason that the pleadings were drawn and the suit prosecuted by a person who did not hold a valid practicing certificate to practice law under Section 9 and 34 of the Advocate Act.

The second issue is whether the 3rd to 14th respondents were validly elected to the positions they vied for in the union's branch elections.

The final issue is whether the claimants are entitled to the order sought.

Preliminary Objection

The respondents have urged the court to strike out the claim on grounds that the counsel who drew up the pleadings was not qualified to practice law at the time of doing so.

As correctly pointed out by Mr. Nyamweya who argued the preliminary objection on behalf of the claimants, the Supreme Court made a final determination on the issue in the case of **National Bank of Kenya Limited –vs– Anaj Warehousing Limited (2015) eKLR**, when it stated that *“no instrument or document of conveyance becomes invalid under Section 34 (1) (a) of the Advocates Act, only by dint of its having been prepared by an advocate who at the time was not holding a current practicing certificate.”*

The court stated that the binding principle is to be found in Article 159 (2) (d) of the Constitution, *“justice shall be administered without undue regard to procedural technicalities.”*

On the foregoing, I need not belabour over this issue any more.

Back to the claim, the claimants made very specific allegations against the respondent as set out in their statement of claim. They alleged that there was confusion over which payslip was to be used for identification during elections and that some of their supporters were turned away without voting because they did not have the proper payslip. As correctly observed by the respondents in their written submissions, the claimant did not name any person who was turned away without voting because of the confusion over payslips. The turnout of voters on election date of 1,150 out of 1,700 members further does not support the contention of the claimants. The 1st claimant garnered 506 votes against the winner who had 644 votes; the 2nd claimant had 467 votes against 544 by the winner and the 3rd claimant 303 votes against 439 garnered by the winner. The claimants did not demonstrate that had the unnamed teachers alleged to have been turned away voted, the results would have been substantially different as to change the final outcome on the exercise. I find no merit in the claim.

The other issue raised by the claimants was that the Branch Executive Secretary did not involve the Branch Executive Committee in the planning for elections as directed in the circular dated 12th January 2016 from the National Secretary General.

The claimants however do not explain how the issues in the circular, which related to preparations for the elections by the Branch Executive Committee affected the election results. The directives they allege were not complied with is the subdivision of branch into electoral areas but they do not state how this affected the election results.

In the testimony of the claimants as well as in the witness statements filed by the claimants there is no mention of how the failure to subdivide the branch into electoral areas affected results. In fact, the issue is not mentioned at all in the statements or evidence. I therefore

find that this issue too has not been proved by the claimants.

On the allegations of appointment of polling clerks, there was no allegation that any of the polling clerks interfered with the results of the elections. There was further no proof that the 4th to 14th respondents participated in the recruitment of the clerks. The argument in the submission by the claimants that the respondents failed to call the Labour Officer is an attempt to shift the burden of proof from the claimants to the respondents. If the claimants felt the testimony of the labour officer was useful, they had all the liberty to have him summoned to give evidence or enjoin him as a party.

The allegations of issuance of more than one voting paper for some posts and of voter bribery were also not supported by any evidence. These are serious electoral malpractices and are also criminal offences, yet there were no reports either to the Returning Officer, the elections Observer or any police station about the criminal acts.

The test for overturning election results was discussed by the supreme Court in the case of **NATHIF JAMA ADAM -V- ABDIKHAIM MOHAMED & 3 OTHERS (2014) eKLR** wherein the court observed as follows –

“As to the effect of irregularities and the point at which a court should overturn an election, we stated that courts must only act on ascertained facts and conjecture and must demonstrate how the final statistical outcome has been compromised. In the Mania case, this court had elaborated the foregoing principles in specific terms [paragraphs 205A-206].

We would state as a principle of electoral law, that an election is not to be annulled except on cogent and ascertained factual premises. This principle flows from the recurrent democratic them of the Constitution which safeguards for citizens the freedom to make political choices [Article 38(1)].

We consequently hold that the learned Judges of Appeal erred in questioning the credibility of the election on the basis of the percentage or margin of victory, without demonstrating how the final statistical vote-outcome had been compromised.

In the instant case, once the trial Judge found that certain errors had been proved he proceed to recalculate the votes and noted that the adjustment between the appellant herein and the runner-up (Mr. Korane) would have been 1,694 votes. This shows that the appellant would still be the winner. With regard to 1,000 that were not accounted for, the trial Judge held (at paragraph 139) that the 1st and 2nd respondents had not provide credible evidence showing that the irregularities complained of and indeed established were substantial enough to affect the election results and the if the 1,000 unaccounted for votes were deducted from the appellant he would no longer be the winner.”

This in my view, should also be the test herein, where the claimants seek to overturn the results of the election of the respondents. It is my finding that this test has not been achieved by the claimants.

Conclusion

In conclusion, I find that the claimants have not proved their case against the respondents with the result that the suit is dismissed.

There shall be no orders for costs.

DATED AND SIGNED AT NAIROBI ON THIS 18TH DAY OF JUNE 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 12TH DAY OF JULY 2018

MATHEWS NDERI NDUMA

JUDGE